The Queen v Bloomfield [1999] NTCCA 137

PARTIES:	THE QUEEN
	v
	JASON IAN BLOOMFIELD
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CCA 6 of 1999
DELIVERED:	9 December 1999
HEARING DATES:	30 September 1999
JUDGMENT OF:	MARTIN CJ, MILDREN & BAILEY JJ

REPRESENTATION:

Counsel:

Appellant:	D Bamber
Respondent:	R Wild QC with Dr N Rogers

Solicitors:

Appellant:	CAALAS
Respondent:	DPP

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

The Queen v Bloomfield [1999] NTCCA 137
No. CA 6 of 1999

BETWEEN:

THE QUEEN
Appellant

AND:

JASON IAN BLOOMFIELD
Respondent

CORAM: MARTIN CJ, MILDREN & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 9 December 1999)

MARTIN CJ:

Crown appeal against sentence

[1] Upon his conviction following a plea of guilty to a charge under s 154 of the *Criminal Code* (dangerous act) with aggravating circumstances that he caused grievous harm to the victim and was under the influence of alcohol at the time, the respondent was sentenced on 23 June 1999, to a term of imprisonment of two years and six months. It was directed that the sentence be suspended after the respondent had served six months and an operational period of two years and six months was fixed. No conditions were ordered to apply. A pending charge of resist arrest arising from incidents committed after the offence was taken into account.

[2] The Director of Public Prosecutions appeals upon the ground that the sentence was manifestly inadequate both as to the sentence and the period to be served prior to suspension. No specific error is assigned to the learned sentencing judge but the notice of appeal suggests that in arriving at the sentence his Honour erred in not giving enough weight to the aggravating circumstances and too much weight to those operating so as to mitigate the penalty. In broad and general terms the countervailing factors were the nature of the act and harm done to the victim and the appellant's youth and prospects for rehabilitation.

[3] It is not necessary to repeat the principles to be applied on a Crown appeal against sentence. They are sufficiently detailed in the reasons of this Court in *R v Raggett and Others* (1990) 101 FLR 323 with ample reference to binding and persuasive authority. It is enough to say that: (a) it is fundamental that the sentencing judge's exercise of sentencing discretion is not to be disturbed on appeal unless error is shown; the presumption is there is no error; (b) this Court will not increase the sentence merely because its members believe they would have imposed a more severe sentence and, in this case; (c) the inadequacy in the sentence must be manifest, this proposition does not admit of sustained argument.

[4] In my opinion, the sentence and the time to actually serve stand out as being obviously inadequate, bearing in mind the circumstances of the offence and of the offender. A more severe sentence and immediate custodial period was warranted and should have been passed. That intuitive approach may not be

appropriate to sentencing at first instance but, given the ground relied upon and the law to be applied, seems to me to be appropriate in examination of such a ground of appeal. The duty of this Court is to quash the sentence and substitute such more severe sentence as is warranted (*Criminal Code* s 411(4)).

[5] The essence of a charge under s 154 is that the dangerous act was such that an ordinary person similarly circumstanced would have clearly foreseen actual or potential danger to the life or health of the victim and not have done the act. The statutory circumstances of aggravation admitted by the respondent constitute an offence carrying a maximum penalty of 11 years.

[6] The facts constituting the offence as recorded by his Honour in his sentencing remarks, and not disputed on appeal, are:

> "..... At about 4.20 am, Thursday, 17 September 1998 you were sitting at the front of the Alice Springs 24 hour store on Gap Road with Kingsley White and Damien Kenny. Whilst you were there the victim, who was driving a taxi, pulled up just past the door of the store. As he walked inside to purchase some food he observed you trying to get into the front drivers seat of the vehicle. The victim approached you and informed you that he already had a fare and an argument then broke out between Damien Kenny and the victim about his manner of driving.
>
> You became involved and started to push at the victim, there was a short struggle between the victim and Mr Kenny and Mr Kenny then punched the victim to the left side of the face. The parties to this dispute were separated by Kinglsey White and others. All persons were then standing at the drivers side of the taxi. At this time you approached the victim who was leaning over the taxi and with your right clenched fist, punched him to the right side of the face and head causing his head to jerk backwards.

> You were restrained by the storekeeper and pushed away from the area. The driver turned his back on you and was arguing with Damien Kenny. Whilst he had his back to you, you approached him from behind. You emerged in front of him and struck him to the front of his face with your right clenched fist. The victim was unable to see the punch coming and he was knocked to the ground by the punch striking his head on a concrete step. ...."

[7] It will be noted that the first assault had been halted by the intervention of others, but that the respondent resumed the aggression. He was determined to continue the attack.

[8] The Court is directed to have regard to a number of factors by s 5(2) of the *Sentencing Act* and I turn to them insofar as they are relevant and known. The facts disclose that the final attack upon Mr Wauchope was made whilst he had no means of knowing he was about to be struck and could not take any steps to avoid the blow or otherwise protect himself. Nor did he have the opportunity of doing anything to minimise the consequences by cushioning his fall to the ground or any other means. In particular he had no opportunity of lessening the impact of his head upon the concrete. The attack was unexpected and unprovoked. His Honour said:

> "It seems that you had struck the victim and then been removed from the immediate scene. You then returned and with what I can only describe as a king hit, that is, a blow to the head without warning, you punched the victim in the front of the face with your right clenched fist."

The respondent was entirely to blame.

[9] Mr Wauchope was rendered unconscious. The harm, injury and loss done to him by the respondent was rightly described by his Honour as:

> "a most serious injuries with permanent and tragic consequences. He was in a coma for several months and has permanent brain injury. He is a 30 year old man has suffered severe traumatic brain injury a fracture of the base of the skull with brain stem haemorrhagic contusions, right thalamic contusion, left frontal contusion, general cerebral odema and increased intracranial pressure as a consequence of those injuries. He remained in a critical condition in intensive care at the Royal Adelaide Hospital until early October 1998. His recovery was complicated by pneumonia, septicemia and meningitis. As at April of this year his problems were:
>
> - significant impairment and disabilities secondary to severe head injury.
> - impairment of cognition.
> - impaired personality.
> - personality and behavioural disturbances.
> - spastic quadraparesis.
> - incontinent bladder and bowel function.
> - dependent for activities of living, for example, bathing and showering.
> - requiring a high level of nursing care and 24 supervision."

[10] The prognosis was extremely guarded and it would appear he would require supportive accommodation on a permanent basis. As his Honour put it: "effectively his life is wrecked". I have been careful not to allow this consideration to "swamp" all other, including when fixing the period which the respondent must serve (*Economedes* (1990) 58 A Crim R 466; *Boxtel* (1994) 2 VR 98).

[11] The respondent ran away after the assault but apart from perhaps knowing his victim had been rendered unconscious it cannot be thought that he then had any idea of the damage he had done. Nonetheless, he was sufficiently impressed as to the wrongness of his conduct that he said to another taxi driver: "Don't dob me in mate. Don't tell the cops, it was only one punch".

The taxi driver attempted to drive to the police station but the respondent managed to get out the cab. He was arrested shortly afterwards and reacted violently. By his admission, and in the view of the police, he was intoxicated. A pending charge of resisting arrest was taken into account when he was sentenced for the dangerous act. The circumstances of that offence were not serious, comprising attempts to pull away from the police and pushing against them. His violent attitude continued after arrest by his uttering threats to kill the police, kicking the door of the police van repeatedly and unruly behaviour in the police station. They bear upon the outcome of this appeal only by showing that the respondent was, on that night, of violent disposition, a not uncommon attitude by people under the influence of alcohol when taken into custody.

[12] It is not held against the respondent, so as to increase the penalty, that he declined to cooperate with the police in their investigations. However, if the Court is to have regard to the degree of assistance given to police in their investigation, it follows that had he assisted to some degree it may have operated to mitigate the penalty.

[13] As to the respondent he was 17 years of age at the time of the offence, had left school at Year 10 and went to work with his father, the manager of a pastoral property near Alice Springs. He is described by his Honour as being his father's "right hand man" in a very responsible position at the station. He had evident family support and his Honour accepted his mother's evidence that he was then full of remorse, a reaction to be expected

given the extent of the damage caused. He was under some stress on the night of the occurrence arising from deaths in the family, which led him to going out and drinking with members of his extended family.

[14] His Honour found that the respondent was regarded as a person of good character. He did not find him to be so for sentencing purposes, no doubt influenced by the fact that the respondent had been convicted for an assault which occurred on 14 December 1997, about nine months prior to this incident. Again, the respondent became angry when intoxicated and on that occasion pushed the man backwards with both hands and then punched him in the chest and tried to head-butt him. For that he was convicted and fined $750. His Honour correctly said he was not to be punished twice for that, but took it into account as a relevant circumstance in reflecting an increased degree of culpability in the manner discussed by Angel J in *Mulholland* (1991) 1 NTLR 1. It is not suggested that that was not the correct approach.

[15] Concluding his sentencing remarks his Honour drew attention what was said by the Queensland Court of Criminal Appeal in *Amituanai* 1995 78 A Crim R at 588:

> "generally when one inflicts serious violence to the head of another, the risk of catastrophic results must be shared by the offender as well as the victim. Often offenders will find that the punishment may depend on the extent of the damage that the victim has sustained."

[16] Although regarding rehabilitation as extremely important, his Honour also referred to what was said by Mildren J in *Kenafake* unreported 31 July 1998:

> "persons who commit offences of this kind must expect a prison term to deter loutish behaviour of this kind both by the prisoner and by others and to express disapproval of the use of a fighting technique which has a known propensity to cause serious harm such as throwing a king-hit."

[17] At common law and in the guidelines provided in s 5(1) of the *Sentencing Act* the justification for sentences is only to be found in the frequently conflicting objectives of punishment, rehabilitation, deterrence, specific and general, denunciation and community protection. The ultimate goal is the protection of people from crime and the specific purposes do not carry the same weight in every case. Individualised justice is the touchstone of judicial sentencing, tailoring the sentence in each case to the circumstances of the offence and of the offender. That minds may genuinely differ as to the appropriate sentence in any case, arising from disagreement as to the weight to be given to the various elements to be taken into account, no means necessarily justifies a reversal of the sentencing judge (adapted from the remarks of Stephen J in *Gronow v Gronow* 1979 144 CLR 513 at 519). But, justice may require it. In *Veen No. 2* (1998) 164 CLR 465 at 476, the majority of the High Court drew attention to the purposes of sentencing adding that none of them could be considered in isolation from the others when determining what is an appropriate sentence in a particular case:

> "They are guideposts to the appropriate sentence but sometimes they point in different directions."

[18] There is a degree of particular sensitivity in this case arising from the victim's occupation as a taxi driver. This is not a case where the taxi driver

had been attacked by a passenger for the purpose of stealing or robbery. It was his job however, which led him to be at the place where he was attacked at a time when it was likely that people adversely affected by alcohol would be amongst potential fares. Mr Wauchope was involuntarily exposed to that risk. There is a responsibility on the courts to minimise such a risk insofar as they are able.

[19] The nature of the offence, notwithstanding lack of intent, is serious. By his plea, the respondent acknowledges that an ordinary sober person in the circumstances would clearly have foreseen the serious danger to Mr Wauchope's health which his action caused. The Parliament particularly addresses intoxication as a circumstance of aggravation leading to a significantly increased maximum penalty as does the grievous harm which befell the victim. The greater the harm, the greater its weight in the balance of conflicting interests against the offender by way of punishment as a general deterrent. It must be made clear, both to the offender and others with similar impulses, that if they yield to them they will meet with severe punishment: "in all civilised countries, all in all ages, that has been the main purpose of punishment and continues to be so" (*R v Willscroft* (1975) VR 292 at 298- 9).

[20] The usefulness of punishment as general deterrent to criminal conduct has often been doubted but it remains the fact that the criminal justice system has always proceeded on the assumption that punishment deters, at least some people (per King CJ in *Yardley v Betts* (1979) 22 SASR 108 at 112).

That may particularly be so amongst those who were in the vicinity when this offending took place or with whom the respondent may associate. The deterrent effect of sure severe punishment in cases like this, may not operate upon the mind of the person affected by alcohol when the incident is about to take place, but it may operate beforehand so as to moderate the intake of alcohol. It was accepted by the Queensland Court of Appeal in *Amituanai* (1995) 78 A Crim R 588, that general deterrence was a factor in sentencing for offences of this type committed by intoxicated young men. It must be accepted that punishment can operate so as to deter potential offenders from voluntarily getting into situations where offending is a possible outcome.

[21] The respondent's age is a relevant factor, but the extent of any mitigation which might be extended to a youthful defendant depends on the circumstances of the case. There is a point at which the seriousness of the crime overrides the mitigating factor of youth [*Braham* (1994) 73 A Crim R 353 at 366, *Nichols* (1991) 57 A Crim R 391, *Pham* 1991 55 A Crim R 128 at 135, *Hawkins* (1993) 67 A Crim R 64, *Gordon* (1994) 71 A Crim R 459]. In my opinion, this is such a case.

[22] Notwithstanding the credit to which the respondent is entitled for his remorse, once he realised what he had done, his plea and his prospects of rehabilitation, this Court should confirm that loutish behaviour will not be tolerated.

[23] The sentence I would substitute, after reduction to take into account that this is a Crown appeal, is a term of imprisonment of three and a half years, which I would order be suspended after the respondent has served 12 months. I would fix an operational period of three years, all to commence from 23 June 1999.

MILDREN J:

[24] The facts relating to this appeal are set out in the judgment of the Chief Justice which I have had the advantage of reading.

[25] The appellant pleaded guilty to an aggravated dangerous act, contrary to ss154(1), (2) and (4) of the *Criminal Code*. The maximum penalty he faced was imprisonment of eleven years.

[26] The principal factors in this case calling for condign punishment were: the extent of the grievous harm caused to the victim; the fact that the accused was intoxicated at the time; the deliberate and unprovoked assault on the victim; the "king-hit" blow to the face performed by the respondent; the fact that the blow was delivered in a cowardly fashion in circumstances where the victim could not have expected it to be coming and have taken evasive action; the fact that the respondent had a previous conviction for assault not nine months earlier; the fact that the respondent had assaulted the victim only a few moments before and had been removed by the intervention of others, but had returned to attack the victim; and the charge of resisting arrest which the sentencing judge was asked to take into account.

[27] The principal mitigating factors were the respondent's youth (he was seventeen at the time of the offence); his remorse; his plea of guilty; the stress he was under at the time caused by deaths in the family, which led him to go out drinking with members of his extended family; and his previous good character.

[28] There is no doubt that the learned sentencing judge took into account all of these factors. No specific error is relied upon by the Crown. The ground relied upon both in relation to the head sentence and the period of suspension is manifest inadequacy. The relevant principles are referred to in *The Queen v Tait and Another* (1979) 46 FLR 386; *R v Tait and Bartley* (1979) 24 ALR 473; *Shane Leonard Ireland* (1987) 29 A Crim R 353; *R v Ireland* (1987) 49 NTR 10; and *R v Raggett and Others* (1990) 101 FLR 323. For the purposes of this appeal, what the Crown must show in order for this Court to interfere is not merely that the sentence is low in the sense that we as individual judges would have imposed a more severe sentence, but that it is plainly and unarguably so low that the inadequacy is obvious.

[29] In cases involving sentences for a conviction against s154 of the Code, this is no easy task. As was observed in *Baumer v The Queen* (1988) 166 CLR 51 at 55, the offence created by s154 is *sui generis*; it has no counterpart in other jurisdictions. It casts a wide net, covering an enormous range of conduct from the comparatively trivial to the most serious. Consequently, like the offence of manslaughter, there is no statistical range, and comparative cases are of little assistance, because there are rarely similar

cases which are truly comparative. For this reason, references to sentences imposed by single justices in this jurisdiction to which we were referred by Mr Bamber, or to sentences imposed for offences dealt with in other jurisdictions, to which we were also referred, I found to be of no assistance. From the appellant's point of view, the lack of such comparatives prevents the Crown submitting to this Court that the sentence was inconsistent with the accepted range, and therefore, for the appeal to succeed, the Crown must show that the sentence is so disproportionate to the seriousness of the crime as to warrant interference by this Court notwithstanding that there is no point of principal involved, except in the elastic sense referred to by Lord Goddard and quoted with approval in *R v Raggett, supra,* at 330-331.

[30] Much of the debate before us focused on the weight to be given to the consequences to the victim. We were referred by Mr Bamber to the decision of the Court of Criminal Appeal (Victoria) in *Christopher Economedes* (1990) 58 A Crim R 466, where the Court refused to interfere with a noncustodial sentence even though the effects upon the victim were catastrophic. That case is not authority for any particular sentencing principle relevant to the circumstances of this case. What is relevant, is that the legislature has made the consequences to the victim an aggravating factor which increases the maximum penalty: see s154(2). And, of course, the more serious the consequences to the victim, the greater the responsibility which must be borne by the defendant: see *Timothy Brian*

Amituanai (1995) 78 A Crim R 588 at 589, 596-7. Here the consequences to the victim are as bad as they are ever likely to be.

[31] Mr Bamber submitted that although this be so, nonetheless it was important to bear in mind that the effects upon the victim were not intended and not foreseen, and were the result of a single blow. He referred to *R v Boxtel* [1994] 2 VR 98 at 103-104 where Crockett and Hampel JJ said:

> It seems to us that it is of great importance not to allow the effects of an unintended catastrophe to "swamp" all other considerations, particularly in the fixing of the non-parole period so as to cause an imbalance between all the factors which ought properly to be given their proper weight. As King CJ observed in *R v Johnston* (1985) 38 SASR 582, at p. 584, when dealing with an Attorney-General's appeal relating to a charge of dangerous driving causing death: "The need to satisfy public feeling and to calm public outrage is not to be ignored, but courts must guard against permitting the course of justice to be distorted by the influence of attitudes which are based upon emotion rather than reason.".

[32] Whilst I accept the strength of these observations, what must also be borne in mind in dealing with this offence is that it was aggravated by the fact that the respondent was under the influence of intoxicating liquor. This is a separate circumstance of aggravation under s154(4) of the Code, the effect of which was to further increase the maximum penalty to eleven years. Of course, that does not mean that the sentencer is required to adopt a staged approach to sentencing. The proper approach is to evaluate the circumstances of the offence in their entirety, including the circumstances of aggravation, and to determine an appropriate term having regard to the prescribed maximum of eleven years and to the possible range of offences to

which it applied: see *Baumer, supra,* at 57. The significance of alcohol as an aggravating factor, is that it was the alcohol which the respondent voluntarily ingested which provided the only reasonable explanation for his failure to foresee that a possible consequence of his actions was to cause brain damage to his victim. Unfortunately, single blows to the head often do cause severe brain injury, particularly if the victim is knocked to the ground and hits his head on a hard surface, as happened in this case. There could be no doubt that an ordinary person similarly circumstanced to the respondent ought to have foreseen that possibility as a real one, and not have proceeded with that conduct. If the appellant had foreseen that possibility, he would have been charged with unlawfully causing grievous harm (s181) which carries a maximum of fourteen years imprisonment; or if he had intended to cause grievous harm (s177), he faced a maximum of life imprisonment. Thus the charge he faced, and the maximum penalty relevant to it, had already taken into account his lack of intent and foresight.

[33] The other factors pointing to a significant sentence I have mentioned in paragraph [26] above, and need not be repeated. On the other hand, the learned sentencing judge was required to give weight to the mitigating factors referred to in paragraph [27]. As to the question of remorse, on the facts it was not immediate. The respondent, although aware that what he had done was wrong, fled the scene, and when arrested, resisted arrest. He declined to cooperate with the police and refused to be interviewed. His remorse, whilst accepted by the sentencing judge, clearly came later.

Weight had to be given to the plea of guilty. It is not clear from the sentencing remarks when this was indicated to the Crown, but the remarks of the prosecutor at AB12 indicate that there had been a hand-up committal and the respondent negotiated his plea to dangerous act although he had originally been committed on a charge of unlawfully causing grievous harm.

[34] A most significant factor was the respondent's age and prospects of rehabilitation. He was only seventeen at the time of the offence, and his prospects were accepted by the sentencing judge as very good. However, as the Chief Justice points out, less weight is given to those factors in fixing the sentence, where the offence is of a serious kind, and this was such a case.

[35] In all the circumstances, I consider that an appropriate head sentence for this case should have been in the order of imprisonment for five years, and that a considerable portion of this sentence should have been served. That is sufficient to conclude that the sentence actually imposed is manifestly inadequate, in the sense discussed above, and that the appeal should be allowed. However, because this is a Crown appeal, and because of the principles of double jeopardy, the appropriate course is to impose a lesser sentence on resentencing by this Court. I therefore agree with the orders proposed by the Chief Justice.

BAILEY J:

[36] I have had the advantage of reading drafts of the judgments of the Chief Justice and Mildren J. I agree that the sentence is manifestly inadequate for the reasons stated by the Chief Justice and which I note are shared to a very large extent by Mildren J. I also agree with the orders proposed by the Chief Justice. I would add only that I also share the view of Mildren J that, setting aside the reduction applied to Crown appeals against sentence, an appropriate head sentence for this case would have been in the order of imprisonment for 5 years and that a considerable portion of this sentence should have been served. For my part, "a considerable portion" would have been not less than eighteen months imprisonment."
