Parry v Hart [2004] NTSC 66

PARTIES:	BEATRICE PARRY
	v
	JOSEF HART
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 36/04 (20403753)
DELIVERED:	16 December 2004
HEARING DATES:	18 August and 24 September 2004
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Appellant:	S Musk
Respondent:	C Kemp

Solicitors:

Appellant:	North Australian Aboriginal Legal Aid Service Inc
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	tho200414
Number of pages:	14

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

Parry v Hart [2004] NTSC 66
No. JA 36/04 (20403753)

BETWEEN:

BEATRICE PARRY
Appellant

AND:

JOSEF HART
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 16 December 2004)

[1] This is an appeal against sentence imposed in the Court of Summary Jurisdiction on 16 April 2004. On that date Ms Parry, the appellant, entered pleas of guilty to three charges on information for an indictable offence of assaulting a police officer whilst in the execution of his duty, contrary to the provisions of s 189A of the Criminal Code. She pleaded guilty to a further two charges on complaint of using objectionable words in a public place, namely, within the Nauiyu community outside house 86 which offended or caused an offence to another person and a further charge of behaving in a disorderly manner in a public place, namely, outside house 86 Nauiyu community.

[2] The learned stipendiary magistrate imposed an aggregate sentence of eight months imprisonment. This sentence was suspended forthwith with an operational period of 12 months from the date of sentence. There were conditions imposed for supervision by the Director of Correctional Services.

[3] Before I deal with the appeal proper, I note that an issue regarding a condition precedent was raised and discussed by both counsel for the appellant and the respondent. The matter concerned whether the recognisance to prosecute had been signed by the appellant prior to the hearing of the appeal. It appears that the recognisance had been properly signed by the appellant and made its way to the court file between adjournments. That being the case, no further determination needs to be made on the issue.

[4] The ground of appeal is as follows:

- That the sentence imposed by the magistrate was manifestly excessive in all the circumstances.

The other grounds set out in the notice of appeal were abandoned by the appellant at the hearing of the appeal.

[5] At the outset of the hearing of the appeal, Ms Kemp counsel for the respondent conceded that the sentence imposed in the instant was contrary to law. There was a further concession on behalf of the respondent that the appeal must be allowed on this ground.

[6] The reason for this is that the sentence is in error for two reasons:

1) Aggregate sentences cannot be imposed for offences on both information and complaint.

Section 52(1) Sentencing Act provides as follows:

> "(1) Where an offender is found guilty of 2 or more offences joined in the same information, complaint or indictment, the court may impose one term of imprisonment in respect of both or all of those offences but the term of imprisonment shall not exceed the maximum term of imprisonment that could be imposed if a separate term were imposed in respect of each offence."

2) Aggregate sentences cannot be imposed for violent offences.

Section 52(3) Sentencing Act provides as follows:

> "(3) Subsection (1) does not apply if one of the offences in the information, complaint or indictment is a violent offence or a sexual offence."

[7] The definition of a "violent offence" is set out in s 3 of the Sentencing Act as follows:

> "'violent offence' means an offence specified in Schedule 2."

Schedule 2 par 3 is as follows:

> "An offence against section 189A, 190, 191 or 193 of the Criminal Code."

[8] The Court of Criminal Appeal has considered s 52(3) of the Sentencing Act in *McKay v R* (2001) 11 NTLR 14 at 23:

> "[19] Section 52 applies only where the relevant offences are all joined in the same information, complaint or indictment. S309(1) of the *Criminal Code* provides that more than one charge may be joined in the same indictment only where 'the charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.'. Similar, *albeit* more restrictive provisions, apply to complaints (*Justices Act*, s 51(1)) and information (*Justices Act* s 101A).
>
> [20] The conclusion to be arrived at by an analysis of these provisions is that the legislative intent is that where separate offences are joined on the same indictment which include at least one sexual offence, property offence or violent offence, there must not be an aggregate sentence imposed. The purpose of this seems to be to ensure that any mandatory terms required to be imposed are not only imposed but are seen to be imposed; and that the requirements of the Act relating to minimum terms of actual imprisonment and the cumulation of mandatory minimum sentences for property offences where required, are not only met, but are seen to be met and separately identifiable."

[9] I agree with Ms Kemp, on behalf of the respondent, that the sentence imposed by the learned stipendiary magistrate is contrary to law. Accordingly, the appeal is allowed and the sentence imposed by the learned stipendiary magistrate is quashed.

[10] I note from the transcript of proceedings before the Court of Summary Jurisdiction that his Worship did ask the prosecutor if there was anything that stopped him from imposing an aggregate sentence for these three offences. The prosecutor replied, "No, your Worship."

[11] It was agreed by Ms Musk, counsel for the appellant, and Ms Kemp, counsel for the respondent, that the appellant should be re-sentenced for the offences in this Court.

[12] Counsel for the respondent also concedes that the sentence is manifestly excessive. The reason for this concession is that the aggregate sentence may have been inflated by taking into account the two minor offences on complaint. The attitude of the respondent is that the two offences on complaint could appropriately be dealt with by the imposition of a fine.

[13] It is however, the contention on behalf of the respondent that sentences of imprisonment fully suspended with respect to the offences of assault police in the execution of their duty, is an appropriate sentence for these offences.

[14] Ms Musk, counsel for the appellant, submits that the offending is toward the lower end of the scale for such assaults and there should be a disposition other than a custodial sentence. Ms Musk detailed the mitigating factors the Court should take into account in sentencing this offender.

[15] Ms Kemp, on behalf of the respondent, referred me to the unreported decision of *Bellis v Burgoyne* [2003] NTSC 103. In that decision Mildren J reviewed the recent history of the legislation covering the offence of assaulting a police officer. He noted that s 189A of the Criminal Code increased the maximum sentence for assaulting a police officer in the execution of his duty to five years imprisonment. He also set out the provisions of s 189A which provides for a maximum of seven years imprisonment for the aggravating circumstance of bodily harm and 14 years imprisonment for the aggravating circumstance of grievous harm.

[16] Mildren J then set out a number of guidelines supported by previous authorities which are of assistance when courts are required to sentence offenders on pleas of guilty for assaulting a police officer in the execution of his duty. These guidelines include the following, which are relevant to the matter before this Court (par [17]):

> "3. However, an immediate gaol sentence can generally be expected where:
>
> (a) The offender deliberately assaults police in order to impede them from performing their work: *Hayes v Trenerry* (unreported, Kearney J 13/3/95, para 18).
>
> (b) There is some other aggravating feature about the case, for example: the appellant may have a prior conviction for assault police or for violence; or the appellant may have used or threatened to use a weapon: see *Ferguson v Chute* (unreported, Mildren J 3/6/92), applied in *Casey v Hayward* (unreported, Kearney J 12/3/9). I would add to this category cases where the police officer has suffered bodily or grievous harm, or has been put in fear of his safety, or has suffered psychological trauma as a result of the attack.
>
> (c) Where the offence took place in circumstances where the police were outnumbered, or in a remote location away from assistance: *Kumantjara v Harris* (1992) 109 FLR 400 at 409."

[17] His Honour then proceeded to refer to mitigating circumstances which may persuade the sentencer to impose an alternative sentence.

[18] I turn now to the facts in this case (tp 2-5). These facts were alleged by the respondent and admitted by the appellant.

> "The defendant is a 37-year old woman who resides at the Nauiyu community with her family and works as a health care worker at the community clinic. At about 12.30 am on Thursday 12 February this year, police attended a disturbance at house 86.

…

The defendant was yelling loudly and picking up scaffolding from around the house and throwing it on the front lawn, the defendant had a verbal argument with her boyfriend from downstairs when he was upstairs. The defendant walked over to police and stood in front of the sergeant and said: 'What are you going to fucking do, why don't you fuck off', while waving her arms around violently.

…

The defendant walked away from police and up the stairs and continued to yell: 'Fuck off' to police. The defendant's boyfriend walked onto the verandah.

…

.. he yelled: 'Go on, you mob fuck off' and repeatedly punched a verandah railing with closed fists.

…

The defendant walked inside the house and had a loud and aggressive verbal argument with her boyfriend, Mr McGregor.

…

The defendant walked out onto the front verandah and started to throw her boyfriend's clothes off the verandah along with ladders, full tins of paint, causing paint to spill over the front lawn and nature strip.

…

The defendant walked back inside her house and the defendant and her boyfriend started to have a loud verbal argument … and appeared to be in a physical altercation. Police walked up the stairs and the defendant yelled to police: 'What are you going to fucking do, fuck off.' … and picked up a 20-litre tin of paint and threw it at police striking Sergeant Hart with the tin and spraying paint all up the front of his uniform and hitting a second officer, Cottier, on the lower half of his uniform and eyes. The defendant then picked up a second tin and threw it at Sergeant Hart, hitting his lower legs and splashing water and paint over both members.

…

Police informed the defendant she was under arrest and she started to kick police and swing arms around violently while yelling: 'You cunts fuck off.' … The defendant had to be physically restrained due to her highly aggressive behaviour.

…

> As the defendant was being escorted to the police car, the defendant began to kick out at police and … struck police to the legs with her feet …
>
> …
>
> While the defendant was being held by two officers, the defendant kicked a third police officer, Mark Casey, in the middle of the back as he was opening the rear door of the police car.
>
> The defendant was placed in the rear of the police car and while being conveyed to the Daly River station she yelled: 'Fucking let me out' several times.
>
> …
>
> The defendant was held at the station due to intoxication, she was later asked if she wished to participate in a record of interview and declined, at no time did she have permission to assault the victims. At all times, the police were on duty and acting in the execution of their duty. As a result of the assault, two police officers' uniforms and shoes were covered in paint and turps, causing a burning sensation to the skin of the officers.
>
> The third officer is currently recovering from a previous assault, in which he sustained back injury by a member of the public. He sustained extra pain and discomfort to the lower back. The defendant was charged and bailed to appear."

[19] A record of prior convictions was tendered Exhibit 1. This shows a conviction on 14 August 2002 for contravening a suspension notice resulting in a six week suspended gaol sentence. On 12 June 2002, the appellant was convicted of an offence of fail to supply a sufficient sample of breath for which she received a fine and disqualification of her driver's licence. On 17 April 1986, she was convicted of an offence of armed with an offensive weapon for which a fine was imposed.

[20] There was no victim impact statement tendered. The prosecutor made a verbal report to the effect that officers Cottier and Hart experienced a tingling, burning sensation on their skin from the paint thinners. Police

officer Casey experienced additional pain, aggravating a pre-existing back injury.

[21] The appellant is 38 years of age. She is the mother of three children. She was educated at Daly River and St Johns College. She reads and writes well. On leaving school she went immediately to the Daly River Community Health Care Centre. She has worked there for 20 years as a health worker. A reference written on behalf of the (Nauiyu) Daly River Health Centre was tendered Exhibit 2. This attests to her hard work and commitment. She is described as a reliable and professional worker. Her employment includes co-ordinating the 0-4 year old growth and vaccination health program. She assists in the clinical operational times, participates in the overtime roster and liaises with visiting specialists.

[22] A reference from the CDEP Co-ordinator Nauiyu Nambiyu Community Government Council dated 16 April 2004 states (omitting formal parts) as follows:

> "I have known Beatrice, both personally and professionally for twenty five years. She has always been a person of exemplary behaviour and has always held a job in all of the communities she has lived on. At Daly River she works as an Aboriginal health worker and is held in high esteem by all on the community.
>
> Her actions on this occasion are totally out of character to her normal disposition and I can only assume that personal problems have caused her to behave in this manner."

This reference was Exhibit 4 in the Court of Summary Jurisdiction.

[23] Submissions were made to the effect that at the time of the offending the appellant was under considerable stress. She was having some financial difficulties supporting her three children on her own. She had been drinking at the Daly River Hotel. When she arrived home there was an argument between herself and Anthony McGregor. Her relationship with Mr McGregor had been under some strain. The appellant lost her self control and behaved in the manner described in the facts presented by the prosecution.

[24] In the Court of Summary Jurisdiction the prosecutor addressed his Worship as follows (tp 10):

> "I've taken instructions from the sergeant who's one of the victims and on behalf of the victims and he tells me that this lady is a highly regarded health professional who looks after the children, the babies at the clinic. This is unusual for her, it was very annoying and hurtful for the officers on the day, but the sergeant doesn't, as a victim, he puts this forward, he doesn't wish for her to have actual imprisonment, he seeks a suspended sentence so that she can continue to contribute to the community."

[25] During the course of the plea the learned stipendiary magistrate sought an assessment from the Department of Correctional Services as to the appellant's suitability for supervision. This assessment was prepared and became Exhibit 3. This report indicates that Ms Parry is suitable for supervision. This report adds the following comment:

> "The offender is prepared to comply with directions as to reporting residence, employment and counselling regarding alcohol. She is also prepared to be assessed by the Territory Mental Health Team. There is no service providing anger management counselling at the

> community at the present time. But if this counselling is available at a later stage, the offender is willing to attend."

[26] Ms Parry is entitled to a discount in her sentence for the plea of guilty to all charges, which was entered at the first reasonable opportunity.

[27] The three offences of assault police in the execution of their duty carry a maximum penalty of five years imprisonment pursuant to s 189A of the Criminal Code.

[28] The offence on complaint of objectionable words pursuant to s 53(7)(a), carries a maximum penalty of a fine not exceeding $2000 or imprisonment for six months, or both. The offence of behave in a disorderly manner under s 47(a) of the Summary Offences Act carries a maximum penalty of $2000 or imprisonment for six months or both.

[29] I consider the offences of assault police in the execution of their duty to be serious. The police officers were attending the home of the appellant as a consequence of a disturbance. The disturbance was in fact a domestic dispute between the appellant and her boyfriend. Police officers deserve to be given every protection when they are called in to deal with situations that are so often associated with violence, as is the case of domestic disputes. There is no excuse for the appellant venting her anger and frustration on police officers who attended in the course of their duty, which included affording her protection. To throw two tins of paint could potentially have had more serious consequences. As it is police officers were struck by the

tins of paint. The assault continued when the appellant kicked two of the police officers to their legs as she was being arrested and then kicked a third officer in the middle of his back exacerbating a previous back injury.

[30] The aspect of general deterrence, and to a lesser extent specific deterrence, are factors to be accorded weight in the sentence for these offences.

[31] I consider the offences themselves to be so serious that the only appropriate sentence is a sentence of imprisonment. I propose to suspend such period of imprisonment on the basis of the mitigating circumstances pertaining to the offender. In particular, she is entitled to credit for the high regard with which she is held in the community through her employment as a health worker. Her record does not indicate a violent disposition. She does appear to have had some problems with alcohol and with anger management, both of which it appears she is willing to address. I assess her prospects of rehabilitation as good. These prospects will be enhanced by appropriate support and supervision from the office of correctional services. Her plea of guilty is an indication of her remorse and, given as it was at the first reasonable opportunity, has assisted in the administration of justice.

[32] I would make the following orders:

Count 1: Assault upon Constable Mark Casey, convicted and sentenced to four months imprisonment.

Count 2: Assault upon Constable Brett Cottier, convicted and sentenced to four months imprisonment, two months concurrent sentence on Count 1 and two months cumulative upon that count.

Count 3: Assault upon Constable Joe Hart, convicted and sentenced to four months imprisonment concurrent upon the sentence on Count 2.

[33] This is a total of six months imprisonment. I would reduce this by two months to give appropriate credit for the pleas of guilty. This results in a head sentence of four months imprisonment.

[34] Pursuant to s 40(1) and (2) of the Sentencing Act, this sentence is suspended forthwith on condition the appellant be of good behaviour and that she accept the supervision of the Director of Correctional Services and obey the reasonable directions of the Director or his delegate as to place of residence, employment, reporting and attending for counselling as the Director or his delegate considers appropriate, which includes counselling with respect to problems with alcohol and anger management.

[35] Pursuant to s 40(6) I specify a period of 12 months from the date of this order during which the offender is not to commit a further offence punishable by imprisonment if the offender is to avoid being dealt with pursuant to s 43 of the Sentencing Act.

[36] With respect to the two offences on complaint I sought further submissions from counsel as to whether the facts as alleged in the Court of Summary

Jurisdiction could satisfy the charges. The appellant submitted that the facts could not support the charges, as it appears that the alleged offences did not occur in a public place, as required by the relevant legislation. The respondent advised that it wished to make no further submissions.

[37] In the circumstances I am inclined to agree with the appellant and therefore quash the convictions and release the appellant on those matters forthwith.

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