Namundja v Schaefe-Lee [2015] NTSC 36

PARTIES:	NAMUNDJA, Samson v SCHAEFE-LEE, Tony
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21504899 (JA 7 of 2015)
DELIVERED:	12 June 2015
HEARING DATES:	5 June 2015
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

APPEALS – Justices Appeal – Appeal against sentence – No sufficient basis for Magistrate to decline to set a non-parole period – Relevant consideration is whether setting a non-parole period is appropriate – Suitability for parole primarily a matter for the parole board –Appeal allowed in part – Non-parole period set.

Sentencing Act ss 5(1)(b), 53(1), 54(1)
Domestic and Family Violence Act s 41

Albert v The Queen [2009] NTCCA 1; *Bugmy v The Queen* (1990) 169 CLR 525; *Dinsdale v R* (2000) 202 CLR 321; *Director of Public Prosecutions v Snell* [2005] VSCA 131; *Hill v The Queen* [2012] NTCCA; *Nummar v Pennuto & Ors* [2014] NTSC 34; *Peach v Bird* (2006) 17 NTLR 230; *Power v The Queen* (1974) 131 CLR 623; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Sullivan v The Queen* (1987) 47 NTR 31; *The Queen v Denyer* [1995] 1 VR 186; *The Queen v Gordon* [2011] QCA 326; *The Queen v Raymond McDonald* (NTSC 20606334, 4 December 2006); *Vartozokas v Zanker* (1989) 51 SASR 277; *Yardley v Betts* (1979) 22 SASR 108, Referred to.

REPRESENTATION:

Counsel:

Appellant:	J. Murphy
Respondent:	S. Ledek

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Blo1507
Number of pages:	20

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

Namundja v Schaefe-Lee [2015] NTSC 36
No. 21504899

BETWEEN:

SAMSON NAMUNDJA
Applicant

AND:

TONY SCHAEFE-LEE
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 12 June 2015)

Introduction

[1] This is an appeal against a sentence imposed by the Court of Summary Jurisdiction on 17 February 2015. The appellant was sentenced as follows:

(i) Count one: aggravated assault (the circumstances of aggravation were that the victim suffered harm, the victim was female and the appellant a male); convicted and sentenced to 12 months imprisonment. Imprisonment to commence on 29 January 2015.

(ii) Count two: contravene an alcohol protection order; convicted and fined $500, and a victim's levy of $150 was imposed. The sentence with respect to count two is not the subject of appeal.

[2] The grounds of appeal are as follows: that the learned Magistrate failed to adequately consider the appellant's prospects of rehabilitation in setting the head sentence; the learned Magistrate failed to adequately consider the principles outlined in *Dinsdale v R* (200) 202 CLR 321; the learned Magistrate failed to adequately consider the sentencing disposition of parole; and that the learned Magistrate sentenced on the basis of facts which had not been admitted or proved, namely that the appellant had said: "she was calling police for me for no reason. I got really angry and I had to hit her".

[3] For the reasons that follow, the majority of the grounds must fail; however, the appeal will be allowed in respect of one aspect only. There was no sufficient basis to decline to set a non-parole period in accordance with s 54(1) of the *Sentencing Act*. Section 54(1) provides a court *must* set a non-parole period unless s 53(1) of the *Sentencing Act* applies and the court: "considers the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate". As will be discussed later, in accordance with the relevant authorities, a non-parole period should have been set in these circumstances. It does not mean the appellant

would be successful in obtaining parole but suitability for parole is a question for the parole board.

Proceedings in the Court of Summary Jurisdiction

[4] The facts read on to the record before the learned Magistrate were that the appellant had been consuming alcohol in the Darwin CBD and became intoxicated. He had an argument with his wife while they were on McLachlan Street, resulting in her calling the police. His wife was the victim of the assault. The appellant left the area. Police spoke with the victim and attempted to locate the appellant. After police left the area, the appellant returned to the area and located the victim. He was angry that she had called police. He chased her inside the nearby service station. The victim dropped to the ground in an attempt to protect herself. The appellant took hold of her and attempted to drag her outside, releasing her briefly as she sat up on the floor. The appellant stood over her and punched her to the right side of her face with his left fist and to the left side of her face with his right fist. He used full force with each blow. The blows caused her to fall flat onto the ground. He held her down and punched her again to the left side of her face with full force and then walked away. The victim stood up. The appellant rushed at her and shoved her into a shelf, before punching her twice to the body, using alternating fists. A witness called on the appellant to stop.

[5] Police arrived a short time later. The appellant was located at the Darwin Entertainment Centre. After being arrested, and during police computer checks, the appellant was found to be the subject of an Alcohol Protection Order (the breach of which comprised count two) and had a breath analysis reading of .232 g of alcohol in 210 litres of breath. He participated in a record of interview with police.

[6] The appellant has a number of previous convictions, the most relevant are convictions for aggravated assault. On 26 October 2011, he was convicted by the Oenpelli Court of Summary Jurisdiction, for two counts of aggravated assault. The Information for Courts document indicates that both assaults were male on female assaults and both included the aggravating circumstance that the victim suffered harm. Short prison sentences were imposed on the appellant. The sentences were substantially suspended on operational periods for two years in respect of each conviction. Further, he was convicted on 27 November 2013 on one count of aggravated assault; the circumstances of aggravation were again harm and male on female. He was sentenced to six months imprisonment, suspended after the service of three months. An operational period of 18 months was imposed.

[7] The Information for Courts document indicated the appellant had four previous convictions for engage in conduct that contravenes a domestic violence order. Short terms of imprisonment were imposed for those offences. From 2014 until the proceedings here, the appellant had nine

convictions for breaching an Alcohol Protection Order. On 19 May 2014 and 9 May 2014, the appellant was dealt with for a breach of a suspended sentence, being the sentence imposed on 27 November 2013. On 9 May 2014, that breach was proven and no further action taken. On 19 May 2014, the term of imprisonment that was held in suspense was restored. The Information for Courts indicates the appellant has also been dealt with for breach of bail and other offending not directly relevant for sentencing purposes with respect to this matter but highly indicative of alcohol dependence and issues of non-compliance with orders of various types.

[8] Before the Court was a brief victim impact statement from the victim indicating that she still felt pain on her ribs; that she does not want the appellant to be near her or her family and that she wanted a DVO that was "more this time".

[9] The appellant's counsel conceded that the three previous convictions for aggravated assault involved the same victim and that the current charge attracted a three month minimum term of actual imprisonment. The appellant's counsel told his Honour that the appellant ordinarily resided in Oenpelli and was a well-respected artist at Injalak Art Centre. A reference from Injalak was provided. The Court was told the appellant was no longer in a relationship with the victim and that it had been a "problematic relationship" within the context of them drinking together. Counsel told the Court the appellant intended to

return to Oenpelli following his release from custody; that he would not be residing with the victim; that the victim had re-partnered and there was no chance of reconciliation. Counsel submitted there was no evidence of long-standing injuries or that medical attention was sought.

[10] It was put that the appellant was taking responsibility for his conduct through his plea of guilty and that he had not previously been given opportunities for rehabilitation. Further, his counsel said his prospects for rehabilitation would be increased if the Court were minded to order him to participate in the Family Violence Program due to commence at Oenpelli on 18 May 2015. Counsel pointed to his work history, adding that he would have a job at Injalak following release. It was submitted that work combined with participation in the Family Violence Program would increase his prospects of rehabilitation. Counsel submitted general and specific deterrence would be met through the imposition of a head sentence, with the balance suspended after serving the minimum term.

[11] The reference before the Court from the arts administrator at Injalak Arts and Crafts Association advised that the appellant had been an artist member of Injalak Arts for around 20 years and was a valued member of Injalak screen printing team, working with other staff in the workshop at Gumbalanya. The reference stated the appellant had also worked in a mentoring capacity, training younger screen printers and had also represented Injalak externally for other arts organisations.

The arts administrator said she could verify the appellant was hard-working and dedicated to his art and that his art was selected for exhibition in Darwin in 2014. The reference also describes him as "extremely polite and respectful in the work environment at Injalak Arts". It also stated that when at Injalak Arts:

> "He has always been kind, reasonable and conscientious, and I believe these charges to be out of character. In my time working with him he has stood out only for his quiet and honest personality, mild manner and his careful application to his painting and printing".

[12] It must be obvious to anyone with knowledge of the facts of this case and the appellant's prior convictions that outside of Injalak Arts and particularly with respect to his wife, he has behaved in a manner quite the opposite of how he is described in the reference. At the outset, there is a significant question of the weight to be given to the character matters raised in the reference.

[13] Counsel prosecuting in the Court below submitted that given the appellant's previous convictions, specific deterrence was relevant and that the Court should sentence beyond the three month minimum term.

[14] His Honour most fairly summarised the facts and went on to say:

> "You were arrested. You talked to the police. When asked about the incident, you advised "she was calling police for me for no reason. I got really angry and I had to hit her".

[15] The conversation repeated by his Honour was not part of the agreed facts read onto the record but was contained at the end of a copy of the

facts tendered. His Honour also mentioned the appellant's accomplishments as an artist and a mentor and that it had been said he was of positive character. In relation to his previous convictions his Honour stated:

> "However, in the last year or so, you have breached every possible court order you can breach. You've repeatedly breached domestic violence orders, alcohol protection orders, suspended sentences. You've got three prior convictions for assaulting the same victim and then sentenced to imprisonment. They are through 2011 and 2013".

[16] His Honour also referred to how frightened the victim would have been. Unsurprisingly, his Honour referred to the appellant as someone who needed to be specifically deterred, notwithstanding positive things said about him. His Honour said he could not ignore how serious the offending was; that the appellant needed to be specifically to deterred, and that the community needs to know and see that this form of conduct is unacceptable.

[17] After a reduction of four months for the plea of guilty, his Honour sentenced the appellant to 12 months imprisonment. When considering whether there could be a partially suspended sentence or a non-parole period his Honour remarked:

> "Over the last 12 months, you have repeatedly and continuously breached all manner of court orders, including suspended sentences.
>
> The most likely event, if you are given a suspended sentence is that you will breach it by reoffending. You will breach any

> order given to you by the Court, so your record in recent times shows. I decline to suspend any part of it.
>
> I should now consider a non-parole period. Again, you are a repeat offender against the same victim. You are a man who continuously, on a weekly basis, almost, repeatedly breaches court orders. You are unlikely to comply with any form of court direction.
>
> You are unlikely to be suitable for parole in the next 12 months and you are a man who needs to have it brought home to you how serious it is to offend in this fashion and how terrible it is for the victim involved. Taking into account, again, all of those matters put on your behalf, quite properly by your lawyer, I am unable, because of those – the seriousness of the offending and your continued ongoing breaches of court order, it is inappropriate to fix a non-parole period".

[18] His Honour then declined to fix a non-parole period.

Consideration of the Ground of Appeal

[19] In my view there could be no complaint with respect to the Magistrate's overall characterisation of the gravity of the offending. Offending of this kind, men assaulting their wives or partners, is an intractable problem in the Northern Territory. With few exceptions, imprisonment is often the appropriate punishment, readily imposed, especially for recidivists such as the appellant. In most cases, particularly with respect to repeat offenders, positive subjective features generally need to be very carefully balanced as rarely will they outweigh the significance of the gravity of offending of this kind. This is especially so with respect to repeat offenders.

(i) That the learned Magistrate failed to adequately consider the appellant's prospects of rehabilitation in setting the head sentence; that the learned Magistrate failed to adequately consider the principles outlined in *Dinsdale v R* (2000) 202 CLR 321

[20] It is convenient to deal with these grounds together. It is well accepted that an offender's prospects of rehabilitation are generally relevant in mitigation, both in respect of the head sentence and the relevant minimum term of actual imprisonment.[1] It is accepted that rehabilitation can offer a long-term protection to the community.[2] Although previous responses to court orders are highly relevant considerations, depending on the circumstances it does not necessarily diminish the weight to be given to an offender's prospects of rehabilitation.[3] Clearly s 5(1)(b) of the *Sentencing Act* (NT) identifies that one of the purposes for sentencing is "to provide conditions in the court's order that will help the offender to be rehabilitated". Generally speaking, prospects of rehabilitation will be considered as part of the intuitive sentencing process with all of the other purposes of sentencing; punishment, general and specific deterrence, and to make it clear that the community, acting through the Court, does not approve of the offender's conduct.

[21] On behalf of the appellant it was submitted the learned Magistrate had not considered a number of factors when assessing the appellant's prospects of rehabilitation. These included the fact the appellant had a

[1] *Bugmy v The Queen* (1990) 169 CLR 525 at 531 per Mason CJ and McHugh J.
[2] *Yardley v Betts* (1979) 22 SASR 108 at 112 per King CJ; *Vartozokas v Zanker* (1989) 51 SASR 277 per King CJ at 279.
[3] *Director of Public Prosecutions v Snell* [2005] VSCA 131 at [28] per Charles JA.

20 year work history and employment to go to upon release. Employment prospects are a relevant consideration concerning rehabilitation.[4] While his Honour clearly took account of the reference, it was submitted his Honour did not consider the work history to the degree that he should have. The work history and employment secured were not mentioned in his Honour's remarks. Further, it was submitted nothing was said of the gap in offending that was evident from the Information for Courts, most notably between 1993 and 2011. Finally, it was submitted that his Honour had proceeded on an incorrect characterisation of the appellant's recent criminal history.

[22] The fact that his Honour did not mention specifically the longevity of employment or the appellant's prospective employment does not mean his Honour had no regard to those factors. It was not necessary for his Honour to repeat every relevant fact and circumstances or forensically dissect each submission.[5] Neither should an appellate court subject a summary court's *ex tempore* reasons to hyper analysis.

[23] It will only be where error is shown in the exercise of the sentencing discretion that there will be interference from an appellate court.

---

[4] *The Queen v Gordon* [2011] QCA 326 [41] per McMeekin J.
[5] *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 259; *Peach v Bird* (2006) 17 NTLR 230.

[24] I am not satisfied his Honour failed to have regard to the employment history or prospective employment. His Honour gave his reasons very shortly after receiving the reference and referred to parts of it in his reasons. In any event, given the severity of the assault, the previous convictions, the need to protect the victim and the prevalence of cases of this kind, the good employment record of the appellant would not have led to a lesser head sentence.

[25] Although between 1993 and 2011 there was a gap in offending, the appellant's more recent offending between 2011 and the current offending was significant. I acknowledge a gap in offending may provide some hope for rehabilitation,[6] however, very little if anything was before his Honour to explain the escalation in offending since 2011. The appellant obviously was a person affected to his detriment by alcohol for some time. In that context, this offending was not just a "once off" in what was otherwise a gap. In any event, the gravity of the offending, the antecedents and other sentencing considerations outweighed the credit that might be given for the earlier gap.

[26] I agree it appears there was, at least partially, a mis-characterisation of some of the previous offending in the Court below. Not all of the orders breached were "court" imposed orders. Indeed, Alcohol

[6] *The Queen v Raymond McDonald* (NTSC 20606334, 4 December 2006) per Mildren J; *The Queen v Denyer* [1995] 1 VR 186, 190, noting that gaps in offending may be relevant to determine whether offending took place due to "transient pressures or conditions".

Protection Orders are not orders of the Court, but are issued by police.[7] It is unclear from the Information for Courts whether the Domestic Violence Orders were breaches of orders issued under s 41 of the *Domestic and Family Violence Act*, or whether they were breaches of court ordered Domestic Violence Orders.

[27] It is apparent that two breaches of bail were police grants of bail, rather than court ordered bail. I do not think a great deal turns on this distinction. Bail must be complied with, the consequences of a breach of bail are similar, whether court ordered or set by police. Bail always involves an obligation to a court. While it is the case that the penalties for breach of police issued Domestic Violence Orders do not attract the minimum term provisions that breaches of court confirmed Domestic Violence Orders attract, [8] breach of a police order still informs the sentencer to some degree about the likelihood of compliance with orders or restraints generally. While it is accepted his Honour has used the term "court orders", when referring to breaches of orders that were not court orders, in my opinion it has not lead to error in setting the head term or in refusing to suspend a portion of the sentence.

[28] It is the case that the part of the reasons that state: "you are a man who continuously, on a weekly basis, almost, repeatedly breaches court orders" if taken literally, is not correct. In the six months prior to this

[7] The character of APO's is described in *Nummar v Pennuto & Ors* [2014] NTSC 34 at [3]-[6], [26], [27].
[8] Section 121(4) *Domestic and Family Violence Act*.

offending, the Information for Courts indicates the appellant was convicted for one breach of an Alcohol Protection Order. The breaches were not on a weekly basis, but I think his Honour was simply emphasising the appellant's history of non-compliance. In emphasising this point, the "weekly basis" comment was overstated. In any event, it is not an error of the type that has in my opinion, infected the decision to set the term of imprisonment at 12 months or to decline to impose a partially suspended sentence.

[29] It was open to his Honour to find the appellant would not comply, or have difficulty complying, with future court orders. Although not all previous orders were court orders, the appellant's history was generally one of non-compliance. Both the head sentence and declining to suspend a portion of the sentence were well within range. The maximum penalty for aggravated assault is five years imprisonment. This was a serious example of offending of this type.

[30] More particularly, the appellant submitted the learned Magistrate was in error by not applying the principles in *Dinsdale v The Queen*, [9] to the effect that all relevant sentencing considerations must be reconsidered when turning to the question of whether to suspend a sentence or part of a sentence. It was argued his Honour unnecessarily restricted his approach to the question of suspension or part suspension to the issue of whether or not the appellant could comply with a court

[9] (2000) 202 CLR 321.

order. His Honour may not have spelt out every consideration, but clearly, he was entitled to draw a negative conclusion from the appellant's poor history of compliance with all forms of orders. A reconsideration of the same sentencing factors to determine whether there should be a portion of the sentence suspended, also required consideration of the gravity of the offending, deterrence, previous convictions and other matters that indicated a suspended sentence may not be appropriate.

[31] I would dismiss those grounds.

(ii) That the learned Magistrate failed to adequately consider the sentencing disposition of parole

[32] In my opinion, given the legislative framework for setting a non-parole period, and the approach generally taken by courts to setting a non-period, error has occurred in this instance. The reasons do not disclose adequate consideration was given to declining to set a non-parole period. It is an unusual course and it is not evident from the materials why a non-parole would not have been set. Although there are cases where courts decline to set a non-parole period, those cases are generally in a much more serious category, both in terms of objective gravity, poor antecedents and subjective circumstances than is the case here. I readily accept this is a serious matter and the setting of a non-parole period must bear proportionately to the gravity of the offending; however, in my view it is difficult to justify the refusal to set a non-

parole period given the statutory framework an applicable principles. Setting a non-parole period is not setting a release date.

[33] Section 53(1) of the *Sentencing Act* states that in cases of a term of imprisonment of 12 months or more, the Court *must* set a non-parole period "unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate".

[34] This provision has been held to create "a prima facie obligation on the sentencing court to specify a non-parole period".[10] Indeed, "it is a rare case in which the Court is justified in declining to fix a non-parole period",[11] and "it [is] desirable in the interests of society that parole remains an option wherever possible".[12]

[35] In *Power v The Queen,* [13] the High Court described parole as a mechanism by which:

> "A prisoner can, by his own behaviour while a prisoner, secure his release from confinement upon parole without serving the full term to which he has been sentenced, but the encouragement to reform so provided does not an obviously is not intended to take the sting out of imprisonment".

[36] In *Whitehurst v The Queen,* [14] the Court of Criminal Appeal quoted what was said in *R v Shrestha,* [15] that the parole system "represents an

[10] *Hill v The Queen* [2012] NTCCA 7 at [10]; *Albert v The Queen* [2009] NTCCA 1 at [38]; *Sullivan v The Queen* (1987) 47 NTR 31 at 35.
[11] *The Queen v Daryl Hill* (SC 20824218, Transcript of Proceedings, 28 August 2009, per Olsen AJ), cited in *Hill v The Queen* [2012] NTCCA 07 at [11].
[12] *Sullivan v The Queen* (1987) 47 NTR 31 at 37.
[13] (1974) 131 CLR 623 at 627-628 per Barwick CJ, Menzies, Stephan and Mason JJ.

important influence for the reform and rehabilitation of those in gaol".[16] Further, in *Whitehurst* it was said the "parole system provides an incentive for prisoners to behave whilst in prison and encourages prisoners to actively engage in rehabilitation".[17]

[37] It is clear that all of the relevant circumstances must be considered before a decision is made to decline to set a non-parole period. Counsel for the respondent submitted that his Honour did consider all relevant factors, including the prospects of rehabilitation and that his Honour was unable to find any redemptive aspect to the circumstances of the offender or the offending. It was submitted no error can be demonstrated as his Honour considered the appellant's prospects of rehabilitation, deterrence, punishment and the requirements of proportionality.

[38] The sentencing remarks disclose heavy reliance on breaches of previous orders. Although appropriate for consideration of the question of a suspended sentence, it is of lesser relevance in respect of the question of whether setting a non-parole period is appropriate. In terms of considering the non-parole period, there was clearly strong reliance on the breach of orders and that the appellant would be "unlikely to be suitable for parole". This part of the sentencing discretion has been skewed by the strong reliance on the breach of

---

[14] [2011] NTCCA 11.
[15] (1991) 173 CLR 48 at 69.
[16] [2011] NTCCA 11 at [25].
[17] Ibid at [26].

orders, which in any event, as discussed above, were somewhat mis-described. Further, suitability for parole is a matter for the parole board. Suitability for parole is a vastly different question from the question of whether it would be inappropriate to set a non-parole period. Further, setting a non-parole period does not diminish or reflect on the deterrent value of this particular sentence, although his Honour's remarks indicate that by not setting a non-parole period it would "bring home" to the appellant the seriousness of the offending.

[39] There were a number of factors to be considered before a decision not to set a non-parole period could be made in accordance with the authorities. The appellant clearly had alcohol problems. There was very little before the Court as to whether alcohol treatment or rehabilitation had been attempted in the past. His Honour was not assisted on this matter. The Information for Courts does not indicate whether there were conditions attached to any of the previous suspended sentences. The appellant had never been sentenced to a sentence long enough to permit a non-parole period and had not previously been the subject of parole. The setting of a non-parole period would provide some incentive for the appellant to engage in programmes while in custody. It would then be up to the parole board to determine whether the appellant would be suitable for parole and in turn whether he would be suitable for alcohol rehabilitation or other programmes if released on parole or whether any risk he posed could

be managed in another way. Although this is a relatively short period of potential parole, the appellant should be assessed for alcohol rehabilitation and given his work history, for work.

[40] Of course, setting a non-parole period does not in any way influence the decision of whether the appellant will be released. Community protection and rehabilitation will be assessed by the parole board. I would allow this ground.

(iii) That the learned Magistrate sentenced on the basis of facts which had not been admitted or proved.

[41] The agreed facts were read to the Court. The prosecutor also tendered written facts that included additional facts that were not in the agreed facts read to the Court. His Honour referred to some of those facts, in particular that the appellant had said: “she was calling police for me for no reason. I got really angry and I had to hit her”.

[42] If facts are not admitted, they need to be proven before they can be taken into account by the sentencer. It would appear there was an over sight on the part of the prosecutor to read the full facts. Although this was an error, in the circumstances, given the facts as summarised above, which provide a factual scenario similar to the matters in the statement, I would not be prepared to find that mistakenly taking those facts into account has affected the overall sentencing disposition. I would not allow the appeal on this ground in this particular instance.

Orders

[43] The appeal is allowed in part. A non-parole period of 8 months is set commencing 29 January 2015.

****