GADATJIYA v LETHBRIDGE

In the Supreme Court of the Northern Territory of Australia

JUSTICES APPEAL from COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction

SCC: 440 of 1991

Delivered at Darwin 28 February 1992

Heard at Darwin 12 and 13 February 1992

Judgment of Mildren J

CATCHWORDS:

ABORIGINALS - Crimes by Aboriginals - Special leniency to be shown

APPEAL AND NEW TRIAL - In general and right of appeal - Justices appeal - Where ground of appeal is manifestly excessive sentence - Statistics indicating tariff very desirable

Justices Act (NT)
Mason v Pryce (1988) 53 NTR 1, applied.
Butcher v Hamon (unreported, 30 August 1991 per Kearney J), considered.

CRIMINAL LAW AND PROCEDURE - Jurisdiction, practice and procedure - Judgment and punishment - Sentence - First offenders - Element of deterrence

Birch v Fitzgerald (1975) 11 SASR 114, applied.
Lovering v Brough (1985) 36 NTR 59, considered.

CRIMINAL LAW AND PROCEDURE - Jurisdiction, practice and procedure - Judgment and punishment - Sentence - No presumption in favour of imprisonment for certain types of assault

Yardley v Betts (1979) 1 A Crim R 329, applied.

CRIMINAL LAW AND PROCEDURE - Jurisdiction, practice and procedure - Judgment and punishment - Limits on CSJ sentencing - Construction of head sentence in relation to jurisdictional limit

Justices Act (NT),s121A
Coggins v The Queen (Federal Court of Australia,

unreported, 26 September 1985), applied.

CRIMINAL LAW AND PROCEDURE - Particular offences - Offences against the person - Aggravated assault - Three separate incidents - Over prolonged period - Various weapons - No police presence

REPRESENTATION:

Counsel:
Appellant: G Barbaro
Respondent: R Davies

Solicitors:
Appellant: NAALAS
Respondent: NT Director of Public Prosecutions

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

№ 440 of 91

BETWEEN:

SAMMY GADATJIYA
Appellant

AND:

ROBERT IAN LETHBRIDGE
Respondent

CORAM: Mildren J.

REASONS FOR JUDGMENT
(Delivered 28 February 1992)

This is an appeal from the Court of Summary Jurisdiction against sentence. On 26 November 1991 the Appellant was convicted of 2 counts of aggravated assault and 2 counts of aggravated criminal damage. On the first count of aggravated assault, and on the first count of aggravated criminal damage, the prisoner was sentenced to 12 months' imprisonment with effect from 19 November 1991, but the court directed that he be released after 4 months upon his entering into a bond of his own recognisance in the sum of $500 to be of good behaviour for 12 months and to be subject to the supervision of the Director of Correctional Services or his delegate, and to obey all reasonable directions about residence, associates, employment, vocational training and reporting. On the second count of aggravated criminal damage he was sentenced to 1 month's imprisonment with effect from 19 November 1991, and on the second count of aggravated assault he was sentenced to 3 months' imprisonment with effect from 19 November 1991. The Appellant was also ordered to make reparations in the total sum of $1756 and was granted 8 months to pay.

The grounds for appeal as set out in the Amended Notice of Appeal are as follows:

"1. The sentence imposed was manifestly excessive.

2. The sentencing Magistrate failed to give sufficient weight to the Defendant's prior good character and the fact that he was a first offender.

3. Counsel for the Defendant failed to put all favourable subjective matters on the Defendant's behalf."

The facts alleged against the Appellant, which were not in dispute, were, that on the afternoon of Saturday 26 November 1991 the Defendant was at the Ramingining Community when a friend of his returned from Darwin bringing with him a 750ml bottle of Bundaberg rum. The Defendant and his friend commenced to consume the liquor and at about 19:55 hours, when in an intoxicated condition, the Defendant attended at the store manager's residence at Ramingining. The Defendant, armed with a large rock, went to the front door of the house and suddenly hurled the rock through a set of louvres on the right side of the door. The rock smashed the louvres and sprayed glass inside the lounge room of the house, only just missing the store manager and another male who was seated in the lounge.

The Appellant, who was on the verandah, then demanded that the store manager supply him with some cigarettes. The manager refused, told the Defendant not to enter his house, and to go home. The Defendant placed his hands through the broken louvres, unlocked the door and entered the house where he picked up 2 pieces of broken glass, smashed them together and threatened to cut himself. The Appellant then lunged at the store manager's throat with the glass,

narrowly missing him.

The Appellant was told by the store manager to calm down and to leave the house, but he ignored these requests and walked into the lounge room. The Appellant was then talked into leaving the house and walked outside with the store manager. He again attempted to gain entry to the house but was stopped by being taken hold of and sat upon by another person.

Upon the arrival of a member of the Ramingining Council, the Appellant was released and he immediately ran off.

A short time later the Appellant returned to the premises and demanded the keys to the store vehicle. At this stage he was armed with a star picket and he struck the door with the picket and then smashed louvres above the door, spraying glass inside the house. After a short time he left the front door area, but again returned to the side of the house where the vehicle was parked, and he smashed the windscreen and both side windows of the vehicle.

The Appellant then returned to the front door of the house with an iron bar. The occupants placed plywood over the smashed windows and the Appellant began to hit the plywood with the iron bar. He then ran to a side verandah screen door, cut the flywire with a pocket knife and unlocked the door and entered a secured verandah area. He went to a kitchen window and smashed the 6 louvres in the window. The store manager went to the window to try and reason with the Appellant but the Appellant, still armed with his pocket knife, took a wild slash at him - fortunately missing him.

An occupant of the house then picked up a chair and ran with the legs of the chair protruding towards the window in order to block the Appellant from entering. At this stage the Appellant demanded the store manager to give to him the

keys to the vehicle. The store manager, being terrified, threw the keys to the Appellant who left the enclosed verandah and drove off in the vehicle.

About 20 minutes later, the Appellant returned to the front door and stated he had the keys. The store manager opened the door, took the keys and shut the door. The Appellant left the area.

I am told that there is no police station at Ramingining, although this was a fact which was undoubtedly known to the learned Magistrate. The police attended Ramingining on Monday 28 October 1991 and spoke to the Appellant who agreed to accompany them to Maningrida to be interviewed. On his arrival in Maningrida he participated in a record of interview where he made a number of admissions. He was later arrested, charged and bailed.

During the events above described, the store manager, who was 56 years of age, and his wife, who was also in the house at the time, feared for their safety throughout.

The Appellant is a full-blood Aboriginal who lived at Ramingining. He was 27 years of age and had no previous convictions. He had, since the incidents referred to above, personally apologised to the store manager and that apology had been accepted. Through his counsel he offered to make reparations for the damage which he committed. There were in fact no physical injuries caused to the store manager or to anyone else in the house, but it may be observed that this was rather by good luck than good management. It was submitted on behalf of the Appellant that the alcohol was brought onto the Community by the Appellant's friend without any prior arrangements. During the course of the drinking this friend had started to fight another person and the Appellant had intervened to prevent the fighting from continuing. In doing so, he was forced to hit his

friend in order to subdue him whereupon his friend retaliated by striking him hard into the face. The Magistrate accepted that this caused the Appellant to be emotionally upset and explained some of the conduct which later occurred.

No material was put before the learned Magistrate as to the Appellant's work history, or about his means generally, other than the fact that the Appellant sought only 3 months to pay for the cost of the damage.

The Appellant was married in 1984, was still living with his wife, and he had one child of 4 years. The Appellant's mother also lived at Ramingining, but his father died when the Appellant was still a child. It was put that, although the Appellant does drink, it was not the case that he was drunk all the time and that he did have some respect in the Community. It was put that he helped in ceremonies and played music, and that he spent most of his time hunting and fishing.

In view of the absence of a previous criminal record, the absence of injuries, his plea of guilty, the giving and acceptance of the apology, and his willingness to make reparations, his counsel submitted that a non-custodial order was appropriate and that the court should consider a period of community service.

The Appellant also indicated to the court through his counsel that he would be prepared to agree to give up alcohol.

The Magistrate ordered a Community Service Order Report. After indicating to the Appellant that he had not made up his mind as to whether or not he would sentence him to imprisonment, the Appellant was remanded in custody until 26 November 1991.

Later that day a Community Service Order Report was made available to the Magistrate who was then invited to dispose of the matter. His Worship declined to do so, saying it was a most difficult sentencing exercise and clearly indicating that he needed further time to consider the matter.

Upon resumption of the hearing on 26 November 1991, counsel for the Appellant informed the court that the Appellant had been profoundly affected by his time in custody and again urged upon the learned Magistrate that he not impose a custodial sentence. After making a few general submissions, and reminding the Magistrate that a community service order was appropriate and available at Ramingining, he said:

> "And unless your Worship wishes me to explore at further length the subjective circumstances, it would be my submission that your Worship could at this point deal with a first offender in such a way as to have him return to his community to perform useful community work in the community's view."

Without proceeding to leave the Bench and without asking for any further submissions from the Appellant's counsel, the learned Magistrate proceeded to impose the sentences and the reparation orders to which I have already referred.

At the hearing of the appeal before this Court, the first ground of appeal argued was ground three. Counsel for the Appellant argued this ground along the lines that the Magistrate should have, in accordance with natural justice, invited counsel at the hearing to put further submissions to him in view of the fact that he intended to impose a sentence of immediate imprisonment and that counsel had clearly indicated that his submissions were directed to a non-custodial sentence. No objection was taken by counsel for the Respondent to the recasting of ground three of the Amended Notice of Appeal in this way.

It was submitted that it was apparent from the submissions of his counsel before the learned Magistrate, that he wished to be further heard if the learned Magistrate was still of a mind to impose a custodial sentence. Much reliance was placed upon the passage which I have quoted above, which followed at the end of the Appellant's counsel's submissions.

I am unable to read into those remarks the meaning contended for by the Appellant. It seems to me that all that the Appellant's counsel did, was to invite the Magistrate to raise again with counsel any matter of fact relating to the Appellant's subjective circumstances if the learned Magistrate required to be reminded of them or needed any further elucidation of them. The expression used by the Appellant's counsel, "unless your Worship wishes me to explore at further length the subjective circumstances" implied that he had already explored the subjective circumstances at length. I do not therefore consider that there was any denial of natural justice to the Appellant. Indeed, it is apparent from the learned Magistrate's remarks on sentence that he had not overlooked any of the matters relevant to the Appellant's personal circumstances which had previously been put to him.

Next it was submitted that the Magistrate gave insufficient weight to the Appellant's good character and lack of prior convictions which he seems to have reflected only in the early release date. Reliance was placed upon the following observation of the learned Magistrate in his remarks upon sentence which were given *ex tempore*:

> "It is my view that the assaults cry out for a prison sentence and a fairly long one. It is also my view that the Defendant's personal circumstances are such that justice will be sufficiently done if he is released from prison fairly soon, but I cannot say that I am anywhere near satisfied that I would be doing justice if he was released more or less straight away, even if it were to home detention if that were

available, and it is not at Ramingining, or to do community work."

However, a reading of the learned Magistrate's *ex tempore* remarks strongly suggests that the learned Magistrate did have the Appellant's personal circumstances in mind when he imposed the sentence of 12 months' imprisonment. Indeed he began his remarks upon sentence by referring to his age and to his lack of previous convictions and soon thereafter referred to his shame, plea of guilty, the apology, the fact that the apology had been accepted, the fact that he was prepared to make reparations, and was prepared to do community work. In all the circumstances I do not think it can be shown that the learned Magistrate failed to take those matters into account when arriving at a sentence of 12 months' imprisonment. However, what was submitted was that insufficient weight was given to these matters which warranted a substantial discount on what otherwise might have been an appropriate sentence. It was submitted that the fact that such a discount was not allowed was evidenced by the length of the sentence imposed and the length of the period of imprisonment to be served prior to release.

The maximum penalty fixed by the *Criminal Code* for aggravated assault was, pursuant to s.188(2) of the *Code*, 5 years' imprisonment or, upon summary conviction, imprisonment for 2 years. The maximum penalty for aggravated criminal damage, where the loss caused is greater than the sum of $500, is, pursuant to s.251(2)(c) of the *Criminal Code*, imprisonment for 7 years.

Pursuant to s.131A of the *Justices Act*, a court constituted by a Magistrate has jurisdiction to hear and determine in a summary way a charge of aggravated assault contrary to s.188(2) of the *Criminal Code*, but the court shall not hear and determine in a summary manner such a charge if it is of the opinion the charge should be prosecuted on indictment. In relation to the charge of criminal damage, the Court of

Summary Jurisdiction had jurisdiction to deal with that matter summarily pursuant to s.121A of the *Justices Act*, if, *inter alia*, the court was of the opinion that the case can properly be disposed of summarily. The court's powers to impose a penalty is limited by s.121A(2) to imprisonment for 2 years, or a fine of $2000.

It was submitted, in effect, that the sentence imposed was, so far as the sentence of imprisonment for 12 months was concerned, half of the maximum sentence that the court had the power to impose. However, that is only partially true. Whilst it is the case that the Court of Summary Jurisdiction could not impose a penalty longer than 2 years, the court always had the power to remand the Appellant for sentence by the Supreme Court. I do not think it is appropriate to compare the sentence imposed with the maximum of the court's jurisdiction: see *Coggins v. The Queen* (Federal Court of Australia, unreported, 26 September 1985, per Northrop and Toohey JJ.).

Having regard to the fairly prolonged nature of the incidents which gave rise to the charges, the fact that there were really 3 separate incidents, the lack of provocation, the number and type of instruments used in the attacks, the place where the offences took place, and the fear which the attacks engendered in the store manager and his wife, I do not think that it can be said that the learned Magistrate failed to give due weight to the Appellant's prior good character or lack of previous convictions. In any event, there was no evidence of positive good character put before the Magistrate; there were no personal references or matters of that kind.

Before leaving this ground of appeal, it is necessary to refer briefly to the remarks of O'Leary C.J. in *Lovering v. Brough* (1985) 36 NTR 59 at 63:

> "In the case of *Matan v. Ruehland*, unreported, 15 October 1984, I referred to the principles which

should guide a court in dealing with a youthful first offender, and in *Ebaterintja v. McKinlay*, unreported, 4 July 1985, I drew attention to the position of first offenders generally. In this latter case I adopted, with respect, what was said by Walters J. in *Coles v. Samuels* (1972) 2 SASR 488 at 492:

> 'In the absence of circumstances of substantial gravity surrounding a simple offence or a minor indictable offence committed by a first offender who stands to be punished for a single offence and who has no other offences to be taken into consideration, and in the absence also of a sufficient reason for sentencing him to a term of imprisonment, I am disposed to think that a reformative or a primarily deterrent sentence is scarcely indicated, and that the imposition of a fine, a release on probation, or a discharge on a suspended sentence should prima facie be adequate.'"

It is to be observed that the Appellant in this case stood to be punished for four offences.

By way of contrast, I adopt, with respect, the observations of Bray C.J. in *Birch v. Fitzgerald* (1975) 11 SASR 114 at 116-117:

> "Nevertheless there are offences in which, as it seems to me, the deterrent purpose of punishment must take priority. When people act under the influence of liquor, passion, anger or the like so as to constitute themselves a physical danger or potential physical danger to other citizens it may well be that a sentence of imprisonment will be appropriate, even in the case of a first offender of good character, in order to impress on the community at large that such behaviour will not be tolerated."

Finally, I adopt, with respect, the observations of King C.J. (with whom Mitchell J. agreed) in *Yardley v. Betts* (1979) 1 A.Crim.R. 329 at 332-334:

> "The question underlying the first point reserved is whether this court should lay down or approve as a matter of principle that there is or ought to be a presumption in favour of imprisonment as

the punishment for assault or for certain types of assault.

It is necessary to keep firmly in mind the fundamental principle that the criminal law exists for the protection of the community. This protection is achieved primarily, in my view, by making the punishment fit the offence and the offender thereby promoting respect in the community for the justice of the criminal law. The aspect of deterrence of the particular offender and of others must not be overlooked. The courts must assume, although evidence is wanting, that the sentences which they impose have the effect of deterring at least some people from committing crime. Deterrence possesses particular significance in cases of unprovoked violence. The observations of Bray C.J. in *Birch v. Fitzgerald* (1975) 11 SASR 114 at 116-117 are in point ...

The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect of sentencing should never be lost sight of and it assumes particular importance in the case of first offenders and others who have not developed settled criminal habits. If a sentence has the effect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an offender to avoid offending in future, the protection of the community is to that extent enhanced.

To say that the criminal law exists for the protection of the community is not to say that severity is to be regarded as the sentencing norm. Times and conditions change, and the approach of Judges to their task must be influenced by contemporary conditions and attitudes. But public concern about crime, however understandable and soundly based, must never be allowed to bring about departure by the courts from those fundamental concepts of justice and mercy which should animate the criminal tribunals of civilised nations. They are summed up, in the aspects relevant to the present discussion, by Napier C.J. in *Webb v. O'Sullivan* [1952] SASR 65 at 66:

> 'The courts should endeavour to make the punishment fit the crime, and the circumstances of the offender as nearly as may be. Our first concern is the protection of the public, but, subject to that, the court should lean towards

> mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest.'

The protection of the public must remain our first concern, but if, consistently with that, we can, in our compassion, assist another human being to avoid making ruin of his life, we ought surely to do so.

How are these principles to be applied to offences of assault? Assaults vary very greatly in seriousness. Some result in injury to the victim and some do not. Some are committed under provocation in the heat of the moment and others are wanton and premeditated attempts to impose the offender's will on the victim by force. Some are mere man to man altercations and others are terrifying and cowardly examples of mass violence. Many other variations could be mentioned. The offenders vary from the normally law abiding person who is caught up in a situation of stress which erupts into violence, to the habitual bully and thug. In some cases a term of imprisonment may enhance rather than diminish the prospects of the offender avoiding crime in the future. In other cases, a term of imprisonment may turn a usefully employed person into a frustrated unemployed person, may deprive the offender of the best and most stabilising influences in his life by disrupting a good family situation and may increase a propensity to crime by placing him in the company of criminals. The need for deterrent punishment will vary according to the circumstances of the offence.

A consideration of these factors leads to the conclusion that cases of assault require individual assessment and treatment. In my opinion there can be no presumption one way or the other as to whether imprisonment is the appropriate way of dealing with any particular case. A judicial policy which were to embody such a presumption in respect of assaults generally, or assaults which could be characterised as "serious," or assaults where "some injury is caused to the victim", would not, in my view, be justified. It is worth pointing out that the degree of injury suffered by the victim is not in every case a satisfactory measure of the gravity of the offence or the culpability of the offender."

Having regard to the observations in the cases to which I have referred, I am unable to conclude that the sentencing discretion of the learned Magistrate has miscarried in that he failed to give sufficient weight to the Appellant's prior good character and the fact that he was a first offender. Similarly, I do not consider that the sentences that the learned Magistrate imposed were manifestly excessive. No statistics were put before me to establish that the sentence exceeded any tariff for this kind of offence. But as Kearney J. observed in *Mason v. Pryce* (1988) 53 NTR 1 at 5:

> "When the effective ground of appeal is that the sentences imposed for common offences were manifestly excessive, it is very desirable that meaningful statistics be provided so that the range of sentences which currently constitute the norm for punishment of these offences in Courts of Summary Jurisdiction may be ascertained. The question of the sentencing 'tariff' is discussed generally in *Clair v. Brough* (1985) 37 NTR 11 at 14-16. Regrettably, however, despite the computerisation of court records, the system currently in use cannot produce the meaningful sentencing information routinely produced elsewhere, essential to the task of both Magistrates and Appellate courts in ensuring that like cases receive like punishment, irrespective of the different Magistrates or Appellate courts before whom each offender chances to appear."

Of course, as assault, including aggravated assault, takes many forms it may well be difficult, even if such information could be made available, for it to be of much assistance, because, as King C.J. in *Yardley v. Betts* demonstrates in the passage to which I have referred, assaults vary very greatly in seriousness depending upon the circumstances to which he referred.

Despite the absence of statistics I could, in the light of my own knowledge derived from an awareness of the sentencing pattern of this Court for more serious assaults and on sentencing appeals from Justices in assault cases and of reported decisions on sentencing appeals from other

jurisdictions, use that information to reach a conclusion one way or another as to whether the sentences on the facts disclosed were manifestly excessive: c.f. *Butcher v. Hamon* (unreported, 30 August 1991, per Kearney J.). The same applies, of course, to cases of aggravated criminal damage.

Having regard to that information in relation to the cases of aggravated assault and aggravated criminal damage, and having regard to the totality of the Appellant's criminality; and taking into account the Appellant's plea of guilty, lack of prior convictions, remorse and the other subjective matters in his favour, I am unable to say that it has been demonstrated that the sentences imposed are manifestly excessive, although the head sentences would appear to be at the high end of the range. As Mr Davies, who appeared for the Respondent, pointed out in his very able submissions, in this case it is pertinent to also note that there were three separate incidents. The first culminated when the Appellant fled the scene. The second involved the criminal damage to the 4 wheel drive Nissan, and the third when he returned to a different part of the house which he entered through the side verandah screen door. The period of time over which the offences took place was prolonged and the store manager and his wife feared for their safety. Although there was no injury sustained to any person, at least four separate instruments were used during the offences, namely a large rock, a star picket, a pocket knife and a blade of glass. Further, the offences took place in a remote community at the victim's home and where there is no police presence. Finally, the offences were unprovoked and without warning, and extensive damage to the house and to the vehicle was caused. A substantial portion of this sentence has been suspended. Even allowing for the fact that the Appellant is an Aboriginal and is a member of a section of the community for whom special leniency has always been shown, I am unable to conclude that it has been demonstrated that the penalties imposed were manifestly

excessive.

Accordingly, the appeal is dismissed.