Karimi v Verity [2014] NTSC 50

PARTIES:	Mustafa Karimi v Brett Justin Verity
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	21332909 (JA No. 24 of 2014)
DELIVERED:	24 OCTOBER 2014
HEARING DATES:	12 AUGUST 2014
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION (DARWIN)

CATCHWORDS:

Criminal law – Justice Appeal – Appeal against sentence – Magistrate erred in finding criminal history in Iran – Misconstruction of appellant's submissions about persecution and wrongful imprisonment – Adverse matters before sentencing court must be proven beyond reasonable doubt – Exercise of discretion to record a conviction – Consideration of enumerated factors in s 8(1) of *Sentencing Act* – Criminal history highly relevant to assessment of character – Appeal allowed – Resentenced – Convictions quashed – *Sentencing Act 1995* (NT), s 8(1).

Justices Act 1928 (NT), s 177(2)
Sentencing Act 1995 (NT), s 6(a), 8(1).

Carnese v The Queen [2009] NTCCA 8; *Cobiac v Liddy* (1969) 119 CLR 257; *Cranssen v The King* (1930) 55 CLR 509; *Davis v Hayward* (Unreported, Supreme Court of the Northern Territory, Martin CJ, 5 February 1997); *Hesseen v Burgoyne* [2003] NTSC 47; *Nayidawawa v Moore; Nabegeyo v Middleton* (2007) 178 A Crim R 473; *R v Lobban* (2001) 80 SASR 550; *R v Storey* [1998] 1 VR 359; *Toohey v Peach* (2003) 143 NTR 1; *Woods v R* [2012] NTCCA 8, applied.

Freiberg, Arie, *Fox and Freiberg's Sentencing, State and Federal Law in Victoria* 3rd Edition (Thomson Reuters, 2014).

REPRESENTATION:

Counsel:

Appellant:	A. Abayasekara
Respondent:	J. Stuchbery

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	BLO 1413
Number of pages:	16

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Karimi v Verity [2014] NTSC 50
No. 21332909

BETWEEN:

Mustafa Karimi
Appellant

AND:

Brett Justin Verity
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 24 OCTOBER 2014)

Background

[1] On 4 December 2013, the appellant pleaded guilty to two counts of assaulting a person in the performance of their work duties, and that both persons suffered harm, contrary to s 188A of the *Criminal Code* (NT).

[2] On 15 January 2014, the appellant was sentenced by the Court of Summary Jurisdiction. The learned Magistrate recorded convictions on both counts and released the appellant without further penalty. The appellant was required to pay two victims levies of $150 on each count, which flowed from the findings of guilt.

[3] On 17 February 2014, the appellant filed a notice of appeal. The grounds were:

1. The learned Magistrate erred in finding that the appellant had a criminal history in Iran; and

2. The learned Magistrate erred in deciding to record a conviction against the appellant.

[4] For the reasons that follow, it is clear that ground one is made out. On behalf of the respondent, it was conceded that submissions made before the learned Magistrate by counsel for the appellant, were intended to inform the court of the appellant's history of prosecution and unlawful detention in Iran, not that the appellant had a criminal history. Counsel for the respondent properly submitted that matters adverse to the appellant such as a criminal history must be proven beyond reasonable doubt before they can be considered in the sentencing process. As a result, the respondent agrees ground one is substantiated. This court must of course examine the matter independently and determine whether there was error and whether such an error justifies allowing the appeal.[1]

Proceedings before the Court of Summary Jurisdiction

[5] The facts in support of the charges were that the appellant was a refugee seeking asylum and, at the time of the offending was detained at Wickham

[1] In terms of the *Justices Act* (NT), s 177(2).

Point Immigration Detention Centre (IDC). At 7:55pm on Saturday the 20 July 2013, the appellant was at the Wickham Point IDC, unaccompanied and standing in the common area adjacent the soccer oval.

[6] The appellant approached the entrance of an area known as 'Surf', being one of two self-contained accommodation complexes commonly referred to as 'Apods'.

[7] Upon arrival the appellant was requested to produce his identity card by the Wickham Point IDC staff. One of those staff members was victim one in this matter, Yadav Mishra. Frustrated by the requirement the appellant hastily removed his card from around his neck and aggressively threw it on a table at the security check point.

[8] Remaining at the check point, the appellant began yelling at the Wickham Point IDC staff, repeatedly shouting in broken English, "4 months" prompting further Wickham Point IDC staff and victim two, Ben Pearse, to intervene and reason with the appellant.

[9] The appellant walked past the check point and continued inside the Apod, followed closely by both victims who continued reasoning with the appellant. The appellant entered the amenities area and sat on a table, facing toward both victims as they stood either side of him. Becoming increasingly frustrated the appellant reached both hands towards the victims while he remained seated.

[10] The appellant grabbed victim one on his left upper arm, using his left hand as the victim stood on his left side. Simultaneously, using his right hand, the appellant grabbed victim two on his right upper right arm, who stood on the appellant's right hand side. Remaining seated and holding the victims with both hands he forced them towards each other, attempting to pull one into the other. The appellant soon lost his grip as both victims immediately broke free and narrowly avoided colliding into each another.

[11] The appellant then stood up and walked away, heading back into the Apod accompanied by his family members. At 10:00pm on Saturday the 20 July 2013, the appellant was spoken to by police at Wickham Point IDC.

[12] The appellant declined to participate in an electronic record of interview. As a result of the incident both victims sustained reddening of their skin around each arm where they had been grabbed respectively, requiring no medical treatment. At no stage was the appellant's conduct excused or permitted. The appellant was informed he would be summonsed to appear in relation to this matter.

Ground one: the learned Magistrate erred in finding that the appellant had a criminal history in Iran

[13] Counsel for the appellant submitted that the learned Magistrate's finding that the appellant had a criminal history in Iran, constituted a misconstruction of the matters that were put by the appellant's counsel at

the plea hearing. After the appellant pleaded guilty to the charges, the learned Magistrate was informed of the appellant's personal circumstances.

[14] The learned Magistrate was informed that the appellant was a 42 year old Kurdish man born in Iraq, who had fled persecution in his country of birth and travelled to Iran with his family when he was 6 years old. The appellant had initially resided in a refugee camp in Iran, before being released into the community. His father was killed by the Iranian government, who wrongly concluded that he was anti-regime. The appellant and his brother had carried the stigma, wrongly attached to his father. As such, the appellant had been sent to prison a number of times without just cause. He and his brother had served a total of approximately five years in prison throughout their adult lives. This included the last occasion that the appellant was imprisoned, when he had been sheltering protesters, who were being shot at by the government during the elections. The appellant had managed to secure paid employment; however, it was performed in secret, as the Iranian government did not permit him to work. The learned Magistrate was told the appellant had fled Iran as the persecution and lack of opportunity had become too much for him. The submission was that the appellant thus came before the Court "without a criminal record of any description whatsoever", and was a man of good character.

[15] The submissions made to the learned Magistrate communicated that the appellant had been imprisoned wrongfully and without just cause; not for any crimes he had committed. The imprisonment had instead formed a

significant part of the persecution that the appellant had been subjected to. There was no argument put to the Court below challenging those submissions.

[16] When sentencing the appellant the learned Magistrate said the appellant had, "some sort of unspecified criminal history in Iran", but that it was of a type, "one would expect, of a man having to live in an unofficial role rather than a man who was carrying out any specific major criminal activities". He concluded, "We simply don't know those details". The learned Magistrate also commented that the appellant's criminal history was of "some relevance", explaining he did "not accept that the appellant comes before this Court as a man of unblemished good character". The learned Magistrate remarked that the appellant's "criminal history" in Iran and precisely what it was comprised of, or whether it could be justified or better understood because of the appellant's "fringe status", had not been made clear.

[17] Counsel for the appellant submitted that the reasoning in relation to the appellant's criminal history in Iran was central to the exercise of the learned Magistrate's discretion to record a conviction, and that the sentencing remarks demonstrated that his Honour, considered the "criminal history" for that purpose.

[18] As noted at the outset, counsel for the respondent emphasized that adverse matters including the personal antecedents of the defendant which have been

put before a sentencing court following a plea of guilty, must be proven beyond reasonable doubt.[2]

[19] There was no evidence before the Court of prior convictions, or the existence of a criminal history in Iran. The submissions made by the appellant's counsel regarding the appellant's personal circumstances and reasons for fleeing Iran including unjust detention, do not amount to proof of previous convictions.

[20] I agree with submissions before this Court that the submissions made at the plea hearing were not intended to convey that the appellant had a relevant, or indeed any, criminal history in Iran. Clearly those submissions were made with the intention of informing the Court of the appellant's history of persecution and unlawful detention. Before this Court, counsel for the respondent acknowledged that the submissions relevant to previous incarcerations were not supported by evidence that would have allowed the learned Magistrate to safely conclude that the appellant had a relevant criminal history, at least in the sense that the appellant had ever been found guilty of a charge following a trial, or had ever entered a plea of guilty to an earlier offence. Rather than characterising the appellant's history as "some sort of unspecified criminal history in Iran", it would have been preferable to note the appellant's previous incarceration and the reasons that could be ascertained for that.

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[2] See for example, the comments of the majority in *R v Storey* [1998] 1 VR 359, cited with approval in *Woods v R* [2012] NTCCA 8.

[21] As the relevance of the appellant's assumed criminal history contributed to a finding that he was not a person of unblemished good character, and the nature of that adverse finding was made without sufficient evidence, the first ground of the appeal was in my opinion properly conceded by the respondent.

[22] In my opinion, the appellant should be re-sentenced on the basis of having no previous convictions.

Ground 2: the learned Magistrate erred in deciding to record a conviction against the appellant

[23] Where a Court finds a person to be guilty of an offence, it may make an order without recording a conviction, pursuant to s 7 of the *Sentencing Act*. Any one of the factors referred to in s 8(1) of the *Sentencing Act*, or any combination of those factors, may provide a sufficient ground for the exercise of the discretion.[3] This includes the character, antecedents, age, health or mental condition of the offender; the extent to which the offence was trivial in nature; and the extent to which the offence was committed under extenuating circumstances.

[24] The Court is not obliged to apportion particular weight to any one of the factors enumerated, provided that each factor, and the overall circumstances of the case, are given due consideration when determining whether the

[3] *Cobiac v Liddy* (1969) 119 CLR 257 at 276.

discretion should be exercised.[4] All relevant circumstances must be taken into account by the sentencing court. The Court is not constrained solely by the matters enumerated in s 8 of the *Sentencing Act*.

[25] The recording of a conviction is to be regarded as a component of the sentence, to be accorded weight in considering whether or not the sentence is proportionate to the offence.[5] As expressed in Fox and Freiburg's 'Sentencing',[6] the recording of a criminal conviction is a "significant act of legal and social censure". It is, "a judicial act by which a person's legal status… is officially and – subject to any provisions relating to expungement – irretrievably altered". The principal complaint, on behalf of the appellant, was that the learned Magistrate exercised his discretion in a manner which did not adequately balance the relevant principles against the appellant's circumstances and, as such, the imposition of a conviction was not proportionate to the offending.

[26] As the question of whether or not to impose a conviction is a matter of discretion, the appellant must establish error in the exercise of the discretion. It is not sufficient to show that the appellate court may exercise the discretion to achieve a different result. An appellate court may, "only interfere if there is some reason for regarding that the discretion conferred upon the Magistrate was improperly exercised and that the Magistrate fell

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[4] *Davis v Hayward* (Unreported, Supreme Court of the Northern Territory, Martin CJ, 5 February 1997) at [14]; *Toohey v Peach* (2003) 143 NTR 1.
[5] *Carnese v The Queen* [2009] NTCCA 8 at [14] - [16].
[6] Freiberg, Arie, *Fox and Freiberg's Sentencing, State and Federal Law in Victoria* 3rd Edition (Thomson Reuters, 2014), at 85.

into error".[7] The principles when dealing with discretionary orders are well known.[8]

[27] Counsel for the appellant raised issues also relevant to ground one; that the learned Magistrate erred in finding that the appellant had a relevant criminal history in Iran. The appellant's criminal history was said to be relevant to the consideration of the factors enumerated in s 8 of the *Sentencing Act*, particularly s 8(1)(a) with respect to the assessment that the learned Magistrate made of the appellant's character.[9] It was stated that the learned Magistrate's erroneous finding contributed to the conclusion that the appellant was not of unblemished good character, which in turn influenced the learned Magistrate's exercise of discretion.

[28] Although conceding that the learned Magistrate erred in finding that the appellant had a relevant criminal history in Iran, counsel for the respondent submitted it was an open question on whether the learned Magistrate would have exercised his discretion not to order a conviction, had the appellant's criminal history not been raised in submissions or had it been properly understood.

[29] Cleary character and a lack of previous offending are highly relevant matters in the exercise of the discretion to impose or not impose a conviction. In my opinion his Honour's understanding of these factors must have

[7] *Hesseen v Burgoyne* [2003] NTSC 47 at [20].
[8] *Cranssen v The King* (1930) 55 CLR 509.
[9] See for example, *Sentencing Act* (NT), s 6(a) and 8(1).

contributed to the exercise of the discretion. I have upheld ground one; there is some overlap with ground two and in my opinion this ground should be allowed on a similar basis.

[30] I do not however, agree with the submission that the learned Magistrate failed to take into account an enumerated factor in s 8(1)(b) of the *Sentencing Act*, namely the level of seriousness of the offending. On 4 December 2014, when the matter was first before the Court of Summary Jurisdiction, the learned Magistrate commented that, "the circumstances of the offending [were] at the very bottom of the seriousness of such offending". The learned Magistrate made no mention of the objective seriousness of the offending in his sentencing remarks on 15 January 2014.

[31] In my opinion his Honour appropriately acknowledged the low level nature of the offending for cases of this kind. The fact that his Honour did not repeat that finding at the later hearing or specifically deal with the enumerated factors in s 8(1)(b) of the *Sentencing Act* when delivering his reasons does not dissuade me from this conclusion.

[32] Consideration as to the level of seriousness of offending, under s 8(1)(b) of the *Sentencing Act*, does not require that an offence be found to be trivial, rather it requires that an assessment be made as to the extent to which the

offence is of a trivial nature.[10] His Honour was clearly aware of the level of triviality of the offending.

[33] As pointed out on behalf of the respondent, reference was made by his Honour to the injuries sustained by the victims, and that the appellant resorted to violence without provocation as a result of his frustration. This assessment by the learned Magistrate indicates he had turned his mind to the relevant sentencing principles in s 8(1)(b) of the *Sentencing Act*, assessing the extent to which the matter was trivial.

[34] On behalf of the appellant, it was further submitted that the learned Magistrate did not properly take into account the extenuating circumstances under which the offence was committed, as set out in s 8(1)(c) of the *Sentencing Act*. It is well established that, "to be extenuating, the circumstances must be such as to excuse to some degree the commission of the offence charged and it is the extent of those circumstances to which the court is to have regard".[11]

[35] Counsel for the appellant asserted that the findings of the learned Magistrate did not show an appreciation of the extent of the circumstances which had plagued the appellant when he committed the offence. Submissions were made before his Honour regarding the physical and psychological exhaustion experienced by the appellant, after having fled Iraq as a child and having lived in persecution for almost the entirety of his adult life. His counsel

[10] *Nayidawawa v Moore; Nabegeyo v Middleton* (2007) 178 A Crim R 473 at [15].
[11] *Hesseen v Burgoyne* [2003] NTSC 47 at [15].

spoke of his frustration about receiving little to no information about his asylum application whilst he believed others, who had arrived after him, had been granted visas. The sentencing court was told that the appellant was overcome by a sense of powerlessness as he could not console his family when they were falling apart.

[36] Counsel for the appellant accepted that the learned Magistrate did not appear to reject the submission that the appellant had suffered severe frustration as a consequence of his prolonged detention, that he had incurred delays in being processed, and that he had the perception that others had been treated more favourably than him. The learned Magistrate concluded that whilst the appellant was a "man suffering circumstances of frustration and difficulty, as any person in detention must… we don't see every person in detention before this court pleading guilty to assaulting guards".

[37] It was submitted that in concluding that the appellant had incurred circumstances of frustration and difficulty, as any person in detention would, but that not every person in detention was before the Court for having assaulted members of staff at the detention centre, the learned Magistrate took into account irrelevant considerations. If as a result of this reasoning his Honour failed to appreciate or to assess the subjective circumstances of the appellant, error might be shown; however, this comment might also be seen in the light of the need for general deterrence and the inherent significance of assaulting persons who were simply performing their duties.

[38] Counsel for the respondent emphasized that the learned Magistrate did refer to the extenuating circumstances of the offending, namely the "circumstances of frustration and difficulty" that lead the appellant to conduct himself in the way he did. The submission was made that the learned Magistrate was noting that circumstances such as this were not unique to the appellant and that other persons in detention suffering from similar feelings of frustration, do not allow that frustration to manifest in offending. The learned Magistrate accepted that the asylum claim process must be inherently frustrating for a person in detention but was making the point, as he was entitled to do, that the appellant had no right to react violently towards employees at the detention centre. This was said to illustrate the balancing process his Honour engaged in.

[39] Counsel for the respondent submitted that the learned Magistrate was unable to adequately consider many of the mitigatory circumstances put forward by counsel for the appellant, in the absence of further evidence in support of those circumstances. It was submitted that whilst matters adverse to a defendant must be proven beyond reasonable doubt, matters put in mitigation on behalf a defendant must be proven on the balance of probabilities. Where a sentencing court is not satisfied as to a mitigatory matter, the matter is to be put aside when forming the basis of the ultimate sentencing disposition.[12] Save for the misinterpretation of the issues around previous incarcerations, the learned Magistrates did not appear to

[12] *R v Lobban* (2001) 80 SASR 550 at [32].

misunderstand or reject the plea material put to him in mitigation. His Honour accepted much of it, which formed the basis of the exercise of the discretion. No objection was taken by the prosecution to the matters put in mitigation; and in the circumstances the submissions were not inherently unreliable. There was sufficient material to make the findings favourable to the appellant that his Honour did in fact make. The principal issue is the misconstruction of the previous incarceration in Iran.

[40] I will allow this ground of appeal, primarily on the same basis as the first ground.

Re-Sentencing

[41] Assaulting persons when they are at work is inherently serious offending. The setting of a detention centre magnifies the assessment of the gravity of the offending. An assault by way of grabbing two persons and pulling them together does not have the attributes of more significant examples of offending of this generic type. The harm caused was reddening of the skin. No medical treatment was required.

[42] Overall, I view the factors relevant to s 8(1) of the *Sentence Act* in a similar way to the Court below, however, I readily make the assessment that the appellant has no prior convictions and is of good character. That assessment is significant. All of the factors relevant to s 8(1) of the *Sentencing Act* are made out. I sentence on the basis the appellant was a middle aged man; that he was hardworking, when given the opportunity to gain employment; that

he had no criminal record; that he was of good character; that the offence was at the lower end of offending of this kind; and that that there were extenuating circumstances, namely the appellant's physical and psychological exhaustion resulting from the cumulative effect of his persecution, flight, detention and feelings of powerlessness. I bear in mind the importance of general and specific deterrence however, those factors do not need to be emphasized in this particular case. The overall justice of this particular case points to an exercise of the discretion in favour of the appellant.

Orders

[43] The appeal is allowed. The convictions imposed by the Court of Summary Jurisdiction on 15 January 2014 are quashed. The findings of guilt in respect of the two counts are confirmed, without proceeding to conviction. The two victim's levies of $150 imposed on each count remain in force.

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