PARTIES:	PILKINGTON, Justin Lorenze
	v
	MALEY, Kevin Gerard
TITLE OF COURT:	Supreme Court (NT)
JURISDICTION:	Appeal from Court of Summary Jurisdiction exercising Territory Jurisdiction
FILE NOS:	No. JA 19 of 1995
DELIVERED:	Darwin 30 August 1995
HEARING DATES:	29 August 1995
JUDGMENT OF:	Angel J

CATCHWORDS:

Justices appeal - Sentencing principles - General and specific deterrence - Whether manifestly excessive - Imprisonment in the case of first offenders - Weight attached to Magistrates' experience in dealing with street offenders Relevant considerations

REPRESENTATION:

Counsel:

Appellant: G Dooley
Respondent: M Carey

Solicitors:

Appellant: NAALAS
Respondent: DPP

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 19/95

IN THE MATTER of the Justices Act

AND IN THE MATTER of an appeal against a sentence imposed by the Court of Summary Jurisdiction at Darwin

BETWEEN:

JUSTIN LORENZE PILKINGTON
Appellant

AND:

KEVIN GERARD MALEY
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 30 August 1995)

This is a justices appeal against sentence. On 17 March 1995 the appellant pleaded guilty before the Darwin Court of Summary Jurisdiction to a charge of assault contrary to s188 of the Criminal Code, a charge of resisting police contrary to s158 of the Police Administration Act, and a charge of using objectionable words, contrary to s53(7)(a) of the Summary Offences Act.

A conviction was recorded in respect of each charge and the appellant was sentenced to one month's imprisonment for the assault and a $300 fine was imposed with respect to the resisting arrest charge, and a $500 fine imposed for the using objectionable words charge.

The learned Chief Magistrate who constituted the Court of Summary Jurisdiction directed that the term of imprisonment be suspended forthwith upon the appellant entering a recognisance in the sum of $500 to be of good behaviour for a period of 12 months.

The Notice of Appeal contained the following six grounds of appeal:

> "1. That the learned Magistrate erred in that he gave insufficient weight to the appellant's youth;
>
> 2. That the learned Magistrate erred in that he have excessive weight to the principles of general and specific deterrence;
>
> 3. That the learned Magistrate erred by failing to give effect to the prospects of rehabilitation of the appellant;
>
> 4. That the learned Magistrate erred by taking into account irrelevant considerations pertaining to the agreed facts of the matter.
>
> 5. That the learned Magistrate imposed fines that were excessive in terms of the appellant's capacity to pay.
>
> 6. That the sentences imposed were manifestly excessive."

Grounds 3 and 5 were abandoned at the hearing, so there remains for determination whether the appellant has made good his attack on the sentence with respect to the assault charge.

The appellant is a 17 year old first offender. He was not a juvenile at the time of the commission of these offences, and so special considerations which apply to juveniles do not apply to him. At 17 he is not, according to the Criminal Code (NT), an adult. Muirhead ACJ said of a 17 year old offender in *Yovanovic v Pryce* (1985) 33 NTR 24 at 27-28:

> "There is wealth of authority supportive of the view that the courts should be slow to imprison young offenders, that the courts should keep rehabilitation much in mind. Few of those experienced with the effects of imprisonment and the sentencing of young offenders can feel much satisfaction that a sentence of imprisonment is a constructive step qua the offender himself. But there is a very real danger that repeated exercises in leniency bring the law into contempt, not only in the eyes of the offender, but in the eyes of the community. His Worship made clear reference to his responsibilities to the local community in his remarks on sentence. Unfortunately when previous efforts to rehabilitate by conditional release, community work orders and the like have failed, imprisonment remains the only option and there is always the hope that such punishment may deflect the repetitive offender from the path he has taken - especially when other efforts have failed."

The Crown facts before the learned Chief Stipendiary Magistrate were stated by the prosecutor to be as follows:

> "MS MARTIN: Your Worship, on the evening of Saturday 22 October 1994 the defendant in company with a number of other persons had been consuming alcohol with other friends. At about 10.30pm the defendant and friends went to the Big Country Saloon in Cavenagh Street in Darwin

City. The defendant and friends left the Big Country Saloon and drove to the Darwin City car park in Mott Court in Darwin, adjacent to the Darwin Cinema Complex.

At about 12.10am on 23 October, the defendant and friends were sitting in a group at the end of Mott Court, the group were yelling out and swearing and generally being rowdy. Two persons, a Phillip Douglas Primmer and his girlfriend, were walking down Mott Court towards their vehicle in the car park when a person in the group the defendant was sitting with yelled out, 'Budju in the white jeans'.

HIS WORSHIP: I beg your pardon?

MS MARTIN: Yelled out, 'Budju in the white jeans', it's a slang term.

HIS WORSHIP: Yes.

MS MARTIN: The victim walked towards the group and asked what had been said. A number of persons in the group then told the victim to, 'Fuck off.' The defendant, along with two other persons, got up and approached the victim. The defendant approached the victim shaping up as he went and said, 'Do you want to go, do you want go?'

The defendant then pushed the victim in the chest with both hands causing him to take a step backwards. The defendant was then punched by the victim and fell to the ground. The victim was then set upon by the group and ended up on the ground where a number of persons punched and kicked the victim. The victim then got back up on to his feet and tried to leave the area, the defendant followed and said, 'Do you want some more?'

The police were advised and attended the area in company with the victim. The defendant was identified to police. The defendant was spoken to by police and the defendant told the police to, 'Fuck off', several times. The police attempted to take hold of the defendant who broke away. The defendant was wrestled to the ground and handcuffed and placed into the rear of the police vehicle. Inside the vehicle the defendant yelled out, 'I hate pigs, you fucking white English shit (inaudible) cunts, I will kill you all.'

The defendant was then conveyed to Berrimah Police Centre and placed in the charge room. He had the handcuffs removed and was supplied with a drink of water. The defendant was agitated whilst at the police centre, he again swore and was spitting on the floor and bench of

the room. He was then removed to another charge room where he was searched.

At the time of the offence, Your Worship, the defendant did not have any permission to push the victim. The victim suffered a sprain to the right wrist, lacerations above his right eye, bruising to the left thigh, the right shoulder and lower back and the victim also had lumps on his head, face and chin. A small piece of timber was also removed from his scalp.

HIS WORSHIP: A small piece of?

MS MARTIN: Timber.

HIS WORSHIP: Timber.

MS MARTIN: Yes, sir.

MR DOOLEY: Perhaps a splinter, Your Worship.

HIS WORSHIP: Sounds like it, may be bigger than that.

MS MARTIN: At the time of the offence, Your Worship, Mott Court car park in Mitchell Street was a public place and open to and used by the public, there were approximately 20 persons in the area at the time of the offence. No admissions were made in the record of interview.

...

MS MARTIN: Yes, sir. The victim's statement indicates - well, he states that he in fact punched the defendant back as he feared for himself and his girlfriend, he could see what was coming."

The appellant's counsel submitted to the learned Magistrate that in respect of the assault charge his client should simply be convicted and released on a bond. The learned Magistrate in the exercise of his discretion declined to do so. In the course of his remarks, which were delivered ex tempore, he said:

"Mr Pilkington, you are a young man who's on this night done the sort of thing that happens far too often in

Darwin, it's the sort of thing that people are worried about and are concerned about and it's the sort of thing which is regularly coming before the courts. The sort of behaviour which is vicious, nasty, violent and almost invariably arises when young men, often in groups, are drunk and pick on somebody for no reason, without justification, for the purposes of either frightening them, terrorising them, or simply having fun at their expense.

None of those reasons of course justifies the behaviour you engaged in. This incident involved the initiative being taken by your group and then directly by yourself when you approached the victim, you invited him to fight, you pushed him in the chest, that is the first physical aggressive action. On the facts that I've heard, which are admitted, there was no justification for that push whatsoever. It did not follow any provocation and it came purely for your own satisfaction. It was what's called gratuitous, in other words it had no reason.

He then punched you to the face and you went to the ground and it's common ground then that members of your group, but that does not necessarily include you, then set upon him and the finding that I make is that he was then of course, and it's common ground, that he was punched and kicked. I do not find however that you were part of the group punching and kicking him, but the incident which led him to be on the ground being punched and kicked would not have occurred, it seems to me quite clearly, unless in the first place your group had baited him and his girlfriend and you had hit him - or pushed him to the chest I should say.

That is the assault which of course is the subject of charge one. That's what you did to him. You made it worse after he got up off the ground by inviting him to participate in further fighting with the question, 'Do you want some more?' Further provocative, aggressive, unjustified, unnecessary behaviour on our[sic] part and no doubt behaviour which put him and probably his girlfriend to some extent in fear, although of course this young man, this victim did in fact to an extent stick up for himself and indeed retaliated.
He ended up with some physical injury, a sprained wrist, some lacerations, some bruises, some bumps and that wouldn't surprise anybody in the light of what happened to him. Not serious injuries, but nonetheless they were injuries.

You then made matters far worse by not only resisting the police, but using language directed at them which was utterly and totally without excuse and which was

disgusting and that's been read in court and it's language which - even when police are doing their job on the streets they expect to hear language, but the language you used on that night is certainly at the more extreme end of the scale and it's said in court every day that the police officers who are simply doing their job are not expected to, and do not have to put up with language of that nature from young drunken louts.

Now that's what you were on this night. This kind of behaviour is frequently occurring in Darwin at night and it is something that, as I've said earlier, the community expects the courts to take seriously, the courts do take seriously and the courts are duty bound to send a message to people that if they behave in this fashion there will be serious consequences. There will be heavy penalties, there will be severe penalties, it will not be taken lightly, it is no joke. All of those messages I'm sure you would understand are the messages that the courts are duty bound to send out because of the frequency of this kind of gratuitous, nasty, drunken violence on the streets at night in Darwin. This is a classic case.

Fortunately this victim was not particularly badly hurt. Now that's all on the negative side, Mr Pilkington, there are some positive matters which are in your favour today and I have of course considered those and taken those into account. You have pleaded guilty, you get credit for that. You are young, you have a very favourable reference from Mr Stephen Fend(?) and I accept what he says. It appears that this was probably something that has shocked him, surprised him, it may well have shocked and surprised your mother, your parents and there is no background of you behaving in this fashion.

The fact that you are young and without prior convictions means that the court has to look very carefully at any sentence which would be likely to lead you into further trouble and look at a sentence which would not expose you to the sort of influences which can occur when you are in prison. The court has to look at the need for sentences which will change your behaviour, deter you and deter others and make the message clear that if they behave this way they are looking at severe sentences, that is sentences of imprisonment, that's what the court has to look at, that's the message. It has to be loud, it has to be clear and it has to be unambiguous and that's the message that I'm indicting now.

It seems to me that your behaviour on this night fits into the category of behaviour which the court has to send that precise message about and despite the fact that you are young and I've had careful regard to the fact

> that you are, and that a sentence of imprisonment should be considered to be a sentence of last resort, certainly for people of your age the nature of the behaviour and the circumstances of it ultimately warrant and indeed call for a sentence which has a deterrent message that is a message which is designed try[sic] to deter you and others from doing the same thing in the future.
>
> It does seem to me then that taking all of the considerations which I'm bound to take into account and weighing them up, that that message must be sent in respect of these particular offences as committed by this defendant and that there must be, in respect of the assault charge, for the reasons that I've referred to, a sentence of imprisonment."

Because of subjective factors, principally the appellant's age, the learned Chief Magistrate fully suspended the gaol term.

The principal submission was that the learned Magistrate erred in placing too much emphasis on the need for general deterrence, that the assault was at the lower end of the scale and was inappropriately used as a vehicle for general deterrence, and that the sentence was disproportionate to the offence. It was submitted that the assault was not pre-meditated, that the appellant did not lay in wait to assault the victim, that there were no multiple punches and kicks - often a feature of street assaults - and that it was not an aggravated assault, eg with a weapon.

It was submitted that it was the victim who initially approached the appellant and that the appellant took no part in the subsequent setting upon the victim by the appellant's

cronies when multiple punches and kicks were delivered. It was also put that the learned Magistrate wrongly considered the assault was aggravated by the appellant's language directed at the police, the subject matter of the third charge.

I do not think there is any substance in these submissions. The appellant's racist remarks demonstrated an attitude and threw light (if that is the right word) on the character of the person being sentenced. The assault did not merely consist of one push. Considered in its full circumstances, the assault could not be said to be of a minor nature as was submitted by the appellant's counsel. The appellant's actions and words on the night in question manifested aggression. Such physical violence as was meted out by the appellant to the victim was unprovoked. It was done at night and in company to a young person lawfully going about his business. The victim struck the appellant in self-defence and out of fear for himself and his girlfriend. The appellant after his temporary demobilisation and after the victim had been beaten by his cronies, spoiled for further violence. As King CJ observed in his oft cited judgment *Yardley and Betts* (1979) 22 SASR 188 at 112: "Deterrence poses particular significance in cases of unprovoked violence".

Of course, sentencing is always a balancing process and in this case, the experienced learned Chief Magistrate considered that general deterrence was a sufficiently important factor to warrant the sentence he imposed. He carefully took account of the appellant's age, the fact that he was a first offender and his prior good character. In order to succeed the appellant really must demonstrate that the learned Chief Magistrate passed a sentence that was disproportionate to the offence, ie that his concern for general deterrence led to a sentence that was out of proportion to the offence. It is true that this assault by the appellant did not cause any injury - the subsequent attack by the appellant's cronies did that - nor was this assault pre-meditated. But it was not, as was submitted, a mere man to man altercation. It was a cowardly example of bullying and physical interference at night, backed by the presence of the appellant's belligerent cronies. It was, if I may say so, a very proper exercise of the learned Chief Magistrate's discretion to consider deterrence, both specific and general, as an important sentencing factor.

Considered in all its circumstances, the assault was such that I am unable to say that it has been demonstrated that the sentence imposed was manifestly excessive or that the learned Chief Magistrate erred in the exercise of his discretion. A sentence of imprisonment for this assault by a 17 year old first offender is not ex facie indicative of error or

departure from principle. As Bray CJ said in *Birch v Fitzgerald* (1975) 11 SASR 114 at 116-117, in a passage often cited and always with approval:

> "Nevertheless there are offences in which, as it seems to me, the deterrent purpose of punishment must take priority. When people act under the influence of liquor, passion, anger or the like so as to constitute themselves a physical danger or potential physical danger to other citizens it may well be that a sentence of imprisonment will be appropriate, even in the case of a first offender of good character, in order to impress on the community at large that such behaviour will not be tolerated."

In *Jambajinba v Seears* (1984) 2 NTJ 439, the appellant appealed against a sentence of 14 days imprisonment for the illegal use of a motor vehicle on the ground that the sentence was manifestly excessive. He was a 20 year old first offender. The Alice Springs Magistrate stressed the need for general deterrence, the offence being prevalent. Forster CJ said at 442:

> "There is a conflict here between two principles concerning appeals against sentence. On the one hand it is said that appeal courts should not lightly interfere with the sentencing discretion of the magistrate on the spot who can be taken to know the prevalence of the offence and local conditions generally. On the other hand it is said, and I have said it myself, that in ordinary circumstances young first offenders should not be imprisoned or, if a custodial sentence is appropriate, its immediate operation should be suspended."

He dismissed the appeal saying:

> "There are aggravating factors such as the breaking of the window and the minor collision and the fact that the appellant was considerably under the influence of liquor and probably incapable of driving with any degree of safety. There must be added to these circumstances the

> fact that an experienced magistrate is apparently firmly of the view that prison sentences, albeit short, are necessary as a general deterrent to the commission of a most prevalent offence."

So here: the learned chief Magistrate was firmly of the view that a prison sentence was necessary as a general deterrent to the commission of a prevalent offence.

The learned Chief Magistrate here was at pains to tell the appellant and to impress on the community at large that behaviour such as that of the appellant will not be tolerated by the courts and he considered the sentence he arrived at was the appropriate means to do so. It can not be said it was outside the bounds of his discretion to so conclude.

It must never be forgotten by would-be appellants and their legal advisers that the views of the Magistrates, ie those whose daily, or almost daily, task is to deal with the sentencing of street offenders, must and do command respect with this Court. The Magistrates are in a better position than this Court on appeal to assess a proper sentence, error or breach of principle apart, see *Griffiths* (1976-1977) 137 CLR 293 at 310 per Barwick CJ.

The appeal is dismissed.
