Zanco v Littman [2006] NTSC 76

PARTIES:	ZANCO, Davina
	v
	LITTMAN, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 17 of 2006 (20511577)
DELIVERED:	5 October 2006
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JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW - Criminal Law – appeal – Justices Appeal – appeal against sentence – aggravated assault – use of a motor vehicle – fresh evidence – appeal allowed – appellant resentenced.

Sentencing Act (NT), s 78BA
Siganto v The Queen (1998) 194 CLR 656; *Cameron v The Queen* (2002) 209 CLR 339, followed.

REPRESENTATION:

Counsel:

Appellant:	P Dwyer and G Dooley
Respondent:	C Baohm

Solicitors:

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

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Zanco v Littman [2006] NTSC 76
No. JA 17 of 2006 (20511577)

BETWEEN:

IN THE MATTER of the Justices Act

AND IN THE MATTER of an appeal against sentence by Mr Bradley CM

ZANCO, Davina
Appellant

AND:

LITTMAN, Andrew
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 5 October 2006)

Introduction

[1] This is an appeal against a sentence imposed by a Magistrate following a plea of guilty to aggravated assault. A sentence of four months imprisonment, suspended after service of one month, was imposed. In essence the appellant complains that the sentence is manifestly excessive and that the learned Magistrate erred in failing to give sufficient weight to specific factors of mitigation.

Facts

[2] The offence occurred on 8 February 2005. It was committed against a background of animosity between the victim and the appellant. They had been friends, but had fallen out. A number of incidents had occurred and these included a child of the appellant being threatened by an associate of the victim. Before the Magistrate the Crown agreed that misbehaviour had occurred on both sides prior to the offending.

[3] On the day in question, the victim was in the vicinity of the appellant's home when an associate of the victim threw a brick through a window of the house. Another person entered the bottom area of the house and commenced removing a bike belonging to the appellant's child. The appellant arrived at the house and forcibly took possession of the bike. It is not surprising that the appellant and her family felt threatened.

[4] The victim walked away from the appellant's home toward the local shops. In an emotional state, and furious, the appellant got into her vehicle and drove after the victim. The appellant swerved to the wrong side of the road and drove her vehicle at the victim causing the right-hand side of her vehicle to strike the victim who was knocked to the ground into the gutter of the road. The appellant did not stop to observe or make any attempt to assist the victim. In a display of anger and callousness, the appellant yelled at the victim and other people before driving off. Fortunately, the victim did not suffer significant injury.

[5] As the Magistrate observed, the offending was serious because the appellant deliberately drove her vehicle at the victim and the vehicle struck the victim. It was put to the Magistrate that the appellant intended only to frighten the victim but, as his Honour observed, at the very least there was a lack of real care as to whether or not the vehicle struck the victim. While the offending may have been spontaneous in the sense that it was a reaction to the earlier provocation, the victim and her associate had moved away from the appellant's home and sufficient time had elapsed for the appellant to get into her motor vehicle and drive after the victim. The offending was not, therefore, instantly spontaneous and involved a significant element of deliberate criminal and dangerous conduct.

Prior Offending

[6] The appellant has a record of prior offending dating back to 1995. That offending includes convictions recorded on 30 November 1999 for two offences of assault committed on 2 July 1998. A sentence of three months imprisonment, suspended immediately, was imposed. On 30 January 2001 the appellant committed the offence of being armed with an offensive weapon in respect of which she was convicted on 29 August 2001. A sentence of seven days suspended immediately was imposed.

[7] Significantly, on 1 February 2005, seven days before committing the offence under consideration, the appellant was convicted in the Katherine Court of Summary Jurisdiction of two offences of unlawfully damaging property.

She was released on a good behaviour bond. The offending under consideration occurred only a week later in breach of that bond.

Guilty Plea

[8] When police spoke to the appellant, she falsely denied being involved. She told the police it was not her vehicle that hit the victim and denied being the driver. Notwithstanding that the victim and two independent witnesses were able to identify the appellant as the driver, the appellant did not admit her guilt until the day on which the trail was due to commence and after she became aware that the witnesses were in attendance at the Court. In these circumstances, it is not surprising that during submissions the Magistrate challenged the assertion by counsel for the appellant that the plea of guilty was a "genuine expression of her remorse for being involved".

[9] The Magistrate indicated that he made an allowance in the order of 5% for the plea of guilty. The appellant submitted that such a low allowance was an error in the sentencing process. I do not agree. As was observed in *Siganto v The Queen* (1998) 194 CLR 656, a plea of guilty is ordinarily taken into account in mitigation on the "pragmatic ground" that the community is spared the expense of a contested trial. However, in the particular circumstances under consideration an allowance in the order of 5% is not manifestly inadequate. This was not a case in which the plea was entered at an early time and saved the expense and inconvenience of preparation for trial and having witnesses attend at the court. Nor was this

plea accompanied by remorse or indicative of an "acceptance of responsibility and a willingness to facilitate the course of justice": *Cameron v The Queen* (2002) 209 CLR 339 at [11]. In my view, the Magistrate was correct in making only a very small allowance for the plea of guilty.

Rehabilitation - Family

[10] The appellant put material before the sentencing Judge directly relating to her rehabilitation and the impact of a sentence of imprisonment upon her family. The plea of guilty was entered on 2 March 2006, but further hearing was adjourned to enable the appellant to undertake a residential drug rehabilitation program into which she had already entered. The appellant commenced the Healthy Families Program at CAAPS on 6 February 2006 and completed that program on 27 March 2006. A report from a support worker with CAAPS subsequently provided to the Magistrate confirmed that the appellant participated in all program activities which ranged from awareness sessions on alcohol and other drugs to parenting and healthy lifestyles. The support worker said:

> "Davina Zanco has maintained her accommodation area in a neat and clean manner for the duration of the program, and fulfilled rental requirements whilst she is residing here at CAAPS."

[11] The Magistrate was also provided with two reports from the Executive Manager of FORWAARD Rehabilitation Services. The appellant was admitted to FORWAARD on 10 January 2006 to undertake the 12-week residential program. Her main problem related to abuse of marijuana. In an

interim report of 23 January 2006, it was noted that the appellant "has shown an honest desire to learn more about her substance misuse problems and have them addressed in their entirety".

[12] In a report dated 21 April 2006 FORWAARD reported that the appellant was discharged on her own request on 6 February 2006 to transfer to the CAAPS Health Family Program to continue treatment as a family unit. Progress to date was noted as "satisfactory".

[13] During submissions, the Magistrate was informed that the appellant "has a lot of family support from her mother and from her father". It was put to his Honour that the appellant was a loving mother who had done a lot to care for her family. For over a year the appellant had been participating in a program run by Centacare of family counselling involving a support program including home visits and financial assistance. Counsel emphasised that the appellant had managed to address her drug use and her primary motivation was keeping the family together. To this end the appellant had displayed courage and strength in removing herself from a relationship with a man who was the father of her 1½-year old child because of his involvement with drugs.

[14] As to the appellant's family, the Magistrate was informed that the appellant was the sole carer of the children aged 1½, 8 and 10 years. The elder two children were attending the Karama school and doing well. It was put to the Magistrate that these were exceptional circumstances relating to the family

which, combined with the efforts of rehabilitation and other factors to which I have referred, justified imprisonment only to the rising of the Court. That submission was made because s 78BA of the Sentencing Act applied and required the imposition of a term of actual imprisonment that was not fully suspended.

No Error

[15] I am unable to discern any error in the approach of the Magistrate. His Honour had regard to all the relevant circumstances, including the background to the offending and the subsequent steps taken by the appellant towards her rehabilitation. In particular, his Honour specifically acknowledged that the appellant is the prime carer for her young children. In that context his Honour noted that the appellant had the support of her family who were in court. Ultimately, however, his Honour declined to suspend the sentence at the rising of the Court because of the seriousness of the offending and the fact that the offence was a second violent offence committed by a person with a "reasonable criminal record". His Honour observed, and reasonably so:

> "If one were to allow repeat assaults with motor vehicles to go, as it were, without serious punishment then I would be sending the wrong message out to members of the public who are wont to use violence and aggression as a means of sorting out relationships."

[16] Notwithstanding the factors of mitigation, on the material presented to the Magistrate his Honour did not make any apparent error and the sentence was not manifestly excessive. It was, in fact, a merciful sentence undoubtedly

brought about by the factors of mitigation, including the existence of the young children.

Additional Evidence

[17] On the hearing of the appeal, I permitted the appellant to place additional material before the Court. First, in an affidavit dated 23 August 2006, the Executive Manager of FORWAARD speaks highly of the appellant's participation in the FORWAARD program. He describes her as a "willing and enthusiastic participant" who complied with all facets of the program.

[18] Secondly, the appellant has set out her personal circumstances in an affidavit of 24 August 2006. She describes her chaotic life involving the use of drugs, including cannabis and amphetamines, which existed in February 2005. The appellant has been a user of cannabis since she was 11 years of age and a heavy user from the age of about 14.

[19] The appellant has also suffered from depression. In February 2005 she was taking prescribed medication and describes her mental state as feeling "terrible" and as if she could not cope with life. In October 2005 the appellant requested assistance and her children were placed in foster car.

[20] On 10 January 2006 the appellant referred herself to FORWAARD where she lived until 6 February 2006 when she transferred to CAAPS. The appellant states in her affidavit that the transfer occurred because she wanted her children with her in the family unit. It was in these

circumstances that the appellant was reunited with her children in February 2006.

[21] The appellant describes finding rehabilitation hard "but very satisfying". She states that she looked after her children and learnt parenting skills. She undertook other courses to assist in controlling any urge to use drugs. After completing CAAPS she also undertook the Centacare Parenting Program and gained assistance from staff who would call upon her at least once a week. As at the time of the affidavit, the appellant was undertaking a "better parenting program" run by the office of a member of Parliament.

[22] In her affidavit, the appellant confirms that she is the sole carer of her children. She states that she is "terrified" of going to gaol because the children will be put back into foster care. The appellant's father has cancer and her mother is mentally unwell. The appellant states that there is no-one else to look after her children.

[23] From the perspective of the children, according to the appellant the children have been happy and healthy since they commenced residing with her at CAAPS in February 2006. The appellant says that the baby was seriously ill while in care and that the baby is now "very clingy" and never wants the appellant to leave her sight. The appellant believes that the baby is traumatised from having been taken away to live with strangers.

[24] The appellant states that she will be desperate with grief and worry if she has to leave the baby. She feels that she has her life on track and she loves

her children. She describes the family as happy and safe together and says that she no longer feels depressed because she can see a future for the family. The appellant plans to go to university next year so that she can further her education and get a well-paid job.

[25] The material before the Magistrate was not complete or entirely accurate. The impression was incorrectly conveyed to the Magistrate that by reason of family support, other persons were available to care for the children should the appellant be required to serve a term of imprisonment. As the affidavit of the appellant now explains, members of her family are not able to care for her children. If the appellant is imprisoned, even for a short time, it will be necessary for the children to be placed in foster care.

[26] At the conclusion of submissions on the first day of the hearing of the appeal, counsel for the appellant sought an adjournment in order to place additional material before the court concerning the circumstances in which the Magistrate was not given complete and accurate information as to care of the children should the appellant be imprisoned. In addition, counsel sought to supplement the material concerning the appellant's rehabilitation because it was felt that the information before the Magistrate did not fully explain the history of the children being placed in care and the appellant's subsequent rehabilitation and progress as a parent. For that purpose I requested a report from the Department of Health and Community Services.

[27] I have received a very helpful report dated 2 October 2006 from the Family and Children's Services (FACS) section of the Department of Health and Community Services. In addition, I have had the assistance of additional affidavits concerning the appellant's rehabilitation and family circumstances. The appellant has also filed an affidavit by counsel who appeared for her before the Magistrate explaining why the Magistrate was not given complete information as to who would care for the children should the appellant be imprisoned.

[28] The children have been in care since 23 October 2005. A FACS Child Protection Investigation found that the appellant was prone to violence and substance misuse. The investigation also found that the appellant had caused significant and serious harm to one of her children and had neglected the needs of all her children for food and safe living conditions. The appellant was emotionally unstable and told FACS workers she was unable to cope.

[29] As mentioned, after commencing a three month residential drug rehabilitation program at FORWAARD, the appellant terminated the program in order to transfer to the drug rehabilitation program with CAAPS. The appellant transferred in order to obtain residential accommodation suitable for her family. The eight week Healthy Families Program run by CAAPS required the appellant to reside at the residential rehabilitation centre and to participate in compulsory counselling sessions and programs including drug and alcohol awareness, parenting and healthy lifestyle. The

manager of the program has stated in an affidavit dated 27 September 2006 that the appellant "participated well and was extremely co-operative whilst in the program".

[30] Significantly, the manager of the Healthy Families Program has also stated that they continue to support the appellant in the community and that members of the staff have visited her on a regular basis since she left the program. As to the current circumstances and future for the appellant and her family, the manager states as follows:

> "10. We have seen Ms Zanco become very strong since she left the programme. She has changed her lifestyle around and has cut ties with old associates.
>
> 11. One of the goals that Ms Zanco wanted to achieve was to create a garden in her home and to maintain a healthy lifestyle with her children. She has achieved these goals. She has also learnt to prepare healthy meals and to stay within her budget. She has maintained the budget skills she learnt while she was here.
>
> 12. We believe that Ms Zanco has developed an excellent, loving relationship with her children since they were returned to her. We closely monitored the relationship between her and the children and we saw a close, loving relationship.
>
> 13. We can continue to offer Ms Zanco emotional support. If she ever has a relapse or needs support, we are there for her and her family. We believe that it would be very traumatic for Ms Zanco and for her children if they were to be separated at this stage, when we have worked with the whole family to help them move forward in their lives and learn to care for and respect each other."

[31] As mentioned, the appellant also participated in a program run by Centacare. An employee of Centacare states in an affidavit that she worked with the appellant in the program from 20 April to 19 July 2006. The program involves intensive family support with families in the child protection system. The affidavit states that the appellant "displayed a real commitment to making a better life for her and her children" and that this commitment has "had a positive effect on the children's wellbeing." In the words of the employee of Centacare, at the conclusion of the program "it was clear that all three of her children were very bonded to [the appellant] and she was doing very well to look after all three." In the opinion of the worker, removing the children into foster care "could have a negative impact on the progress the children are currently making."

[32] According to the report from FACS, during the appellant's participation in the Centacare program a change was noted in her presentation. She became more confident and her depression lifted to some extent. Significantly, advice to FACS from the primary school at which two of the children attend indicates that they regularly attend school on time and well dressed. The children are now interacting more with the other children and their presentation has been described as "completely different" to prior attendances. If issues or concerns with either child arise, the appellant is contacted and attends the school to discuss the concerns. The appellant's presentation at the school has been described as "cooperative".

[33] The conclusion of the report from the manager of FACS is expressed in the following terms:

> "On her most recent visit with Ms Zanco and her children the FACS Case Manager noted that the family was doing very well. The children were happy, well dressed, looked healthy and were running around and playing. Ms Zanco was giving her children hugs and, when [her son] was asked to do his homework, he complied willingly.
>
> FACS is satisfied with the way the family is functioning and pleased with the way in which Ms Zanco has assumed responsibility for her children and is managing her situation. She has participated in, and completed, the required programs and currently the home situation is stable.
>
> In the event that Ms Zanco is required to serve a short term in prison, the children would, of necessity, be placed with a Departmental Foster Carer, as there are no suitable family members or friends available to assist with their care. In the event that this was to occur, there would be no guarantee that all the children could be placed together. As such, it is likely that there would be some detrimental impact on the children should they be required to be placed with Foster Carers even for a short period."

[34] As I have said, and as is noted in the final paragraph of the FACS report, if the appellant is required to serve a term of imprisonment it will be necessary to place the children in foster care. The affidavit from counsel who appeared before the Magistrate has explained that she was instructed by the appellant that although the appellant's parents are supportive in many ways, it is not possible for the children to be left with her parents. Counsel has explained that her failure to inform the Magistrate that family members were unable to care for the children if the appellant was imprisoned was an oversight. I unhesitatingly accept that explanation.

[35] The constraints on sentencing courts taking into account the impact of a sentence upon the family of an offender are well recognised and do not need discussion. However, the circumstances of the family under consideration are special. The appellant's children have undergone very traumatic experiences. In the past they have been abused and neglected by their mother. The report from FACS indicates that the elder children understood that their mother was suffering from a mental illness. In addition, the children have experienced the trauma of being separated from their mother and being placed in foster care.

[36] The children have now been reunited with their mother for eight months. They have seen their mother make very significant progress in her own rehabilitation and in the way in which she cares for them and their home. Together, the family has moved forward as a unit. The children have made significant progress and are happy and settled in the home environment with their mother. The happiness and the progress of the children will be severely interrupted if the appellant is required to serve a sentence of imprisonment. They will be forced to experience again the trauma of being separated from their mother.

[37] In addition to the impact upon the children, imprisonment will have a negative impact upon the appellant's progress in her own rehabilitation. I am satisfied that separation from her children would be extremely distressing and traumatic for the appellant. The happy and settled life of the appellant and her family would be severely interrupted.

Conclusion

[38] As I have said, I am unable to discern any error in the approach of the Magistrate and, on the material before his Honour, the sentence was merciful and appropriate. However, the material before the Magistrate was not complete and important aspects concerning the appellant's rehabilitation and the interests of the children were not placed before his Honour. In these circumstances, as the material would have been significant to the exercise of the Magistrate's sentencing discretion, I have decided that the interests of justice require that I reconsider the sentence in the exercise of my independent sentencing discretion. It would be unfair and contrary to the interests of justice if the appellant was prejudiced through the failure to present all relevant material to the Magistrate and if this Court was to refuse to reconsider the sentence notwithstanding the significant and compelling additional material which is now before this Court.

[39] The circumstances are special and my decision to reconsider the sentence should not be taken as a precedent for the view that whenever there is a failure to place relevant material before a sentencing court, additional material relevant to sentence will automatically be received on appeal. There are well known limits to the circumstances in which a court will receive additional evidence and review a sentence. My decision in the special circumstances of this matter should not be taken as detracting from the well settled principles that apply to appeals against sentence.

[40] The appellant committed a very serious offence. Ordinarily, a term of imprisonment of sufficient length to serve the important purposes of punishment and deterrence would follow and the appellant would be required to serve a significant period in custody. However, given all the circumstances to which I have referred relating to both the offending conduct and matters personal to the appellant and her family, I have reached the view that it is in the best interests of the community that the appellant not be required to serve any period of imprisonment other than imprisonment to the rising of the court. This is one of those exceptional cases in which it is appropriate to exercise mercy in view of the background circumstances to the offending, the remarkable efforts of the appellant in working towards achieving rehabilitation and the strong community interest in supporting the appellant and her children in their efforts to put traumatic and difficult times behind them and to continue their progress as a successful family unit.

[41] The appeal is allowed and the sentence is set aside. I impose a sentence of four months imprisonment to be suspended at the rising of the court upon the appellant entering into a bond in the amount of $500 to be of good behaviour for a period of 12 months from today. That period is the operative period for the purposes of the Sentencing Act. It is a condition of the suspension that for a period of 12 months from today the appellant be under the supervision of the Director of Correctional Services and obey the directions of the Director or a probation officer as to her residence,

employment, counselling and medical treatment including counselling and medical treatment for drug and alcohol abuse and relating to the care and welfare of the appellant's three children. It is a further condition of the suspension that during the period of the bond the appellant not smoke or consume cannabis or any other illicit drug and that on request by a probation officer or police officer she undergo urinalysis for the purpose of testing for the presence of drugs.
