Ford v Nicholas [2010] NTSC 53

PARTIES:	FORD, Tiare v NICHOLAS, Sally
TITLE OF COURT:	SUPREME COURT OF THE of the NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 20 of 2010 (21010317)
DELIVERED:	3 November 2010
HEARING DATES:	3 November 2010
JUDGMENT OF:	RILEY CJ
APPEAL FROM:	Mr Neill SM

REPRESENTATION:

Counsel:

Appellant:	R Anderson
Respondent:	M McColm

Solicitors:

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

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

Ford v Nicholas [2010] NTSC 53
No. JA 20 of 2010 (21010317)

BETWEEN:
TIARE FORD
Appellant

AND:

SALLY NICHOLAS
Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 3 November 2010)

[1] The appellant entered a plea of guilty to the offence of unlawful aggravated assault and, on 3 August 2010, was convicted and fined $650. She appeals against that sentence on the grounds that:

- the learned Magistrate erred in recording a conviction upon the sentence of the appellant, and
- the learned Magistrate erred by failing to properly take into account a relevant consideration in sentencing the appellant.

[2] The offending occurred on 24 March 2010 when the appellant attended a clothing store in Alice Springs. There had previously been some difficulty between the appellant and members of the staff of the store and, on this occasion, a security guard was called and he served the appellant with a trespass notice. After the effect of the trespass notice was explained to her she was requested to leave the store. The appellant then turned to the victim, an employee of the clothing store, and said: "You fucking bitch, I am going

to bash the fuck out of you." She then slapped and scratched the victim's face and pulled her hair. During the altercation both the appellant and the victim bumped into nearby displays causing damage. The appellant and victim were separated and the appellant left the store threatening: "I am coming back for you. I'm going to bash your head in."

[3] On 25 March 2010 the appellant was arrested. When asked why she hit the victim, she replied: "Because she had called me a dirty Abbo". At the time of the hearing both counsel agreed that the victim had not made those comments but that someone in the vicinity had said those words and the appellant believed they had been said by the victim.

[4] At the hearing before the Magistrate counsel for the appellant advised that the appellant:

> Obviously is not aboriginal herself but did take offence to the comment that she perceived was made by (the victim), partly because of her experience in growing up in Redfern in Sydney and also the last year or so that she has lived in Alice Springs, she has come across - witnessed a number of things that she has perceived to be rude or racist in the way some people deal with aboriginal people and people from different backgrounds in this town.

[5] In sentencing the appellant the Magistrate considered whether to record a conviction. In so doing he looked at the circumstances of the assault and observed:

> The explanation I have been given is that you observed what you believed to be very bad behaviour by a member -- by an employee of the store racially directed, something which you personally found very offensive. I do not reject that explanation at all. But similarly, I do not reject the explanation which has been -- I have been asked to reject; namely, that you reacted with some outrage and anger because you were served with a trespass notice. The fact that that happened and within a very short time immediately thereafter you attacked the woman working in the store, I think entitles me to infer that there was some connection between your anger at being served with the trespass notice and your actions.

Failure to take account of a relevant consideration

[6] In determining to proceed to conviction his Honour observed that the appellant had not been the subject of any "physical attack by anybody" but was "happy to leap on somebody else and attack her". His Honour concluded that a conviction should be recorded.

[7] It was argued on behalf of the appellant that the Magistrate erred in recording a conviction because he failed to consider the matters outlined in s 8 of the *Sentencing Act* and also failed to take into account the extenuating circumstances of the assault, being the perception of the appellant that she had been racially abused by the victim immediately before committing the offence.

[8] In support of the argument counsel for the appellant referred to the following comments of his Honour made during the course of sentencing:

> Although the plea of guilty on your behalf has been carefully structured in such a way that I am invited to accept that you too were the subject of deliberately offensive and racist remarks, at the same time I am given to understand that the victim firmly denies having said any such thing to you, so I do not know what I am supposed to do with that conflicting information. What remains, at the end of the day, is that although you were not the subject to any sort of physical attack by anybody, you were more than happy to leap on somebody else and attack her.

[9] It was submitted that these remarks reveal that the Magistrate failed to take into account the extenuating circumstances of the assault, as accepted by the Crown, and his Honour fell into error by not considering a relevant matter in deciding whether or not to record a conviction. In my opinion a full reading of the sentencing remarks does not support this submission. His Honour expressly accepted that the appellant believed that things had been said that she regarded as "very offensive". At an early point in the remarks his Honour referred to the appellant being cooperative with the police. She had admitted what she had done and his Honour noted that she provided an

explanation for her conduct. His Honour said that he treated the explanation as "indicative of remorse on your part". Later in the sentencing remarks his Honour said:

> What this means is that if you further engage in physical violence as a way of showing your displeasure with people; whether or not they deserve your displeasure is not the point. You do not have the right to leap on people in public places and attack them.

[10] In my view it is apparent that his Honour took into account the submission that the assault took place in the context of the offensive remarks but felt that the nature of the "physical attack" warranted a conviction being recorded. I do not accept the submission that the Magistrate failed to properly take into account the identified relevant consideration.

The recording of a conviction

[11] The provisions of the *Sentencing Act* relating to a decision whether or not to record a conviction have been discussed in a number of cases in this jurisdiction including *Carnese v The Queen*;[1] *Liddy v The Queen*[2] and *Hesseen v Burgoyne*.[3]

[12] In *Carnese v The Queen* it was observed that, pursuant to s 7 of the *Sentencing Act*, where a court finds a person guilty of an offence, subject to special provisions relating to the offence, it may make orders without recording a conviction. Without recording a conviction it may order the dismissal of the charge, the release of the offender, the payment of a fine or the performance of community service.

[13] Section 8 of the Act provides direction in relation to the decision whether or not to record a conviction. The section is in the following terms:

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[1] [2009] NTCCA 8.
[2] [2005] NTCCA 4.
[3] [2003] NTSC 47.

8. Conviction or non-conviction

(1) In deciding whether or not to record a conviction, a court shall have regard to the circumstances of the case including:

(a) the character, antecedents, age, health or mental condition of the offender;

(b) the extent, if any, to which the offence is of a trivial nature; or

(c) the extent, if any, to which the offence was committed under extenuating circumstances.

[14] The Court of Criminal Appeal in *Carnese v The Queen*[4] noted that s 8 requires a consideration of "the circumstances of the case" including the identified and enumerated factors. All relevant circumstances must be taken into account by the sentencing court.[5]

[15] Section 6 of the Act provides that, in determining the character of an offender, the court may consider, inter alia, the following:

(a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender;

(b) the general reputation of the offender; and

(c) any significant contributions made by the offender to the community.

[16] "A conviction is a formal and solemn act marking the court's, and society's, disapproval of a defendant's wrongdoing".[6] As the Court in *Carnese v The Queen*[7] observed, the recording of a conviction is to be regarded as a component of the sentence and to be accorded weight in considering whether

[4] [2009] NTCCA 8.
[5] *Toohey v Peach* (2003) 141 A Crim R 437 at 440 - 441.
[6] *The Queen v McInerney* (1986) 42 SASR 111 at 124.
[7] [2009] NTCCA 8.

or not the sentence is proportionate to the offence.[8] The result of declining to record a conviction is to free the offender of some of the immediate legal consequences of having committed the offence although s 7 of the Act permits other consequences to be imposed.

[17] In *Hales v Adams*[9] Southwood J said of the decision whether or not to record a conviction**:**

> It is a component of the sentence and is to be given weight in determining whether or not the sentence is proportionate to the offence. The more serious or blatant an offence, the less proportionate it is for the Court of Summary Jurisdiction to decline to record a conviction. Mature age offenders who have led previously blameless lives may benefit from an exercise of the discretion not to record a conviction. The discretion may also be exercised in an offender's favour where the offender has no previous convictions, or where the offending related to ill health or where it would, in itself, be a significant additional penalty for a first offender. On the other hand, the recording of a conviction may be necessary where the offender is of mature age and deterrence is being given weight, especially in relation to breaches of regulatory or social legislation. A useful summary of these considerations may be found in RG Fox and A Freiberg, Sentencing State and Federal Law in Victoria 2nd Ed, at 190–193.

[18] In the present case submissions were made to his Honour in support of a conclusion that no conviction be recorded. It was not suggested that the recording of a conviction would impose a significant additional penalty for the appellant. There is no sound basis for a suggestion that his Honour did not give due consideration to the matters raised before him in determining whether or not to record a conviction. His Honour's reasons were delivered ex tempore immediately following the submissions of counsel. As has been pointed out on many occasions[10] an appellate court is entitled to assume that a Magistrate has considered all matters which are necessarily implicit in the conclusion reached. It should not be inferred that a Magistrate did not

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[8] *Lanham v Brake* (1983) 34 SASR 578 at 585.
[9] [2005] NTSC 86 at [17].
[10] See, for example, *Ingram v Littman* [2009] NTSC 70.

consider all of the relevant material merely because the Magistrate failed to specifically mention a particular matter. This is especially so when the matters have been raised before the Magistrate immediately prior to sentence being delivered.

[19] The conduct of the appellant was to be deplored. It was a violent attack upon the female staff member of the store. His Honour concluded that, whilst the appellant may have reacted to a perceived insult thought to be from that staff member, she also acted in immediate response to the service of the trespass notice. On the basis of the information placed before his Honour that was a reasonable inference for his Honour to draw. The assault was accompanied by threats made by the appellant to the victim and was followed by threats of further serious violence delivered as the appellant left the store. This was not an offence of a trivial nature. It was an offence where deterrence, both personal and general, was to be given weight.

[20] In *Hesseen v Burgoyne*[11] Martin (BR) CJ said:

> Judicial minds may well differ as to the significance to be placed upon any one or more of the enumerated factors in s 8 as well as the other circumstances of the case, and in ultimately deciding whether or not to record a conviction the sentencer is exercising a judicial discretion. An appellate court will only interfere if there is some reason for regarding that the discretion conferred upon the Magistrate was improperly exercised and the Magistrate fell into error (*Mason v Pryce* (1988) 34 A Crim R 1). It may not be obvious how the sentencer fell into error, but if the sentence is unreasonable or plainly unjust, the appellate court may interfere (*House v The King* (1936) 55 CLR 499; *Dinsdale v The Queen* (2000) 202 CLR 321).

[21] In my opinion there is no reason to conclude that the discretion conferred upon the Magistrate was improperly exercised or that the Magistrate fell into error. Further, I do not regard the imposition of a conviction in the circumstances of this matter as being unreasonable or plainly unjust.

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[11] [2003] NTSC 47 at [20].

[22] The appeal is dismissed.
