kea93015J

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

No. SC 28 of 1993

IN THE MATTER of the Justices Act
AND IN THE MATTER of an appeal from a decision of the Court of Summary Jurisdiction at Elliott

BETWEEN:

AARON JUNGARI
Appellant

AND:

SAMUEL MARK ROBINSON
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 28 July 1993)

This is an appeal against the severity of 2 sentences of immediate imprisonment imposed by the Court of Summary Jurisdiction at Elliott on 19 May 1993.

The charges

On 12 March 1993 the appellant pleaded guilty to 3 charges. First, that he had assaulted a member of the Police Force (the respondent) in the execution of his duty, contrary to s158 of the Police Administration Act; he was

sentenced to 2 months imprisonment. Second, that he had hindered the member in the execution of his duty, contrary to s159 of the Act; he was sentenced to 1 month imprisonment, to be served concurrently. Third, that he had behaved in a disorderly manner; the fine of $200 imposed on him for this offence was not appealed.

The background

On the night of 12 March 1993 there was a disco in the basketball court at North Camp in Elliott. The appellant earlier that evening had been entrusted with the safe custody of Mr Lawrence Bill's carton of beer. Someone stole the beer. Mr Bill thought that the thief was a Mr Brian; they argued later at the disco, and fought. The appellant told the Court of Summary Jurisdiction that he was "trying to stop" that fight, when the Police arrived at about 11pm. The appellant and some 40-50 others were then in fact behaving in a disorderly fashion - waving their fists and yelling insults; this gave rise to the third charge.

Mr Lawrence Bill, a big strong man, was very agitated when the Police arrived. They tried to restrain and arrest him. The appellant hindered the Police by standing between them and Mr Bill; this gave rise to the charge under s159 of the Act.

At a later stage Mr Bill was on the ground, struggling with Senior Constable Robinson who was then on his knees attempting to handcuff him. At that time the appellant struck Senior Constable Robinson from behind,

punching him once in the back of his head. This led to the charge under s158 of the Act. The police at this time were attacked by a number of persons and temporarily left the area.

The case in the Court of Summary Jurisdiction

The appellant, represented by Mr Kilvington of counsel, pleaded guilty to all 3 charges. He gave evidence in support of his plea in mitigation, to the effect that he was not aware at the time that the person at whom he aimed his punch was a police officer - "it was too dark - - - I didn't see [the Senior Constable]". He said that he thought he was punching Mr Brian who was "grabbing Lawrence by the ground". He also said "I was too drunk, too". His counsel submitted that this misidentification was a mitigating circumstance in that the need for a deterrent element in sentencing, stemming from the concern of the Courts to protect outnumbered police trying to carry out their duty in rural communities, would therefore not be so prominent in this case, because there was no intent to strike a police officer. Mr Kilvington conceded that in the circumstances a reasonable person would have realised that the man on his knees at whom the punch was aimed was a police officer; however, the question was what the appellant had realized, not what a reasonable person would have realized, and his evidence that he had honestly (though unreasonably) misidentified his victim should be accepted.

I observe in passing that it was sufficient for the respondent to prove intent in relation to the assault

only, and not in relation to the other elements of the s158 offence; see the majority opinion in *R v Reynhoudt* (1962) 107 CLR 381, an authority binding on me. However, the appellant's misidentification, if honest and reasonable as required by s32 of the Criminal Code, would have been an excuse; see *Towse v Bradley* (1985) 73 FLR 341 at 343.

Mr Kilvington appeared to submit that on the factual basis that the appellant did not intend to assault a police officer but intended to assault someone else, he should not receive any form of custodial sentence. I am unable to see why that should necessarily be so.

In the course of Mr Kilvington's submissions in mitigation, his Worship said at transcript pp11-12:-

> "Look at it logically. You've got Jason Bill [who] sees his brother in trouble. You've got Lawrence Bill [who] decides that this Andrew [Brian] had stolen a carton of beer. Now, there's some justification for Jason; there's justification for Lawrence. You've got a third party [that is, the appellant] who strikes a police officer a cowardly blow from the back, right?"

After hearing evidence on the point of misidentification, his Worship did not accept the appellant's account, and clearly held that the appellant had aimed his punch at a person he then knew to be a police officer. The first 3 grounds in the Notice of Appeal attacked this finding, but were abandoned before me.

At transcript p14, his Worship expressed his conclusions:-

> "- - - Well, Mr Jungari, I've listened to what has been said to me. I don't believe you. I believe the blow was aimed at the senior constable. I've listened to what the senior constable said to me

> under oath. He was over Mr Bill at the time, in overalls clearly marked as police overalls. Whilst I appreciate that you were connected, in as much as you were supposed to be looking after the carton, it was a cowardly act that you did. From behind you struck somebody; nothing to be proud of about that, - - -
>
> > On the first count you are convicted and sentenced to 2 months imprisonment. On the second count you are convicted and you will pay a fine of $200 plus $20 levy, in default 5 days imprisonment. <u>On the third count of hinder</u> you are convicted and sentenced to 1 months' imprisonment concurrent." (emphasis mine)

<u>The case on appeal</u>

I note at the outset that the Notice of Appeal wrongly transposed the penalties respectively imposed for the offences of hindering the police and disorderly behaviour; the appeal was argued on that erroneous basis. The error is clear when the Magistrate's words emphasised above are noted.

The only ground of appeal ultimately relied on was that the sentence of 2 months imprisonment -

> " - - was manifestly excessive having regard to the sentence imposed on other offenders involved in the same incident, namely Lawrence Bill and Jason Bill."

I turn to examine this ground.

Mr Lawrence Bill received a suspended sentence of 2 months imprisonment for assaulting a Police officer in the execution fo his duty. The assault took the form of pushing the respondent's chest. He was aged 18 at the time, drunk, and angry with Mr Brian for the reason earlier mentioned. He was substantially deaf, and had no previous convictions;

16 months before, charges of fighting in a public place and criminal damage had been found proved against him, but the Court did not proceed to record convictions. His brother, Mr Jason Bill, was upset at the time because his brother Lawrence was being arrested. In the melee, and after the respondent stood up after trying to handcuff his brother, he had pushed the respondent in the chest, using his open hands, causing him to stagger backwards; Jason Bill then ran away. He was aged 18 years, and had priors 2 years before for resisting arrest and fighting, for which he had been fined. On his plea of guilty to a charge of assault under s158 of the Act he also received a 2 months suspended sentence.

Mr Kilvington submitted that of the 3, Mr Lawrence Bill's part in the fracas was the most culpable, on the basis that it involved a strenuous scuffle with the police and considerable violence. I note that the facts in relation to Mr Lawrence Bill, as placed before his Worship, were the push in the chest, and a wrestle on the ground "due to his attempting to continue to get away from the Police and also attempting to punch the Police" (transcript, p3). Mr Kilvington submitted that it was "absolutely incomprehensible" that the appellant could be sentenced to immediate imprisonment while Mr Lawrence Bill's sentence was suspended. He submitted that Jason Bill and the appellant were more or less equally culpable - that is, Jason Bill's strong push in the chest was about as serious as the appellant's punch to the back of the head. There was no

suggestion that the punch had caused any injury to the senior constable.

Mr Kilvington noted that his Worship had taken a different view: he clearly considered that the appellant was the most culpable of the 3, for the reasons he had stated (see p4). Mr Kilvington submitted that those reasons indicated a wrong approach to sentencing: the question to be addressed was not whether it was more understandable that a particular person had become involved in the melee, but what was the culpability of his actions. I consider that in the circumstances the 2 are intertwined; culpability is linked to "justification".

Mr Kilvington conceded that the sentence of 2 months imprisonment was not manifestly excessive when considered by itself. The concession was rightly made. A sentence of 2 months immediate imprisonment falls within the permissible range of sentences for s158 offences, the appellant having had recent prior convictions for violence; see Ferguson v Chute (unreported, Mildren J, 3 June 1992) at pp4-5. Mr Kilvington submitted, however, that as a sentence of immediate imprisonment it was manifestly excessive when viewed in the light that the sentences imposed on the other 2 had been suspended.

Mr Kilvington referred me to Lowe v The Queen (supra), conceding that a manifest disparity must be shown. I accept that proof of marked disparity is a ground upon which this Court may, not must, interfere; see R v MacGowan [1986] 42 SASR 580 at p583 and R v Charles [1979] VR 8 at

p11. He submitted that the suspension of the sentences imposed on the Bills, and the non-suspension of the appellant's sentence, established a disparity which was manifest. He conceded that the appellant's prior criminal history was "slightly more serious" than that of the Bill brothers, but submitted that all 3 had previously committed offences of the "law and order type". He submitted that the cowardly nature of the appellant's assault - by way of a punch from behind - did not warrant his sentence not being suspended; the resulting disparity, manifestly excessive when compared with the Bills' sentences, was not justified, since there was insufficient difference in their respective moral culpability.

Mr Roberts of counsel for the respondent stressed that the appellant bore a heavy onus in showing that the Magistrate had erred in improperly exercising his sentencing discretion; see Mason v Pryce (1988) 53 NTR 1. He submitted that the appellant's behaviour was more morally culpable than that of the Bills, bearing in mind the order in which they became involved in the melee, and what each of them had actually done - the Bills had pushed from the front while the appellant had punched from behind. Further, he submitted that his Worship rightly took into account the difference in their respective prior criminal histories. In the result, disparity in the sentences was justified.

Mr Roberts observed that in Robertson v Flood (unreported, Mildren J, 29 October 1992) his Honour stated at p16 that a prior conviction for assault "indicates that

the appellant is more morally culpable than someone without any prior history of violence." I respectfully agree, but here the 2 Bills were not "without any prior history of violence." I also note that at p19, after referring to the great variation in the seriousness of assaults, his Honour concluded:-

> " - - - there can be no general judicial policy applying throughout the Territory that "assault police" is an offence where there is a presumption that the appropriate disposition is a gaol term. Each case has to be individually assessed."

Mr Roberts submitted that there was no question of his Worship having misdirected himself or of the sentence being manifestly excessive in itself. The latter point was of course conceded by Mr Kilvington. He submitted that at best for the appellant there was a disparity which was arguable excessive, and this was not enough to establish that there had been a miscarriage of the sentencing discretion.

Conclusions

It can be seen that the basis of the appeal was that there had been an unjustified disparity in sentencing. It is clear that since the two Bills and the appellant all took part in the same melee, the sentences imposed on them should reflect their respective culpabilities. If their culpabilities and other relevant factors were indistinguishable, the 3 should have received the same sentence. Similarly, material differences in their respective culpabilities, or in their individual mitigating factors, should have been reflected in different sentences.

See generally the observations of Brennan J in Lowe v The Queen(1984) 154 CLR 606 at 617. In spontaneous offences such as those which occurred in the melee, variations in the degree of participation by the 3 offenders should have been reflected in their sentences; so should differences in the mitigating factors applicable to each of them. In this case, for example, the appellant had 10 previous convictions in 1991 and 1992, including in particular 2 in May 1992 for aggravated assault, for each of which he had received concurrent sentences of 3 months imprisonment suspended after serving 2 months; this record may be compared with those of the other 2 (pp5-6).

The essence of the appellant's case is that the non-suspension of his sentence when compared with the suspension of the Bills' sentences, established a manifest and unjustified sentencing disparity which requires to be corrected. The disparity is clear. The question is whether it was unjustified. This leads to a consideration whether there was a difference in the cases sufficient to warrant the decision not to suspend the sentence. In my opinion there was such a difference; it lies in the nature of the appellant's attack, a punch from behind, and in his worse previous record. I do not consider that the decision not to suspend his sentence results in a disparity in sentencing which is unjustified.

No argument was directed to the sentence of 1 month imprisonment for the s159 offence, because of the error set out at p5.

In the result, the appeal against the sentence of 2 months imprisonment for the s158 offence must be dismissed, and that sentence affirmed.

Orders accordingly.
