Jongmin v McMaster [2003] NTSC 36

PARTIES:	JONGMIN, JUNITA
	v
	McMASTER, DEAN STEWART
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 23 of 2003 (20216430)
DELIVERED:	11 April 2003
HEARING DATES:	3 April 2003
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	G. Bryant
Respondent:	M. Johnson

Solicitors:

Appellant:	North Australian Aboriginal Legal Aid Service
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

Jongmin v McMaster [2003] NTSC 36
JA 23 of 2003 (20216430)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

JUNITA JONGMIN
Appellant

AND:

DEAN STEWART McMASTER
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 11 April 2003)

[1] On 15 January 2003 the appellant pleaded guilty to one count of having, in a public place, by threatening behaviour, caused substantial annoyance to another contrary to s 53(7) of the Summary Offences Act. She was convicted and was placed on a bond to be of good behaviour for 12 months. It was a condition of that bond that during the period of 12 months the appellant should not approach, contact or communicate with Elizabeth Penairo, who was the victim.

[2] The appellant now appeals that sentence on the following grounds:

> "1. the learned Magistrate erred in recording a conviction for this offence;
>
> 2. the learned Magistrate erred in concluding that a conviction for the offence would have a deterrent effect;
>
> 3. the learned Magistrate erred in placing too much weight on the victim impact statement and matters extraneous to the offence;
>
> 4. the learned Magistrate erred in imposing a condition of the bond that is impossible to comply with and against public policy."

Ground 3 was expressly abandoned during the course of the hearing.

[3] The principles applicable to an appeal such as this are well known. The exercise of the sentencing discretion will not be disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it is shown that the sentencing Magistrate was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing Magistrate said in the proceedings or the sentence may be so excessive or inadequate as to manifest such error. A sentence itself may afford convincing evidence that in some way the exercise of the discretion has been unsound.

[4] The offending occurred on the morning of 4 November 2002 at Wadeye. The appellant, who was then aged 17 years, was at the home of her boyfriend to whom she was pregnant. The Wadeye Youth Support Juvenile Diversion caseworker, Ms Penairo, attended at the residence to collect the appellant so that she could attend her diversionary program. Ms Penairo sounded the horn of her vehicle and when there was no response, walked to the front door of the house where she asked the appellant to come from the house to attend the program. The appellant refused. The appellant was then informed that police would be notified and Ms Penairo walked back towards her vehicle. The appellant then walked out of the front door of the house and picked up an empty 10 kilogram red flour tin from the ground and chased after Ms Penairo. As Ms Penairo got into the car the defendant raised the tin and swung it at the window near to Ms Penairo's head. Ms Penairo managed to wind up the window before the tin struck her. She ducked below the line of the glass window fearing it would shatter and the appellant then swung the tin on a further two occasions striking the vehicle before Ms Penairo managed to drive away. Minor damage was caused to the body of the vehicle with a substantial dent in the bottom panel area of the passenger door. Damage to the vehicle was estimated at $300. The appellant returned to the house and was subsequently arrested by police. She declined to take part in an interview.

[5] Ms Penairo claimed to have suffered "severe fright and a lack of confidence" in relation to her position within the community.

[6] The learned Magistrate was informed that the appellant was from a good family and that she came before the court without any convictions. It was said that she was upset because Ms Penairo had come to the house at a time when the appellant was sleeping. She was pregnant at the time and "her emotions were pretty much all over the place". In addition her cousin/ brother had died in a shooting the day before and she was upset because of that. She did not want to go to the diversion program on that day. The court was informed that the appellant knew that what she did was wrong and she wished to apologise to Ms Penairo. It was put to the learned Magistrate that he should not record a conviction in all of the circumstances.

[7] The learned Magistrate, who is familiar with the remote Aboriginal community of Wadeye, was clearly concerned as to the impact of such conduct upon public officials such as Ms Penairo in such a community. He noted that the role of Ms Penairo was to help with the diversionary programs to assist people such as the appellant to stay away from the criminal justice system and "to find a quicker way which is more useful to the community of sorting out some of the problems that young people" in that community have. He then said of Ms Penairo:

> "She was pretty brave to come out here because Port Keats (Wadeye) has a terrible reputation in the rest of the Territory, probably not at all deserved because in many ways it is no worse than a lot of other places and in some ways it is better than other places, but you talk to anyone in Darwin about Port Keats, people who don't know the place and they think it's just horrible here. So it's very hard to get people to agree to come. … to do these important jobs like Ms Penairo".

[8] His Worship noted the need to protect people such as Ms Penairo and others such as teachers and health staff "because without them this community which is just hanging on in many ways would start to break down even more than it presently has." His Worship then went on to say:

> "So it seems to me that that charge of threatening behaviour is a pretty serious one because of the person you were threatening who was doing her job and indeed was at the house with the permission of the householder. For that reason it seems to me I ought to convict you of this offence but I'm not going to proceed to sentence you, I'm going to place you on a bond to be of good behaviour for 12 months, a bond of $500 in your own recognizance."

[9] He subsequently imposed the condition in relation to which a complaint is also made.

[10] In this case there is no suggestion that the remarks made by his Worship were other than a fair portrayal of the situation that prevailed in Wadeye at the time of sentence and in the period leading up to the imposition of the sentence. The learned Magistrate is an experienced Magistrate who has a familiarity with the community developed over a period of time by virtue of being a visiting Magistrate to that community. As Muirhead A/CJ observed in *Jambajimba v Dredge* (1985) 81 FLR 180 at 182 it is "a healthy thing in a restricted community for a Magistrate to take sufficient interest in the people amongst whom he works to gain understanding of the background of individuals". Similar observations can be made in relation to the importance of individual people and public officers to the proper functioning of a

community and to the ability of the Magistrate to identify particular problems that may exist in that community.

[11] It is necessary to bear in mind that appellate courts have accorded respect and weight to the views expressed by those who are regularly called upon to deal with certain offences. Barwick CJ said in *Griffiths v The Queen* (1976-1977) 137 CLR 293 at 310:

> "I ought at this point to say that I agree with the reasons for judgment of Isaacs J in *Whittaker v The King* and accept the citations which he makes in support of his views. I would call attention to what his Honour says and add that, in my opinion, the views of those whose daily, or almost daily, task is the sentencing of prisoners must command respect. They are in reality in a better position to assess the proper sentence than, in my opinion, is a court of appeal, error or breach of principle being absent."

[12] If one adopts those observations and applies them to the circumstances of this matter it can be readily seen that the learned Magistrate was a person whose views are to be accorded respect and weight and will not be interfered with, "error or breach of principle being absent". See also *Meneri v Smith* (2001) NTSC 106.

[13] The first complaint of the appellant is that his Worship should not have recorded a conviction in the circumstances of the matter. Reference to the transcript reveals that he was invited not to do so. However, it is also clear that his Worship gave careful consideration to the request. In concluding that a conviction was called for, he took into account the circumstances of the appellant and, in particular, that she was pregnant and possibly more

emotional than normal and that she was grieving over the recent death of her cousin/brother. He also considered the seriousness of the offending and the fact that it was an attack on a public official who occupied an important, sensitive and vulnerable position within the particular community. These were appropriate matters to weigh in the balance.

[14] It must be acknowledged that the decision to impose a conviction on a young first offender is not one to be taken lightly. There may be long-term ramifications from such a course and those ramifications may not readily be recognised at the time of sentencing. There will always be an emphasis placed upon rehabilitation of the juvenile but, of course, that will not be at the expense of all other considerations.

[15] The decision of his Worship to impose a conviction was a considered one and followed a weighing of the relevant matters. Such a penalty was within the range of the penalties available to his Worship and I am unable to see that he erred in reaching the conclusion that a conviction was appropriate.

[16] The remaining complaint of the appellant was that the condition imposed as a term of the bond was one which was against public policy and also one with which it was impossible to comply. That condition was that the appellant must not approach, contact, or communicate with Ms Penairo. It was submitted that in a small community this was a condition which it was not possible to honour. The first observation to be made is that this community is not so small that it was necessary for the appellant to be in

contact with Ms Penairo. Such conditions are often imposed in relation to domestic violence orders and grants of bail, along with bonds such as that applying in the present case. They serve a useful purpose in avoiding further conflict in sometimes difficult interpersonal relations. They are not to be lightly cast aside. In my view, taking into account the particular circumstances of this appellant and the community in which she and Ms Penairo live, it cannot be said that the condition is against public policy or one with which compliance is not possible.

[17] The appeal is dismissed.

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