Wilfred v Rigby [2004] NTSC 31

PARTIES:	CURTIS WILFRED
	v
	KERRY LEANNE RIGBY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA147 OF 2003 (20308303)
DELIVERED:	30 JUNE 2004
HEARING DATES:	7 MAY 2004
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Appellant:	Mr P O'Brien
Respondent:	Mr N J Browne

Solicitors:

Appellant:	Katherine Regional Legal Aid Services
Respondent:	Director of Public Prosecutions

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

Wilfred v Rigby [2004] NTSC 31
No. JA 147 of 2003 (20308303)

BETWEEN:

CURTIS WILFRED
Appellant

AND:

KERRY LEANNE RIGBY
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 30 June 2004)

[1] On 2 September 2003 the appellant pleaded guilty to failing to comply with the terms of a restraining order, aggravated assault and assaulting a police officer whilst in the execution of his duty. On the same day the learned Magistrate imposed a fine of $500 in relation to count 1 and sentenced the appellant to serve 21 days imprisonment and 2 months and 16 days imprisonment cumulative on counts 2 and 3 respectively.

[2] Immediately thereafter, whilst he was in the cells, the appellant instructed his solicitor to lodge an appeal against the sentencing orders. That afternoon he was flown in police custody to Darwin and taken to Berrimah gaol. The

appellant's solicitor lodged a notice of appeal on the same day. However, no recognizance on appeal was entered into at that time.

[3] Section 171 of the Justices Act provides as follows:

> **171. Appeal to be instituted within one month**
>
> (1) The appeal shall be instituted by notice in accordance with section 172, by entering into such recognizance on appeal as is required under sections 167 and 168 and by payment of the fee specified in section 172.
>
> (2) Every appeal shall be instituted within one month from the time of the conviction, order, or adjudication appealed against: Provided that where the Judge of the Supreme Court is of opinion that, by reason of the remoteness from the seat of the Court of Appeal of the place at which the conviction, order, determination, or adjudication was effected or made, an extension of the time within which notice of appeal from the conviction, order, determination, or adjudication may be given is reasonable, he may extend that time for such further period, not exceeding 3 months, as he thinks fit.

[4] It is well established that it is a condition precedent to the valid institution of an appeal that the appellant must comply with the requirements of the Justices Act relating to the need to enter into a recognizance to prosecute the appeal: see *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8. The appeal is therefore incompetent unless either the court dispenses with compliance pursuant to s 165 of the Justices Act or (perhaps) permits an amendment to a recognizance entered into subsequently pursuant to s 169 of the Justices Act. I should mention that when it was eventually discovered that no recognizance had been

entered into by the appellant the appellant's solicitors immediately arranged for him to enter into such a recognizance. This occurred on 6 May 2004.

[5] Section 165 of the Justices Act provides as follows:

> **165. Power of Supreme Court to dispense with conditions precedent to appeal where compliance impracticable**
>
> The Supreme Court may dispense with compliance with any condition precedent to the right of appeal, as prescribed by this Act, if, in its opinion, the appellant has done whatever is reasonably practicable to comply with this Act.

[6] It is equally well established that where a layman has provided to his solicitor all necessary information and proper instructions within a reasonable time so as to enable his solicitor to lodge an appeal on his behalf within time and the failure to lodge the relevant documents within time is due to the fault of the solicitor, the appellant will have done everything which is reasonably practicable for him to comply with the provisions of the Act: see *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (supra) at p 18. In the present case, the evidence is that the appellant instructed his solicitor to lodge an appeal on his behalf on the very day on which he was sentenced. At that time he was in custody and on the same day he was removed from Katherine where his solicitor was, to Berrimah gaol, Darwin. There he remained until he was granted bail on 9 September 2003. Not unnaturally, the appellant swears in his affidavit that he believed that he had done everything he needed to do in order for his appeal to have been properly lodged. He says that he signed all of the papers that he was asked

to sign and he relied on his lawyer to make sure that everything was done to ensure that his appeal was ready to be argued by his lawyers and not delayed. Moreover the justice who granted him bail was required by s 168(1) of the Act to ensure that his appeal has been duly instituted before releasing him on bail. It appears from the affidavit of Ms Opie, the appellant's legal representative, that the justice who made the order granting bail to the appellant was a judge of this Court.

[7] Ms Opie's affidavit does not specifically mention anything about the recognizance to prosecute the appeal. She does not say for instance that she did not know that a recognizance to prosecute the appeal was necessary or that she thought the appellant had entered into one or quite what the position was in relation to the need for a recognizance. Counsel for the respondent, Mr Browne, has submitted that Ms Opie must be presumed to have been aware of the provisions of the Justices Act relating to the need to enter into the relevant recognizance. Whilst it is surprising that Ms Opie's affidavit does not mention anything about the recognizance it is clear from both her affidavit and the appellant's affidavit that the appellant trusted her to ensure that the appeal was duly instituted. In his situation it was clearly her responsibility to ensure that he signed the relevant recognizance. I consider that the appellant did do whatever was reasonably practicable to comply with the Act and that in those circumstances I should dispense with compliance of the recognizance.

[8] I turn now to consider the merits of the appeal.

[9] The facts were that on 27 May 2003 the victim to the aggravated assault count, the appellant's de facto wife, obtained a domestic violence order against the appellant at the Katherine Court. The conditions of that order stated that the appellant was not to assault the victim or to approach her.

[10] At about 8.40 pm on Saturday 31 May 2003, the appellant was walking into town with the victim and their children, having attended together at the local football oval where they watched a football match. An argument occurred and as result the appellant slapped the victim across the face. Part of the reason for that argument was that the appellant believed that the victim had been making eyes at another man while they were walking along the street and that he felt jealous because of it. At the time the victim was experiencing emotional distress and had been doing so for some time. At one stage she ran onto the road in order to attract attention to herself and the appellant had to rush to her to bring her back from off the road. The appellant told her not to do that and settle down and the victim said to him "It's my life and it's my body and I'll do what I want to do". The appellant took that as suggesting that she would sleep with another man if she chose to. This upset him and as a result he slapped her across the face. He was also upset by the fact that she had been swearing at him, which he found to be particularly offensive.

[11] It is not clear from the facts how the police happened to get involved, but it appears that the police told the appellant to stay away from the victim. The appellant stated that he just wanted to talk to her. The policeman, the victim

of the assault police charge, grabbed the appellant by the shirt. The appellant put his hands on the police officer's chest and said, "Back off" and then tried to walk towards his de facto wife. At that stage the police officer tried to restrain the appellant. The appellant fell over. Another police officer came up from behind pushing his legs back to further restrain him. The appellant had a plate in his knee from an old football injury. The effect of having his legs pushed up behind him caused him intense pain. He also suffers from asthma and was having some trouble breathing. He was frightened, upset and he lost his temper and bit one of the police officers on the right wrist causing it to bleed. He was then handcuffed and conveyed to Katherine Police Station where he later participated in a taped record of interview. During the record of interview he stated that he knew about the order and knew that he was not allowed to approach his de facto wife. When asked why he did it, he said he was jealous. When asked why he bit the police officer, he said that he had lost his temper and was sorry for what he had done.

[12] Evidence was given by the police officer that when he was bitten there was excruciating pain which caused him to utter a number of obscenities towards the appellant. He applied disinfectant to the wound immediately and was taken straight to the Katherine Hospital where the wound was cleaned by medical staff. The area around the bite caused bruising and bleeding. Photographs of the wound were tendered before the Magistrate. Clearly the bite was a significant wound. The wound had since healed leaving a scar on

the wrist. The police officer was given a course of antibiotics to prevent infection, but two days later the wound, nevertheless, became infected. At the time of the sentencing hearing before the learned Magistrate, the results of the blood tests for Hepatitis C and HIV had not been returned.

[13] The appellant had no prior convictions for violence and his only prior convictions were for breaches of the Traffic Act. He did not have an alcohol problem and none of his prior convictions were alcohol related.

[14] The appellant was 26 years of age, an Aboriginal who had been bought up in the traditional manner and was fully initiated. He attended school at Hudson Downs and completed his education to Year 12. After school he worked at Hudson Downs for a while. From 1994 to 1999 he worked at Ngukurr doing landscaping work for the CDEP Program there. In 1999 he met the victim on count 2 and they "got married". In 2001 they came to Katherine as a family. The appellant was unable to find work at that time. In 2002 he found work mango picking. That work finished in February 2003. He had since been out or work although attempting to find employment. The domestic violence order was withdrawn on 10 June 2003 and the appellant and his de facto were back living together again at the time of the sentencing hearing.

[15] The grounds of the appeal as set out in the notice of appeal are as follows:

1. that the learned Magistrate erred in placing too much weight on the principle of general deterrence;

2. that the learned Magistrate erred in failing to adequately take into account the Applicant's (sic) prior good character and prospects of rehabilitation;

3. that the learned Magistrate erred in failing to take in account the principle of totality in sentencing with respects to counts 2 and 3; and

4. that the sentence of the learned Magistrate was in all the circumstances manifestly excessive.

[16] The main thrust of the argument on appeal was that the learned Magistrate ought to have fully suspended the sentences of imprisonment which were imposed.

[17] The submission of Mr O'Brien for the appellant was that in relation to the assault on his de facto wife, the Magistrate gave no weight to the other relevant considerations apart from the need for general deterrence. In particular, it was put that it was not merely as the learned Magistrate said, a balancing exercise between the need for general deterrence on the one hand and the appellant's prospects of rehabilitation on the other. Rather the learned Magistrate was required to take into account all the circumstances of the case including giving appropriate weight to the relatively minor assault on the de facto and the provocation from the victim which brought about the assault.

[18] In relation to the assault on the police officer, it was submitted that the attack on the police officer in the circumstances of this case, was not one involving gratuitous violence, but a spontaneous act in circumstances where the appellant was overpowered, in a state of high emotion and in serious pain and discomfort, that the bodily harm was relatively minor, there bring no evidence of any psychological trauma, that the appellant had admitted his actions to the police, had no prior convictions for violence and had already spent two nights immediately after the incident in custody. In those circumstances it was submitted that the learned Magistrate erred in tipping the balance in favour of general deterrence over all other matters.

[19] It is well established that on a sentencing appeal the appellant must show error on the part of the learned magistrate before this Court will interfere. It is not enough that this Court might have imposed some lesser penalty. A magistrate in imposing sentence has a wide discretion, and unless error is demonstrated this Court will not interfere. Even if no particular error is shown, the Court will interfere if the sentence imposed is manifestly excessive.

[20] In relation to the imposition of the sentence concerning assaulting the police office in the execution of his duty, I am satisfied that no error has been demonstrated and furthermore that the sentence was not manifestly excessive. Although for offences of that kind a sentence of actual imprisonment is not inevitable, that is the usual penalty where the assault results in bodily harm even in the case of first offenders: see *Bellis v*

Burgoyne [2003 NTSC 103] at par [17]. I also note that there was a very late plea of guilty.

[21] However, the assault on the de facto, I think, is in a different category. It appears to me that inadequate weight was given by the sentencer to all the circumstances of the case and in particular to the degree of provocation involved, the appellant's lack of prior convictions and the fact that the parties had subsequently reconciled. Had that charge stood alone, I consider that the proper course would have been to suspend the order of imprisonment made by the learned Magistrate. However, I do not think it would now be appropriate to suspend that sentence, because I am of the view that the appellant must serve the sentence imposed for the assault on the police officer. I think substantial justice can be done by ordering that the two sentences be served concurrently rather than cumulatively.

[22] Accordingly the appeal is allowed. The order that the sentence in relation to count 3 commence at the expiration of the sentence in relation to count 2 is set aside. In lieu thereof I order that the sentences in relation to counts 2 and 3 be served concurrently. The appeal is otherwise dismissed.