Currie v Burgoyne [2004] NTSC 10

PARTIES:	STEPHEN KEVIN CURRIE v ROBERT ROLAND BURGOYNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 51 of 2003 (20217938)
DELIVERED:	15 March 2004
HEARING DATES:	15 March 2004
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	S.K. Currie (In person)
Respondent:	R. Noble

Solicitors:

Appellant:	In person
Respondent:	Office of the Director of Public Prosecutions

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Currie v Burgoyne [2004] NTSC 10
No JA 51 of 2003 (20217938)

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 Alice Springs

BETWEEN:

STEPHEN KEVIN CURRIE
Appellant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 15 March 2004)

[1] The appellant, who appears in person, appeals against his conviction for aggravated assault and also against the sentence imposed upon him in relation to that offence. The grounds of the appeal are:

(1) that the finding of guilt was unsafe or unsatisfactory;

(2) that the sentence was manifestly excessive; and

(3) that the learned magistrate failed to have proper regard to the effect of a sentence of imprisonment upon the appellant's family.

[2] The conviction was recorded on 16 October 2003 and followed a trial in the Court of Summary Jurisdiction at which the appellant was legally represented by experienced counsel. He was convicted of having unlawfully assaulted his ex-wife, Jodie Williams, in circumstances where she suffered bodily harm. It was an aggravating circumstance of the assault that it was by a male upon a female. The maximum penalty for that offence is imprisonment for 5 years. The appellant was sentenced on 31 October 2003 to imprisonment for a period of 5 months with a direction that he be released after serving 1 month.

[3] The Crown case was that the appellant assaulted Ms Williams on 6 November 2002. Her evidence, which was accepted by the presiding magistrate, was that she and her husband had been together for some 9 years and there were 4 children of the relationship. The children were with the appellant and Ms Williams had not spoken with them for some weeks. An arrangement was made for the appellant to bring the children to the house occupied by his wife on 6 November 2003. He arrived with the children and with a female aged in her 20s. The complainant said that after a short time her husband made derogatory remarks in relation to her. He also asked her to repay some money. She became concerned and indicated she would call for help. Her husband then threatened to beat up anyone who responded.

She asked him to leave. He obtained a can of beer and tipped it over her head. He said that if she tried to take custody of the children he would kill her. She said she was then punched on the arm, chest and back. Whilst she could not remember being punched in the face, she suffered from a split lip. She received bruises to the head and inside of her left ear. She was hit at least 10 times.

[4] The female who was with the appellant then dragged him away and he walked outside. Ms Williams was seated on the couch, crying, and shortly thereafter the appellant returned and kicked her to the left side of the head. He then left with the children. The case for the appellant, as put to her Worship, was that whilst something happened to Ms Williams on the night, he was not present and he was not responsible.

[5] The appellant did not give evidence at the hearing. However, his version of events was placed before the court in the form of a record of interview. In the record of interview he said that on the day in question he got drunk. He had no recall of the incident described by the complainant. He remembers being at the supermarket during the course of the day and the evening but he had a loss of memory as to a period of between 30 minutes and 90 minutes. He attributed that loss of memory to his consumption of whisky. He said he had some memory of ringing the complainant and speaking with her, however he could not recall being at her flat.

[6] He said in his record of interview that he had put a lot of effort into remembering what happened that day but still had the memory loss for some 30 to 90 minutes. When asked whether he committed the assault, he responded that he did not think so because he had no marks on his hands and he said at the time: "I could have been home, as far as I know".

UNSAFE OR UNSATISFACTORY

[7] The test for determining whether a verdict is unsafe or unsatisfactory was stated by the majority in the High Court in *M v The Queen* (1994) 181 CLR 487 as being whether, upon the whole of the evidence, the court is persuaded that it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty. In making this assessment the court must pay full regard to the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence and it had the benefit of having seen and heard the witnesses. See also *Gipp v The Queen* (1998) 72 ALJR 1012; *Jones v The Queen* (1997) 191 CLR 439. The same principles apply in relation to an appeal from the Court of Summary Jurisdiction to this Court. The question is one of fact which the court on appeal must decide by making its own independent assessment of the evidence.

[8] A miscarriage of justice will also occur when findings or verdicts raise a real doubt as to whether a conviction is safe or just. In *M v The Queen* the majority judges explained the application of the test as follows (at 494):

> "In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a Court of Criminal Appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the Court of Criminal Appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence."

[9] Of course when the appeal is from a magistrate to this court, as in the present appeal, the court has the added advantage of access to the reasons for decision provided by the presiding magistrate.

[10] In his submissions to me the appellant raised a number of specific issues. The first was that he had not been provided with the opportunity to hear all of the tapes that constituted his record of interview and that he was not given the chance to give evidence about the record of interview. Reference to the transcript reveals that the tapes were played. They were stopped, rewound and replayed at the request of counsel. There is no suggestion that any part of those tapes was not played. If any part was omitted, it was with the full knowledge and agreement of both counsel. Indeed, her Worship was provided with a transcript of the tapes as an aide-memoire. It is not suggested that the transcript does not cover the whole of the materials on the tapes. Counsel for the appellant had a copy of that aide-memoire and referred to it.

[11] As to the suggestion that the appellant was not given the opportunity to respond to the record of interview, that must be rejected. At the end of the playing of the tapes a witness was recalled and the Crown case then closed. Counsel for the appellant sought a short adjournment "to have a couple of minutes with my client". When he returned he advised the court that "there is no evidence to be called via the defence, Your Worship". Submissions were then commenced. If the appellant wished to lead evidence, that was the time to do so. Through his counsel he advised otherwise.

[12] The next issue the appellant raised was that, on his submission, the police had failed to investigate an alibi which he had raised with them. Reference to the record of interview makes it clear that he did not raise any alibi with the police. In the record of interview he said he did not know where he was at the time. As her Worship observed: "No explanation for his whereabouts during the relevant period was proffered". She quite correctly concluded that no alibi was raised and there was no obligation on the prosecution to negative any alibi in all the circumstances.

[13] The appellant complained that her Worship found that the assault occurred between 5 pm and 6 pm and said that he was not given the opportunity to address that finding. Reference to the transcript of the reasons of her Worship reveals that there was no such finding. She concluded that "the times do not cause me concern". She did not need to put a specific time on the occurrence and she did not do so.

[14] Further, the appellant did not give evidence as to the timing of events because he chose not to give evidence at all. His version of matters is to be gleaned from his record of interview in which he is quite unclear as to what he did on the day and where he was at any given time.

[15] The appellant also complained of discrepancies in the evidence led for the prosecution. The instances he gave were each addressed by her Worship and satisfactorily resolved. I see no reason to revisit them. I adopt, with respect, the observations of her Worship.

[16] A review of the evidence reveals a strong Crown case. The evidence of the complainant disclosed an assault by the appellant upon her. The fact of the assault is supported by photographs of her injuries and by medical evidence. The identity of her assailant was the issue. The identity of that person as the appellant was made by the complainant and his presence at the location at the relevant time was confirmed by the independent witness, Mr Palmer. This was a strong case and a review of the evidence does not suggest any basis for concluding that the finding of guilt was in any way unsafe or unsatisfactory. In my opinion, the appeal against conviction must be dismissed.

FAMILY CIRCUMSTANCES

[17] I turn to the appeal against sentence. I deal firstly with the complaint that her Worship failed to have proper regard to the effect of a sentence of imprisonment upon the family of the appellant.

[18] The hardship caused to an offender's family is not normally a circumstance which the sentencer must take into account. However, as is noted in *The Queen v Nagas* (1995) 5 NTLR 45, there are exceptions to this policy including where the particular circumstances of the family are such that the degree of hardship is exceptional and considerably more severe than the deprivation suffered by a family in normal circumstances as a result of imprisonment. Such circumstances include where the children are to be deprived of parental care by virtue of imprisonment.

[19] In their work "Sentencing, State and Federal Law in Victoria" (2nd Edition) Fox and Frieberg observe (paragraph 3.904):

> "Distress, reduced financial circumstances and deprivation of emotional support and comfort are the usual consequences of the imprisonment of a spouse but, unless the circumstances are truly exceptional, the superior courts advise sentencers to ignore them as a significant factor in arriving at the sentence, taking the view that the granting of preference to offenders with dependants will defeat the appearance of justice."

[20] The authors went on to note that circumstances may be regarded as exceptional if the imprisonment of a parent leaves children without parental care. See also *Wayne v The Queen* (1992) 62 A Crim R 1; *Arnold v Trenerry* (1997) 118 NTR 1.

[21] In *Mawson v Nayda* (1995) 5 NTLR 56 Kearney J observed that for an exception to the usual rule to be established it is necessary that the defendant produce cogent evidence to the sentencing court to establish that

his imprisonment would impose exceptional hardship upon his family or that his imprisonment would effectively deprive the children of parental care.

[22] In this matter the learned sentencing magistrate dealt with the issue of the impact of the sentence upon the children of the family in some detail. At the relevant time there were four children aged between 3 years and 8 years who were in the care of the appellant. Her Worship observed that the mother of the children was in a position of care for the children in the event of the appellant being imprisoned. That finding has not been challenged.

[23] Her Worship reviewed the authorities and went on to note:

> "It is clear from Northern Territory authority that I can take account of the effect upon the children of the defendant and the complainant if the particular circumstances of family are such that the degree of hardship is exceptional and considerably more severe than the deprivation suffered by family in normal circumstances as a result of imprisonment or where the imprisonment of one parent effectively deprives the children of parental care."

[24] Her Worship went on to conclude that there was no reason why the children could not be cared for by their mother and that the exceptions set out in *R v Nagas* (supra) had not been established. There was, she concluded, "an adequate proposal for the care of the children should the defendant be imprisoned".

[25] Having reached that conclusion her Worship then considered the position of the family in the process of determining whether any part of the sentence should be suspended. She expressed the view that a lengthy separation

between the appellant and the children was not desirable as "the care of the children (was) the mainstay of his life for some time". In those circumstances she concluded that the sentence imposed upon the appellant should be suspended after one month. I am unable to conclude that she erred in so doing. She considered the appropriate test and applied it to the circumstances of the matter then before her. No error has been identified. No error has been demonstrated.

MANIFESTLY EXCESSIVE

[26] I turn to the complaint that the sentence was manifestly excessive. In this case her Worship provided detailed reasons for the sentence she imposed. She categorised the offending as serious and spelled out the reasons for so doing. The assault occurred when the appellant obtained entry to the victim's home by offering her access to her children. Whilst there he threatened her and then assaulted her. The children were nearby. The assault was a sustained attack and involved numerous blows to the face, head, back, shoulders and left arm of the victim. There was also contact between his leg and her head. The attack only came to an end when another person intervened. The appellant did not voluntarily desist. The offence occurred at a time when the appellant was subject to a good behaviour bond. The appellant demonstrated no remorse for his conduct.

[27] The general principles applicable to an appeal against sentence are well known. The presumption is that there is no error in the sentence. An

appellant must demonstrate that error occurred in that the learned sentencing magistrate acted on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the facts: *The Queen v Raggett* (1990) 50 A Crim R 41.

[28] In applying these principles to submissions that a sentence is manifestly excessive it is for the appellant to show that the nature of the sentence itself affords convincing evidence that in some way the exercise of the discretionary sentencing power was unsound. To do so he must show that the sentence was clearly and obviously, and not just arguably, excessive: *Cranssen v The King* (1936) 55 CLR 509 at 520.

[29] In light of the circumstances of the assault as found by her Worship and in light of the circumstances of the offender it cannot be said that the sentence was manifestly excessive. No error on the part of the sentencing magistrate has been demonstrated. The appeal against sentence is dismissed. The appeal is dismissed.

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