Habib Urahman v Semrad [2012] NTSC 95

PARTIES:	HABIB URAHMAN v SEMRAD, Monica
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 41 of 2012 (21126200) and JA 43 of 2012 (21203102)
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JUDGMENT OF:	SOUTHWOOD J
APPEAL FROM:	LOWNDES SM

CATCHWORDS:

APPEALS AGAINST SENTENCE – refugee – offences committed while in immigration detention - failure to take account of extenuating circumstances – failure to properly assess objective seriousness – weight to be given in mitigation to the period in immigration detention– manifestly excessive – appeal against the sentence for the offence of cause harm to a Commonwealth public official allowed

Crimes Act 1914 (Cth) s 16A, s 19B, s 29
Criminal Code 1995 (Cth) s 147.1
Migration Act 1958 (Cth) s 501, s 510
Justices Act (NT) s 163

R v Bob [2003] QCA 129
Darcie v R [2012] VSCA 11
R v David Guan Liang Qin [2008] NSWCCA 189
Dauphin v The Queen [2002] WASCA 104
Commissioner of Taxation v Baffsky (2001) 192 ALR 92
R v Griffith (unreported, Victorian Court of Appeal, 29 April 1998)
Greenburg v R (1993) 68 A Crim R
Guden v R (2010) 28 VR 288
HAT v R (2011) 256 FLR 201
Hesseen v Burgoyne [2003] NTSC 47
Hoare (1989) 167 CLR 348
R v Jap (unreported, NSW Court of Criminal Appeal, 20 July 1998)
R v Kwon [2004] NSWCCA 456
Lanham v Brake (1983) 34 SASR 578
R v Latumetan and Murwanto [2003] NSWCCA 70
R v M.A.H (2005) NTLR 150
R v MAO (2006) 163 A Crim R 63
R v Pham [2005] NSWCCA 94
R v S [2003] 1 Qd R 176
R v Woods (2009) 24 NTLR 77
R v Zainudin (2005) 190 FLR 149

REPRESENTATION:

Counsel:

Appellant:	J B Lawrence SC
Respondent:	M Voller

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Commonwealth Director of Public Prosecutions

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

Habib Urahman v Semrad [2012] NTSC 95
No. 41 of 2012 (21126200) and 43 of 2012 (21203102)

BETWEEN:

HABIB URAHMAN
Appellant

AND:

MONICA SEMRAD
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 28 November 2012)

Introduction

[1] This proceeding involves two appeals from the Court of Summary Jurisdiction. The appeals were heard together.

[2] On 8 June 2012, following a trial in the Court of Summary Jurisdiction, the appellant was found guilty of the crime of engaging in conduct which caused harm to a Commonwealth public official contrary to s 147.1(1) of the *Criminal Code 1995* (Cth). The maximum penalty for this offence is imprisonment for 10 years or a fine not exceeding 120 penalty units. On 15 June 2012 the appellant pleaded guilty to the crime of causing damage to property belonging to the Commonwealth contrary to s 29 of the *Crimes Act*

1914 (Cth). The maximum penalty for this offence is also imprisonment for 10 years.

[3] On 18 June 2012 the presiding magistrate sentenced the appellant for both crimes. For the crime of engaging in conduct which caused harm to a Commonwealth public official, the offender was convicted and sentenced to three months imprisonment. The sentence commenced on 14 June 2012 and was suspended forthwith upon the appellant giving security by recognizance in the sum of $1000 to be of good behaviour for 12 months. For the crime of causing damage to property belonging to the Commonwealth, the appellant was convicted and released on a $1000 own recognizance bond to be of good behaviour for 12 months.

[4] The appellant, who is a refugee in immigration detention, has appealed against both of the sentences imposed on him by the Court of Summary Jurisdiction. The appeals are brought under s 163(1)(a) of the *Justices Act* (NT). The appellant's primary object is to try and correct what he says was a failure of the presiding magistrate to exercise his discretion under s 19B(1) of the *Crimes Act 1914* (Cth) not to record a conviction against him because his convictions may result in the Minister for Immigration refusing to issue him a visa.

[5] The grounds of appeal against the appellant's sentence for the crime of causing harm to a Commonwealth public official are as follows.

1. The sentence is manifestly excessive.

2. The sentencing magistrate erred in finding that there were insufficient extenuating circumstances to enliven the s 19B(1)(a) & (b)(iii) of the *Crimes Act 1914* (Cth).

3. The sentencing magistrate erred in failing to accord appropriate weight to the positive good character and mental condition of the appellant pursuant to s 19B(1)(a) & (b)(i) of the *Crimes Act 1914* (Cth).

4. The sentencing magistrate erred by placing too much weight on the objective seriousness, general deterrence and public policy of the offence thus ordering the recording of a conviction and a partially suspended sentence of three months imprisonment.

5. The sentencing magistrate erred by merely taking into account seven months of the appellant's two years and seven months detention.

[6] The grounds of appeal against the appellant's sentence for the crime of damaging Commonwealth property are as follows.

1. The sentencing magistrate erred by considering the offence to be a serious matter.

2. The sentencing magistrate erred by giving insufficient weight to the positive good character of the appellant.

3. The sentencing magistrate erred by finding that there was insufficient extenuating circumstances to enliven s 19B(1)(a) & (b)(iii) of the *Crimes Act 1914* (Cth).

4. By recording a conviction in all the circumstances of the case and the sentence was manifestly excessive.

5. The sentencing magistrate erred as a matter of justice by merely taking into account seven months of the appellant's two years and seven months detention.

The facts

[7] In his sentencing remarks the presiding magistrate did not set out the full details of the factual findings that he made about the appellant's crime of engaging in conduct which caused harm to a Commonwealth public official. However, the facts may be summarised as follows.

[8] The appellant is a 33 year old Burmese refugee who has been in immigration detention under the *Migration Act* (Cth) since he arrived at Christmas Island on 28 December 2009. In May 2010 the Australian Department of Immigration assessed the appellant and determined that he was a genuine refugee. However, he remained in detention while the Australian Security Intelligence Organisation completed a security check. The security check was not completed until December 2011 when it was determined that the appellant was not a security risk.

[9] While refugees are in detention they are subject to welfare checks. Welfare checks are undertaken three or four times a day to ensure that detainees remain in detention and are being cared for appropriately. They are also undertaken after there have been rooftop protests or demonstrations. A welfare check after a rooftop protest, involves SERCO employees entering the rooms of detainees and speaking to them to ensure that they are off the roof, safe and unharmed. They also involve an assessment of a detainee's mental state. The appellant was familiar with such checks.

[10] On 12 August 2011 the appellant participated in a rooftop protest at the Northern Immigration Detention Centre in Darwin where he was detained. The protest was against the length of detention of refugees. During the course of the protest the appellant climbed up onto the roof of one of the buildings where he remained for about five hours. After he came off the roof he went to sleep in the room that he had been allocated.

[11] After the appellant went to sleep, a welfare check was conducted by Mr Paul Green, a SERCO employee. Mr Green was a Commonwealth public official. He conducted the welfare check quietly and respectfully because it was night time and efforts are made not to disturb people if they are asleep. Mr Green walked into the appellant's room which was dark. There appeared to be a person asleep with a cover over his head on a bottom bunk in the room and it looked like another person occupied the top bunk. A light was on in the bathroom so Mr Green walked to the bathroom to see if somebody was in the bathroom. He knocked quietly on the bathroom door before he checked the bathroom. There was nobody in the bathroom.

[12] After he checked the bathroom, Mr Green turned and saw that the appellant was out of his bunk and standing directly in front of him. He asked the appellant if he was Mr Habib and if he had come down from the roof. Mr Habib responded by screaming, "Get out of my room!" Mr Green again asked the appellant if he was Mr Habib and if he had come down from the roof. The appellant pointed at Mr Green's face and again screamed, "Get out of my room". Mr Green put his hands up in a peaceful stance in

response to the appellant pointing and shouting at him aggressively. The appellant then hit him, at least twice, in the face. There was then a scuffle in the room which involved another detainee and a number of SERCO employees who had come to Mr Green's assistance. During the scuffle the other detainee bit Mr Green in the chest. Ultimately, both the appellant and the other detainee were restrained.

[13] Mr Green was injured and he was taken to hospital. He sustained superficial lacerations to his left ear and bruising to his left face. That is, bruising to the posterior auricular region and some mandible tenderness but no mastoid tenderness. These injuries were consistent with Mr Green being hit or punched by the appellant. Mr Green also suffered a bite wound and bruising to his left upper chest. These injuries were caused by the other detainee biting Mr Green.

[14] The facts of the appellant's crime of damaging Commonwealth property are as follows.

[15] On 30 October 2011 the appellant engaged in another rooftop protest at the detention centre. He jumped up and down on the roof of the North One Medical Centre. Then he walked from the roof of the Medical Centre to the roof of the North Two Recreation Room and back. He removed a metal pole from the electrical security fence near the Recreation Room. The pole was about one meter long and 2.5 to 4.5 centimetres in diameter. It was hollow in the centre. The appellant gripped the pole with both hands and struck the

roof of the Medical Centre with the end of the pole several times. He made four holes in the roof and damage was done to an interior fluorescent light fitting in the waiting room of the Medical Centre. The light fell out of the ceiling and it remained hanging by the electrical cable which was attached to it.

[16] The appellant then had a brief conversation with the SERCO operations manager and asked to see a doctor. He was told that he would have to get off the roof first. He dropped the metal pole and climbed down from the roof. The cost of repairs to the roof of the Medical Centre was $3,500.

The appellant's personal circumstances

[17] The appellant comes from the state of Arkan in Burma. The state is on the border between Burma and Bangladesh. He is a descendant of the Rohingyan ethnic group which is a Muslim group of about 750,000 people. The Rohingyan have been the target of severe discrimination and persecution by the military government in Burma. Many Rohingyan people have fled from Burma to refugee camps in Bangladesh.

[18] The appellant is one of five siblings. In 2007 his family home was demolished twice by the Burmese authorities and he and his family moved to his mother's village. His father and two of his siblings were then detained by the authorities and his father died while in detention in 2008.

[19] The appellant excelled at the local school and he achieved good enough results to matriculate. However, because he was a Rohingyan this was not

possible. His family wanted him to go to university and study engineering and in 2007 it was decided that he should leave Burma. He did so in 2007. He first went to Thailand and then to refugee camps in Malaysia. During his travels he learnt to speak seven languages. While he was in a detention camp in Malaysia he was sold by corrupt officials to the owner of a Thai fishing boat and he was forced to work as a crew member on the boat for eight months before he was able to escape. He then stayed in other refugee camps in Malaysia where he was able to obtain paid work and send some of the money he earned to his family in Burma. He was also able to save enough money to pay to travel to Indonesia and then to Christmas Island. After his arrival on Christmas Island he applied for protection as a refugee.

[20] No information about what the appellant did between the time he left school and the time he left Burma, which is a period of at least a decade, was placed before this Court or the Court of Summary Jurisdiction.

[21] While the appellant has been found to be a genuine refugee and not to be a security risk, he has not been granted a visa to remain in Australia. Before he can be granted a visa, the Minister for Immigration must consider if he passes the character test under s 501(6) of the *Migration Act 1958* (Cth). If the appellant does not pass the character test, the Minister for Immigration may refuse to grant him a visa. Under s 501(6)(aa) of the *Migration Act 1958* (Cth) a person does not pass the character test if the person has been convicted of an offence that was committed while he was in immigration detention.

[22] Five testimonials were tendered during the plea on sentence. The first testimonial is from Ms Jennifer Scott who is a Humanitarian Observer with the Red Cross Migration Support Program. Of significance, she states that Red Cross's Immigration Detention Team first met with the appellant on 20 May 2010. They found the appellant to have escalating distress and anguish due to his experiences in detention. Deterioration of judgment, reasoning and awareness is very common while a person is in immigration detention. The Red Cross observers are of the view that there has been a significant deterioration in the appellant's functioning due to the length of time he has been in detention and his experiences while in detention.

[23] Ms Emma Murphy states that she first met the appellant in 2011. The appellant has always struck her as an incredibly humble and gentle man who has a quiet and caring character. She considers the offences committed by the appellant are out of character. Implicit in her testimonial is a recognition that the appellant has suffered from mental stress and trauma while he has been in detention.

[24] Ms Justine Davis states that she first met the appellant in September 2010. In her opinion, the appellant is an amazing young man who has selflessly supported and helped others. In her view he is a true humanitarian. The charges are completely out of character.

[25] Mr Dil Mohammad was detained with the appellant for a period of time. He states that he first met the appellant in Malaysia in either 2007 or 2008

through the Rohingya Arkanese Refugee Committee. The committee is an advocacy and welfare group that supports Rohingyan asylum seekers in Malaysia. The appellant was a spokesman for the committee. He continues to assist Mr Mohammad by asking the committee to support his family. While the appellant has been in detention he has run English classes for refugees. He has also written many letters, on behalf of refugees, to the Australian Government and its agencies. On one occasion the appellant and another refugee climbed a tree to prevent a person from hanging himself. The person had climbed the tree, put a scarf around his neck and jumped from the tree. The appellant and his assistant supported the hanging man's body so that it did not put pressure on his neck. The appellant has also provided support and help to others in detention who have wanted to kill themselves. He has managed to provide some support to his family throughout the time he has been in detention.

The remarks of the sentencing magistrate

[26] When sentencing the appellant the presiding magistrate made the following remarks:

> This matter is for sentence today in relation to two charges. One, causing harm to a Commonwealth official, namely, Paul Green and there is a second matter involving damage to property belonging to the Commonwealth.
>
> First of all I give the defendant a substantial discount in relation to his guilty plea to the damage count.
>
> In relation to the matter of causing harm to a Commonwealth official, it is noted that the matter proceeded to a contested hearing and

following the hearing of that matter, the defendant was found guilty by this court. The defendant is not entitled to a discount for an early guilty plea in relation to that but, of course, he is not to be punished for having pleaded not guilty and subsequently being found guilty by the court.

In sentencing the defendant regard must be had to the considerations set out in s 16A of the *Crimes Act* (Cth). That section sets out a shopping list of considerations. I have had regard to each and every one of those considerations as they are relevant to these particular offences. **Indeed, I had regard to the requirement that the sentence adequately reflect the requirements of general deterrence.**

....

The court has been advised that the maximum penalty for the offence of causing harm to an official is two years imprisonment or a fine not exceeding 120 penalty units. I have kept in mind the provisions of the *Crimes Act* (Cth) that a term of imprisonment is a measure of last resort and should only be imposed when all other available sentencing options have been considered and rejected as being appropriate and that really reflects no more than the common law position and indeed the position under the *Sentencing Act* (NT) except where there are mandatory sentencing provisions.

Mr Lawrence made a submission that the court ought to consider making an order under s 19B of the *Crimes Act* (Cth) that provides for the discharge of offenders without proceeding to conviction and, as rightly pointed out by Mr Lawrence, that section broadly reflects the provisions of s 8 of the *Sentencing Act* (NT).

Section 19B of the *Crimes Act* (Cth) provides that where the court is satisfied in respect of a charge or more than one of those charges, that the charge is proved, but is of the opinion having regard to (1) the character, antecedents, age, health or mental condition of the person; and (2) the extent to which the offence is of a trivial nature; or (3) the extent to which the offence was committed under extenuating circumstances – that it is inexpedient to inflict any punishment or to inflict any punishment other than a nominal punishment and that it is expedient to release the offender on probation, the court may discharge the person without proceeding to conviction upon his own recognizance to be of good behaviour.

Can I say this at the outset, in this particular case, **I consider that the discretion has at least been triggered or enlivened to a point where the court should consider the exercise of this discretion. I am here referring to the character, antecedents and age of the offender.**

Mr Lawrence put before the court a wealth of material relating to Mr Habib's character and antecedents and, in fact, pointed out the contributions that he has made in various ways, in a humanitarian sense, and in other respects and also relied very heavily upon the character evidence that was put to the court and, of course, the absence of any prior convictions. **So, on the character ground, the discretion has been enlivened.**

Mr Lawrence also relied upon the extent to which the offence was committed under extenuating circumstances. I am inclined to think that particular limb has not been sufficiently enlivened, but it does not have to be for the court to consider the exercise of this discretion.

Of course, one has to balance the character and antecedents of the offender against the relevant public policy considerations that relate to the sentencing of offenders. Indeed one has to look at the objective seriousness of the matter and the need for general deterrence. Those things have to be weighed in the balance.

In my view, the principles that apply to assaults on police officers have some relevance to the case at hand. In this case there was an assault on a Commonwealth official who was acting in an official capacity and carrying out his duties. It seems to me that people who are performing those particular duties are entitled to do so without being assaulted or being subject to harm. The authorities that deal with assaults on police are replete with those sorts of observations.

I think the matter is intrinsically serious and I think that this is not a matter where the court should proceed without proceeding to conviction. I know Mr Lawrence relies upon one of the cases in the schedule which has been handed up. However, those comparable sentences are only a very rough guide and they really only indicate a range of sentences in particular cases. It is trite to say that every case turns upon its individual facts and circumstances and just because someone on another occasion has been given the benefit of such a disposition does not mean to say that in the particular

circumstances of this case that the same disposition should be imposed. **So I reject the application not to record a conviction. In my opinion the matter is so serious as to warrant the recording of a conviction.**

I then need to go and consider what the appropriate disposition for this offence is. I am leaving the criminal damage matter aside for the moment.

In my view, the prosecution's submission that the offence warrants a term of imprisonment is well founded. I have reached that view having regard to the objective seriousness of the offence and the need for general deterrence. At the same time I have taken into account the personal circumstances of the offender and his prospects of rehabilitation, as I must do.

I note that the defendant has spent four days in custody in relation to this matter and that must be somehow factored into the disposition of the court today. There is another aspect, and I think this is an important aspect. **That is, that although the period during which Mr Habib has been in detention cannot be applied in terms of backdating any sentence of imprisonment, it is, of course, a matter that cannot be overlooked when determining the appropriate sentence.** In my view, justice only requires that it be taken into account in determining the appropriate sentence and that mirrors what Mildren J said in [*R v Zainudin*]. **Mr Lawrence submits that the period of 7 months detention needs to be weighed in the equation and I agree with him on that.**

Turning just briefly now to the property damage count, that is a serious matter also and, in my view, it warrants a conviction. As to what is the appropriate disposition in that particular case, one has to have regard to again the four days spent in custody **and furthermore the period of detention needs to be factored into the consideration of the relevant sentencing order.**

Bearing in mind the things that I have stated I now proceed to sentence Mr Habib as follows.

In relation to the causing harm to the Commonwealth official I record a conviction. The defendant is sentenced to three months imprisonment commencing four days ago on 14 June 2012. Under s 20(1)(b) of the *Crimes Act* (Cth) I direct that the sentence be

suspended forthwith on him giving security by recognizance in the sum of $1000 to be of good behaviour for a period of 12 months.

I wish to make it clear that **I have ordered Mr Habib's release early into the serving of that head sentence principally on account of the time he has spent in detention.** I think that is a substantial period of time and it needs to be factored into the overall disposition. If he had not spent a substantial period then I would have ordered that he serve substantially more than four days and I may have even required him to serve the entire three month head sentence. **But, in my view, in all the circumstances of this case, it was appropriate to take that period of detention into account by ordering his release at that early time.**

In relation to the criminal damage matter, I record a conviction. I consider that case is also an appropriate case for a conditional release order. However, it will be somewhat less onerous than the sentence I have imposed in relation to the count of causing harm. I make an order pursuant to s 20 (1)(a) of the *Crimes Act* (Cth). **Without passing sentence** I direct that Mr Habib be released upon him giving security by recognizance in the sum of $1000 to be of good behaviour for 12 months.

....

[27] The presiding magistrate did not give reasons why he found that the extenuating circumstances limb of s 19B(1)(b)(iii) of the *Crimes Act 1914* (Cth) had not been sufficiently enlivened. Nor did he refer to any particular circumstances that he found made the offence of cause harm to a Commonwealth public official objectively serious.

The appeal against the sentence imposed for the crime of cause damage to property belonging to the Commonwealth

[28] In my opinion, none of the grounds of appeal about the sentence imposed on the appellant for the crime of cause damage to property belonging to the Commonwealth are made out. The sentence imposed on the appellant was a

lenient sentence. The appellant got up onto the roof of a building at the Northern Immigration Detention Centre, he obtained a piece of pipe and he deliberately caused $3500 damage to the roof of the building with the piece of pipe. One of the blows he struck to the roof was so forceful that it went through the roof and ceiling of the building and dislodged a light in the waiting room of the Medical Centre. In the circumstances, even allowing for the appellant's mental state and his good character, it was appropriate to record a conviction against the appellant for this crime. The appeal about the sentence imposed for the crime of cause damage to property belonging to the Commonwealth should be dismissed.

[29] In the paragraphs below I consider the appeal against the sentence imposed on the appellant for the crime of cause harm to a Commonwealth public official.

Ground 2 – extenuating circumstances

[30] In my opinion, this ground of appeal is made out.

[31] Extenuating circumstances are those that "lessen the seeming magnitude of guilt or, in other words, tend to lessen the offender's culpability. To be extenuating the circumstances must be such as to excuse to some degree the commission of the offence charged ***and it is the extent of those circumstances to which the court is to have regard***."[1] In order for a particular extenuating circumstance to be relevant, it is necessary to

[1] *Hesseen v Burgoyne* [2003] NTSC 47 at [15] per Martin CJ; *Lanham v Brake* (1983) 34 SASR 578 at 583 – 584 per Cox J.

demonstrate "some kind of link between the circumstance said to be extenuating and the commission of the offence".[2]

[32] In this case there was evidence of both extenuating circumstances and the requisite link between the extenuating circumstances and the offences committed by the appellant which was not contradicted by the prosecution. At the time he committed the offence of cause harm to a Commonwealth public official, the appellant had suffered a significant deterioration in his mental function as a result of the length of his detention and his experiences in detention. While he was in this mental state, the appellant had his sleep interrupted after he had participated in a five hour rooftop protest. The victim opened the door to his room and walked through his room to the bathroom. In other circumstances, this would have been a significant invasion of the appellant's privacy and somewhat demeaning. The appellant reacted to the entry of his room. He lost his temper and assaulted the victim. There is a fair inference that the significant deterioration in the appellant's function contributed to some degree to his loss of temper and his inability to exercise self-control.

[33] Immigration detention is notoriously indeterminate and most refugees find this very debilitating. There was evidence before the presiding magistrate to the following effect. (1) The appellant had been in detention since December 2009. (2) After the appellant had been found to be a genuine refugee, he was kept in detention for a further 19 months while the

[2] *Commissioner of Taxation v Baffsky* (2001) 192 ALR 92 at [47] per Spigelman CJ.

necessary security checks were undertaken in circumstances where he must have believed that he was not a security risk. (3) The appellant witnessed an attempted suicide while he was in immigration detention and he helped other people who were experiencing suicidal ideation. (4) The appellant was anxious about the well-being of his family in Burma. (5) Evidence from Ms Jennifer Scott, a Red Cross Humanitarian Observer, which was not contradicted by the prosecution, that (a) the appellant was experiencing escalating distress and anguish due to his experiences in detention; (b) deterioration of judgment, reasoning and awareness is highly common in the immigration detention environment; and (c) the Red Cross was of the view that the appellant's length of detention and experiences in detention had caused significant deterioration in his function.

[34] There is a fair inference that at the time the appellant committed these offences he was suffering impaired judgment, reasoning and awareness and that his deterioration in function was such that it tended to lessen his culpability for the crime of cause harm to a Commonwealth public official. His mental state excused to some degree the commission of that crime. The question for the presiding magistrate was whether the extent of the extenuating circumstances was such that he should exercise his discretion under s 19B(1)(b)(ii) of the *Crimes Act 1914* (Cth)?

[35] Before the presiding magistrate could come to a conclusion that his discretion under s 19B(1)(a) & (b)(iii) of the *Crimes Act 1914* (Cth) had not been sufficiently enlivened in this case, his Honour needed to give reasons

why this was so and he needed to deal with the evidence of Ms Scott. He did not do so.

[36] The sentencing magistrate erred in finding that his discretion was not sufficiently enlivened.

Ground 3 – positive good character

[37] Senior counsel for the appellant submitted that there was a large amount of evidence which established unequivocally that the appellant was a person of positively good character. He stated that the appellant's good character was deserving of significant, if not exceptional, weight in the exercise of the sentencing discretion. In the circumstances, he submitted that the presiding magistrate erred by recording a conviction and imposing a head sentence of three months imprisonment, which was suspended after the appellant had served four days in prison, for the offence of cause harm to a Commonwealth public official.

[38] In my opinion, this ground of appeal is also made out.

[39] The presiding magistrate found that the discretion that he had under s 19B(1)(b)(i) of the *Crimes Act 1914* (Cth) had been enlivened as a result of the appellant's positive good character and antecedents. His Honour acknowledged that there was a wealth of material relating to the appellant's character and antecedents which demonstrated the humanitarian contributions that he made to his family and to the lives of other detainees. His Honour correctly stated that these factors were to be considered in the

context of the objective seriousness of the offending and the sentencing objects of protecting Commonwealth public officials and general deterrence. However, the presiding magistrate does not appear to have given the appellant's good character any weight in determining the sentence to be imposed on the appellant for the crime of cause harm to a Commonwealth public official. His Honour's principal reason for ordering the appellant's early release from the head sentence of three months imprisonment was the additional seven months that the appellant had spent in immigration detention. His Honour stated that if the appellant had not spent a substantial period in immigration detention then he would have ordered that the appellant serve substantially more than four days and he may have even required him to serve the entire three month head sentence. This fails to allow for the fact that the appellant was a first offender of exceptionally good character and that he had good prospects of being rehabilitated.

[40] Further, the less serious the offence the greater the weight which may be given to personal mitigating factors.[3]

Ground 4 – objective seriousness

[41] As I have stated above, the presiding magistrate did not specify any of the factors upon which he based his conclusion that the appellant's crime of cause harm to a Commonwealth public official was objectively serious. His Honour should have done so. The only factor which seems to have weighed upon the presiding magistrate is that the victim was a Commonwealth public

[3] *Greenburg v R* (1993) 68 A Crim R 392 at 400.

official who was acting in the course of his duty. This is the essence of all such offences, regardless of where an offence falls within the range of seriousness of such offences. As senior counsel for the appellant correctly submitted, there is no principle of law which states that an offender who assaults either a police officer or a Commonwealth public official in the execution of their duty is prevented from obtaining a sentencing disposition in accordance with s 19B of the *Crimes Act 1914* (Cth).

[42] The offence of cause serious harm to a Commonwealth public official carries a maximum penalty of imprisonment for 10 years or, by operation of s 4J(3)(b) of the *Crimes Act 1914* (Cth), a fine not exceeding 120 penalty units. This indicates that the Australian Parliament considers that some of the offences that are committed contrary to s 147.1(1) of the *Criminal Code 1995* (Cth) may be very serious offences. However, the offence covers a wide range of conduct.

[43] It is also important to note that an element of the offence that the appellant engaged in conduct which causes harm to a Commonwealth public official is that he intended to cause harm to the victim. This involves a higher level of culpability for the offence than a simple assault.

[44] The facts bearing on the objective seriousness of the crime of engaging in conduct which caused harm to a Commonwealth public official are set out in par [9] to par [13] above. The offence is towards the lower end of the range of such offences. It was committed on the spur of the moment. The

appellant reacted inappropriately to the victim interrupting his sleep by going into his room and checking the bathroom. The appellant's emotions are likely to have still been high following his participation in the rooftop protest. The appellant screamed at the victim to get out of his room twice before he struck the first blow. The assault was not a sustained assault. The force used was of a low level. The victim only suffered minor harm as a result of the appellant's conduct. The appellant did not strike the victim from behind. He did not use a weapon and he did not kick or attempt to kick the victim. At the time of the incident the appellant's judgment and reasoning was impaired to some degree.

[45] However, it must not be overlooked that the check undertaken by Mr Green was a welfare check, the offender was familiar with such checks and he must have been aware that it was a requirement of the detention centre that a welfare check was to be conducted after the rooftop protest in which the appellant had participated before retiring to his room. The purpose of s 147.1(1) of the *Criminal Code 1995* (Cth) is to protect Commonwealth public officials from such attacks.

[46] I note that in the list of comparative sentences that was available to the Court that most of the cases where a sentence of imprisonment of three months or more was imposed for the crime of cause harm to a Commonwealth public official involved the use of some object as a weapon and that a discharge without conviction has been granted on some occasions.

Not that this establishes any kind of a tariff as each case must be looked at in the context of its own particular circumstances.

[47] Subsection 16A(1) of the *Crimes Act 1914* (Cth) requires that a sentencing court must impose a sentence that is of a severity appropriate in all the circumstances of the offence. This provision of the Act establishes the principal of proportionality or 'just deserts'. Andrew von Hirsch, a leading exponent of the just deserts theory has described the principle as follows:[4]

> …severity of punishment should be commensurate with the seriousness of the wrongs. Only grave wrongs merit severe penalties; minor misdeeds deserve lenient punishments. Disproportionate penalties are undeserved – severe sanctions for minor wrongs and vice versa. This principle has variously been called a principle of 'proportionality' or 'just deserts'; we prefer to call it commensurate deserts, a phrase that better suggests the concepts involved.

[48] In *Hoare*[5] the High Court stated:

> … a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which is justified as proportionate to the gravity of the crime considered in the light of its objective circumstances.

[49] The principle of proportionality means that it is impermissible for punishment to be extended above the gravity of the offence being punished in order to enhance specific or general deterrence. This is so irrespective of

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4 Von Hirsch A, *Doing Justice: The Choice of Punishments* (New York, Hill and Wang, 1976) 66.
5 (1989) 167 CLR 348 at 354.

whether those objectives would better protect the community, including Commonwealth officials, against further crimes.[6]

[50] In the circumstances, I am satisfied that this ground of appeal is made out. A sentence of three months imprisonment is not proportional to the objective seriousness of the offence that was committed in this case. In my opinion, the punishment was extended above the gravity of the offence to enhance the object of general deterrence and the protection of Commonwealth public officials.

Ground 5 – the sentencing magistrate erred by merely taking into account seven months of the appellant's two years and seven months detention.

[51] It was submitted by senior counsel for the appellant that the presiding magistrate erred by only taking into account seven months of the two years and six months that the appellant had been in detention as a mitigating circumstance. In my opinion this ground of appeal is not sustained.

[52] In the Court of Summary Jurisdiction, senior counsel for the appellant made the following submissions which were poorly constructed and very difficult to follow.

> He arrived in Australia on 28 December 2009 and he has been in custody since that date. He went through the proper procedures. He applied for a protection visa as a genuine refugee pursuant to the United Nations guidelines. UNHCR in Malaysia had, in fact, processed Mr Habib on a similar application and held him then to be a genuine refugee. However, this held no sway with the Australian processing system. Malaysia, unlike Australia is not a signatory to

[6] See more generally, Fox and Freiberg, *Sentencing State and Federal Law in Victoria* (Oxford University Press 2nd ed. 1999) at p 219 to 221.

the Geneva protocol. In May 2010, approximately six months after arriving in this country, our Department of Immigration and Citizenship, having assessed him under the international criteria, held that he was a genuine refugee. That was over two years ago.

He then had to be processed by ASIO. This process took no less than 19 months, leading to a decision in December 2011, that he was considered by the authorities not to be a security risk.

There is still one last consideration remaining in the Department's process which is known as the character test. That is pursuant to s 501 of the *Migration Act* (Cth), which sets out the criteria which are to be addressed by the Minister. Pursuant to that provision, specifically direction No. 41 states that if there are in existence any criminal charges which have not been finalised and are pending, the Minister for Immigration is prevented from administering and conducting that test.

Hence, Mr Habib has remained in limbo in relation to these matters in the [Court of Summary Jurisdiction]. This means that, but for these charges pending which were laid, the first one in August three days after the alleged assault, and the second one in December two months after the property damage, his application [for a visa] would now be complete. **He has actually been in custody since receiving the green light from ASIO on 2 December last year which is a period of seven months** [emphasis added]. Now that **cannot** [*emphasis added*] be taken into account because it is still immigration detention. The process has not been completed by virtue of the impending character test which can be done once these matters are finalised.

[The presiding magistrate then asked: "So how do I deal with it if it cannot be taken into account?"]

This was a fisheries case [*R v Zainudin*[7]] and it involved charges under the *Fisheries Act* but it also involved concomitant detention under the *Migration Act*. If I can just take you to the relevant observations of Mildren J, who conceded, in his own words, that reluctantly he could not strictly take into account the period under which the prisoners were kept pursuant to the *Migration Act* (Cth). In head note number 5 on page 150, [his Honour] says, "Nevertheless

[7] (2005) 190 FLR 149.

justice required that the time already spent in detention be taken into account." Which is further touched on in par [46] which is to be found at page 156.

Par [42][8], and I am happy to do as my friend invites me to do, and I think it is a sensible course, par [42] points out the rationale if you like, the reason why there is that distinction, of which there is no argument your Honour. This is not an issue but it does explain it for your Honour's purposes. What [Mildren J] goes onto say at par [47] is, "The conclusion I reach, reluctantly, is that the power to back date a sentence of imprisonment in this case cannot be used in respect of the offence against s 149.1, but nevertheless considerations of justice require that I take into account the time spent in detention."

[The presiding magistrate then asked senior counsel for the appellant how detention was to be taken into account, if it did not result in any back dating. His Honour specifically asked, "Does it mean that when you come to consider the substantive disposition you can take into account the time spent in custody?"]

It has no arithmetical relevance, [Mildren J] does not actually articulate, I do not think it is a quantum leap, forgive me. Perhaps par [53] gets as close as it can to articulating it. [His Honour] says, "In relation to count 3, the defendant is convicted. I consider that no other sentence than a sentence of imprisonment is appropriate. Taking into account that the prisoner has been held in detention for 11 weeks, I impose a sentence of imprisonment of four months back dated to 29 November 2004."

Now what I was going to say is when [his Honour] says that, through the considerations of justice it has to be taken into account, it is hardly a quantum leap to deduce and conclude from that, that [his Honour] would be reducing the sentence because of the considerations of justice. [This] presumably goes to the fact that the prisoner at the dock has not been out on the town, at the casino every night enjoying the life of Riley. He has actually been in detention.

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[8] Par [42] states: "There can be no doubt that the defendant was in custody when he was held in detention. Now whether the detention was under the Fisheries Act or the Migration Act, he was not free to go and he would have committed an offence if he had escaped. This kind of detention is different from the kind of detention used to hold illegal immigrants because they have the right under s 198 of the Migration Act to ask the Minister to remove them from Australia and then they must be removed as soon as reasonably practicable. Section 198 does not apply to prisoners held under and detained under s 250."

> [The presiding magistrate then stated: "I know. Well that suggests to me that if it was not for the period in detention, his Honour might have imposed a sentence greater than four months. So I think that is maybe what he has done. It is not overt."]
>
> No, he has not actually, but, with respect, I do not think he needs to. I think that is what he has done. When you take the considerations of justice, when you have got the facts before you, **I have told you the story of Mr Habib and how long he has been in** and I am just saying that your Honour should take that into account in the overall scheme of things [*emphasis added*].

[53] Senior counsel for the appellant seems to have commenced his submission in the Court of Summary Jurisdiction with the proposition that, by analogy with the decision of *R v Zainudin*,[9] the appellant's period of detention post December 2011, when he received the security clearance from the Australian Security Intelligence Organisation, is equivalent to a period of custody, and should be taken into account by way of mitigation when a court is exercising the sentencing discretion. However, because senior counsel for the appellant's language was so loose, it is unclear whether senior counsel extended this submission to the whole period of the appellant's detention. In the circumstances, it was fairly open for the presiding magistrate to conclude that senior counsel for the appellant submitted that the period of seven months detention was the period of immigration detention that needed to be weighed by him.

[54] In my opinion, senior counsel for the appellant's starting position is in accordance with the principles *R v Zainudin.*[10] It is arguable that after

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[9] (2005) 190 FLR 149.
[10] (2005) 190 FLR 149.

December 2011 the appellant remained in immigration detention because the criminal proceedings against him had not been resolved. Such detention is analogous to a period in custody. However, the balance of the appellant's detention is not and therefore cannot be taken into account. The balance of the appellant's detention is not equivalent to the detention that Mr Zainudin was subject to for the reasons given by Mildren J. The presiding magistrate did not fall into error in concluding that the period of seven months detention needs to be weighed in the sentencing equation.

Ground 1 – manifestly excessive

[55] It was submitted on behalf of the appellant that the sentence of recording a conviction and imposing a partly suspended sentence of three months imprisonment for the offence of engaging in conduct which caused harm to a Commonwealth public official was in all the circumstances of the case, including the particulars of both crime and the subjective features of the appellant, manifestly excessive.

[56] In my opinion, this ground of appeal is made out. The sentence of three months imprisonment was clearly and obviously and not just arguably excessive.[11]

Section 501 of the Migration Act 1958 (Cth)

[57] During the course of these appeals and during the course of proceedings in the Court of Summary Jurisdiction some reference was made by senior

[11] *R v Woods* (2009) 24 NTLR 77.

counsel for the appellant to s 501 of the *Migration Act 1958* (Cth). Subsection 501(1) of the *Migration Act 1958* (Cth) states that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test. So far as is relevant to these appeals, under s 501(6)(aa) and (c) of the *Migration Act 1958* (Cth) a person does not pass the character test if: the person has been convicted of an offence that was committed while the person was in immigration detention; or having regard to either or both of the following: (i) the person's past and present criminal conduct; (ii) the person's past and present general conduct the person is not of good character.

[58] The power granted to the Minister under s 501 of the *Migration Act 1958* (Cth) is completely discretionary. The Minister is not under a duty to exercise the power to refuse the grant of a visa if one of the relevant factors specified in s 510(6) of the *Migration Act 1958* (Cth) is established. Nonetheless, if the appellant's convictions for these crimes are not set aside there is a greater risk that the Minister may refuse to grant the appellant a visa because he has failed the character test.

[59] The authorities as to what consideration, if any, a sentencing court should give to such provisions vary between Australian jurisdictions. In New South Wales,[12] Queensland,[13] Western Australia[14] and the Northern Territory[15] the

[12] *R v Jap* (unreported, NSW Court of Criminal Appeal, 20 July 1998); *R v Latumetan and Murwanto* [2003] NSWCCA 70; *R v Pham* [2005] NSWCCA 94; cf *R v Kwon* [2004] NSWCCA 456; and *R v David Guan Liang Qin* [2008] NSWCCA 189 where it was acknowledged that there was a dispute about the principle.

[13] *R v MAO* (2006) 163 A Crim R 63; *R v S* [2003] 1 Qd R 176; and *R v Bob* [2003] QCA 129.

approach seems to be that it is impermissible for a sentencing judge to reduce an otherwise appropriate sentence in order to avoid the risk of an administrative authority making a decision which is adverse to the person. In those jurisdictions, the risk of the administrative authority making an adverse decision to the person has been held not to be a relevant consideration in the sentencing process. However, in Victoria[16] the prospect of the administrative authority making an adverse decision to the person is a factor which may be relevant to the impact that a sentence of imprisonment will have on an offender, both during the currency of their incarceration and upon an offender's release, and therefore, subject to the state of the evidence that such an adverse decision is likely, it should be taken into account when sentencing. In *Hat v R*[17] Redlich JA further stated, "Also, if the effect of receiving a sentence of imprisonment is that an offender will lose the opportunity of settling permanently in Australia, this may be taken into account as a form of additional punishment. But a sentencing judge is not required to speculate; there must be evidence that enables a sensible quantification of the risk of deportation will in fact occur, and proof that deportation would in fact be a hardship for that particular offender."

[60] In *R v S*, on the other hand, Macpherson JA stated:[18]

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[14] *Dauphin v The Queen* [2002] WASCA 104.
[15] *R v M.A.H* (2005) NTLR 150 at [41] and [64].
[16] *Darcie v R* [2012] VSCA 11; *HAT v R* (2011) 256 FLR 201; *Guden v R* (2010) 28 VR 288; *R v Griffith* (unreported, Victorian Court of Appeal, 29 April 1998).
[17] (2011) 256 FLR 201 at [126].
[18] [2003] 1 Qd R 76 at par [5].

> To the extent, therefore, that the application to re-open made on 19 July 2001 was based on the ground that, in imposing sentence on 9 April 2001, the learned judge had wrongly failed or refused to take into account the impact that that sentence would, if unaltered, have on the appellant's prospects of retaining his visa, it was in my opinion misconceived. Re-opening and reducing the sentence imposed on 9 April 2001 would not have detracted from the Minister's power to exercise his discretion under s 501(2) of the *Migration Act*. But, in any event, I consider that the process of sentencing should not seek to anticipate the action that some other authority or tribunal, lawfully acting within the limits of a proper discretion, may take in future, by so adjusting the sentence as to defeat, avoid or circumvent that result. See, although in a different sentencing context, *R v Booth* [2001] 1 Qd R 393, 400, where it was said to be wrong to attempt to circumvent a specific legislative direction by deliberately imposing a lesser sentence in order to avert it. More specifically, in *R v Chi Sun Tsui* (1985) 1 N.S.W.L.R. 308, 311, Street C.J. said that "the prospect of deportation is not a relevant matter for consideration by a sentencing judge in that it is the product of an entirely separate legislative policy area of the regulation of society". Those remarks of the learned Chief Justice were cited without apparent disapproval in *R v Shrestha* (1991) 173 C.L.R. 48, 58.

[61] Further, in *R v M.A.H*[19] Mildren J (with whom the other members of the Court agreed) stated that the possibility of an adverse administrative decision, such as deportation, is an entirely irrelevant matter for sentencing purposes. There is some force in the Victorian authorities in a case such as this where a refusal to grant the appellant a visa may result in him remaining in immigration detention indefinitely. However, courts in the Northern Territory are bound by the decision of the Court of Criminal Appeal in *R v M.A.H* and they must disregard the possibility that a person such as the appellant may be refused a visa if they are convicted of a crime committed while they are in immigration detention. Further, even if the Victorian

[19] (2005) 16 NTLR 150 at [41].

authorities were to be applied, there is no evidence in this case about the actual risk of the offender being refused a visa by the Minister.

Conclusion

[62] The appeal against the sentence imposed for the crime of cause damage to property belonging to the Commonwealth is refused. The appeal against the sentence imposed for the crime of cause harm to a Commonwealth public official is allowed. The sentence of three months imprisonment and the conviction of the appellant of that crime are set aside.

[63] The appellant is re-sentenced for the crime of cause harm to a Commonwealth public official. In my opinion, this is an appropriate case for the Court to exercise the discretion under s 19B of the *Crimes Act 1914* (Cth). I am satisfied that the charge of cause harm to a Commonwealth public official is proved, but I am of the opinion, having regard to the character of the appellant and the extent to which the offence was committed under extenuating circumstances, that it is inexpedient to inflict any punishment on the appellant. The appellant is discharged without the Court proceeding to conviction in respect of the charge of cause harm to a Commonwealth public official upon him giving security by recognizance in the sum of $1000 to be of good behaviour for 12 months from today.

[64] The crime of cause harm to a Commonwealth public official committed by the appellant was totally out of character. It was committed under extenuating circumstances, namely, his debilitated mental state, and those

circumstances do have a tendency to significantly reduce his culpability for the crime. The appellant has excellent prospects of being rehabilitated and the victim only suffered minor harm. This is not a case in which the object of general deterrence should be given particular weight.

[65] In exercising my sentencing discretion, I have noted that a factor which has a tendency to reduce the extent of any leniency that may be accorded to the appellant is his intransigence and apparent lack of remorse which is demonstrated by the fact that he pleaded not guilty to the offence in circumstances where the prosecution case was a strong case and the victim had to give evidence. However, this factor is outweighed by his previously positively good character and the extenuating circumstances in which he committed the offence.
