

CITATION: *Yinarrarra v Heath* [2017] NTSC 54

PARTIES: YINARRARRA, Barry

v

HEATH, Andrew

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: APPEAL from LOCAL COURT  
exercising Territory jurisdiction

FILE NO: LCA 16 of 2017 (21715644)

DELIVERED ON: 21 July 2017

DELIVERED AT: Darwin

HEARING DATE: 14 July 2017

JUDGMENT OF: Grant CJ

**CATCHWORDS:**

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – JUDGMENT  
AND PUNISHMENT

Assertion that sentencing judge erred in failing to accord procedural fairness to the appellant by not clarifying the assessment report ordered pursuant to s 103 of the *Sentencing Act* – assertion that defence counsel should have been permitted to examine author of the report – assertion that matter should have been adjourned to seek provision of a further report – no relevant denial of natural justice – appeal dismissed.

*Sentencing Act* (NT) s 78, s 103

*O’Keefe v Tankard* [1989] VR 371, distinguished.

**REPRESENTATION:**

*Counsel:*

Appellant: RD Anderson  
Respondent: SA Robson

*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 DARWIN

*Yinarrarra v Heath* [2017] NTSC 54  
No. LCA 16 of 2017 (21715644)

BETWEEN:

**BARRY YINARRARRA**  
Appellant

AND:

**ANDREW HEATH**  
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 21 July 2017)

- [1] This is an appeal brought pursuant to s 163 of the *Local Court (Criminal Procedure) Act* (NT).
- [2] On 2 May 2017, the appellant pleaded guilty to unlawfully assaulting his domestic partner contrary to s 188(1) of the *Criminal Code* (NT). The offence was aggravated by the circumstances that the victim suffered harm, the victim was a female and the appellant was a male, and in the course of the assault the victim was threatened with an offensive weapon.
- [3] The offence attracted a maximum penalty of imprisonment for five years. It was also a “level 3 offence” within the meaning of s 78CA of

the *Sentencing Act* (NT). The appellant had a previous conviction for a violent offence. This required the court, if it found the offence proved, to order the offender to serve a minimum term of actual imprisonment of three months: see *Sentencing Act*, s 78DD. That mandatory provision had application unless the court was of the view that there were “exceptional circumstances” in relation to the offence or the offender: see *Sentencing Act*, s 78DI.

[4] The sentencing judge received submissions from defence counsel that there were “exceptional circumstances” presenting, that an order suspending sentence would be an appropriate disposition in those circumstances, and that the matter should be adjourned for the purpose of receiving a report under s 103 of the *Sentencing Act*. The sentencing judge adjourned the matter for that purpose.

[5] The hearing resumed on 10 May 2017. At that time the sentencing judge found that exceptional circumstances had not been made out, convicted the appellant, imposed a sentence of imprisonment for five months, and declined to suspend any part of that sentence.

[6] A Notice of Appeal was filed on 6 June 2017. The grounds of the appeal are that:-

(1) The learned judge erred in failing to accord procedural fairness to the appellant by not clarifying the report that had been ordered pursuant to s 103 of the *Sentencing Act*.

(2) Counsel for the appellant was incompetent in her duty to the appellant in failing to seek to examine the author of the report that had been prepared pursuant to s 103 of the *Sentencing Act*.

[7] No challenge is brought to the finding that exceptional circumstances had not been made out, or on the ground that the sentence imposed was manifestly excessive.

**Objective circumstances of the offending and subjective circumstances of the offender**

[8] The agreed facts on which the matter proceeded to a plea may be summarised as follows.

- The appellant had been in a domestic relationship with the victim for approximately 18 months.
- On 5 December 2016 the appellant was issued with a domestic violence order under which the victim was a protected person. The order was of 12 months' duration.
- On 27 March 2017 the appellant was at home with the victim. The victim asked the appellant where her cigarettes were. The appellant became angry, told the victim he had smoked them all, and without warning punched her to the shoulder with a closed fist.
- The appellant then picked up a power cord and used it to strike the victim on the back, shoulders, face and head. The appellant then

punched the victim in the right eye with a closed fist and bit her on both the left and right forearms.

- The attack continued until it was stopped by the victim's sister. The victim was flown to Alice Springs Hospital for treatment. As a result of the assault she suffered extensive bruising to her back and face, bite marks on her left and right forearms, a minor laceration on the right side of her face, and swelling around the left eye.

[9] The Victim Impact Statement made by the victim disclosed that she experienced significant levels of pain as a result of the assault, and that she feared for her life as it was being committed.

[10] The appellant was 32 years of age at the time of the offending. He has limited English comprehension. He is originally from Ramingining. He has a limited criminal history. In addition to the aggravated assault committed in 2010 (which also involved the infliction of harm and the use of a weapon), he has one conviction for trespass and one proven offence of unlawful property damage.

### **Consideration**

[11] Section 103 of the *Sentencing Act* requires only that before imposing a sentence that places the offender under the supervision of a probation and parole officer, the sentencing court must have regard to a report of the Commissioner of Correctional Services as to the offender's

suitability for supervision. A number of matters may be noticed concerning the operation of that provision.

[12] First, courts in this jurisdiction frequently order reports under that section at the behest of counsel for the accused. To do so is not an indication that the sentencing court will impose, or is actively considering the imposition of, an order requiring supervision (and/or suspending sentence).

[13] Secondly, the provision of that assessment by the Commissioner of Correctional Services is an administrative act. It does not direct or otherwise fetter the exercise of the judicial function. The sentencing court may decline to make an order involving supervision even if the accused is assessed as suitable for that purpose. Conversely, the court may make an order involving supervision even if an accused is assessed as unsuitable. So, an assessment by the Commissioner of Correctional Services that an offender is not suitable for supervision does not close off an order suspending sentence and placing the offender under supervision if that is the appropriate disposition in the circumstances.

[14] Against that background, during the course of the hearing on 2 May 2017 the sentencing judge ordered the assessment pursuant to s 103 of the *Sentencing Act* at the request of the appellant's counsel. That request was plainly made as a precursor to a submission that any

sentence to imprisonment imposed on the appellant should be suspended in part. That the sentencing judge acceded to the request provided no indication that he considered an order suspending sentence subject to supervision was an appropriate disposition in the circumstances.

[15] The report subsequently generated provided relevantly:

The offender was spoken to however he has limited English comprehension and did not demonstrate adequate understanding of the general conditions of supervision. Unfortunately the Aboriginal Interpreter Service in Alice Springs does not employ interpreters with language skills from Northern languages; where the offender is from.

Community Corrections does facilitate supervision in Ramingining, and the offender could potentially be considered suitable for supervision. However without understanding potential conditions he cannot be considered suitable at this time. He may benefit from an adjournment to the Darwin court; where an interpreter would be more readily available.

**The offender is assessed as unsuitable for general supervision at this time.**

[16] When the matter resumed on 10 May 2017, the sentencing judge gave some consideration to the assessment and concluded that the appellant was possibly suitable for supervision if he was returned to Ramingining (Transcript, p 14). The sentencing judge clearly did not approach the matter on the basis that the offender was unsuitable for supervision, or that the assessment closed off a disposition which involved supervision by Correctional Services.



[17] The sentencing judge then went on to make remarks concerning matters which informed the question whether an order suspending sentence was warranted in the circumstances of the case. Those observations included that offending involving domestic violence was prevalent in the community (Transcript, p 15); that the parliament had fixed penalties reflecting the seriousness with which the community views offending of this type (Transcript, p 15); a recitation of the particular facts constituting the offending in this case (Transcript, p 15); and that this offending was a typical example of domestic violence offending which fell well short of any finding of “exceptional circumstances” (Transcript, p 16).

[18] The sentencing judge concluded by observing:

Because of the nature of this case and the other matters that I have mentioned, I decline to suspend any part of that five months period of imprisonment. (Transcript, p 16)

[19] The sentencing judge was plainly not there saying that he declined to make an order suspending sentence because the assessment conducted by Correctional Services found him unsuitable for supervision. Rather, the sentencing judge was saying that having regard to the objective circumstances of the offending, the prevalence of this type of conduct, and the appellant’s subjective circumstances, a disposition involving suspension and supervision was not appropriately made in this case. It is important to note also in this respect that the appellant does not

suggest that the failure to make an order suspending sentence in whole or in part was manifestly excessive.

[20] Once those matters are understood, there can be no complaint that the sentencing judge failed to accord procedural fairness by, for example, not permitting the author of the assessment report to be examined in relation to the matter, or by not referring the matter for further assessment with the assistance of an interpreter. This is not a case in which the assessment report contained matters that were materially adverse to the appellant's interests, or which contained materially adverse opinions concerning the appellant, such that counsel for the accused should have been given opportunity to test the validity of the adverse opinion and the material on which it was based: cf *O'Keefe v Tankard* [1989] VR 371. It may be assumed this was the reason counsel for the appellant in the sentencing proceedings did not make application to do so.

[21] As there was no relevant denial of natural justice in the matter, the second ground of appeal must also fall away.

### **Disposition**

[22] The appeal is dismissed.

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