Porter v Pryce and Ryan [2001] NTSC 11

PARTIES:	PORTER, William v PRYCE, Leonard David AND PORTER, William V RYAN, Craig Victor
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL

Justices – appeal against sentence – unlawful assault – cumulative sentence – whether manifestly excessive – totality principle

Justices Act 1928 (NT)
Sentencing Act 1995 (NT), s 50

REPRESENTATION:

Counsel:

Appellant:	J Condon
Respondent:	C Roberts

Solicitors:

Appellant:	CAALAS
Respondent:	DPP

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

Porter v Pryce and Ryan [2001] NTSC 11
Nos JA 18 of 2001 and JA 19 of 2001

BETWEEN:

WILLIAM PORTER
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

BETWEEN:

WILLIAM PORTER
Appellant

AND:

CRAIG VICTOR RYAN
Respondent

CORAM: MARTIN CJ

REASONS FOR DECISION

(Delivered 2 March 2001)

[1] Appeal against sentence.

[2] On Tuesday 31 October 2000, the appellant pleaded guilty in the Court of Summary Jurisdiction at Alice Springs to a charge that on 29 October 1998, at Alice Springs, he unlawfully assaulted Doreen Katakarnintji with three

circumstances of aggravation (that the victim suffered bodily harm, that the victim was threatened with an offensive weapon, namely a post and a rock, and that the appellant was a male and the victim was a female), contrary to s 188(2) of the Criminal Code 1983 (NT). On that day, the appellant also pleaded guilty to a charge that on 17 September 2000, at Hermannsburg, he unlawfully assaulted Doreen Katakarnintji, with three circumstances of aggravation (the victim suffered bodily harm, that the victim was threatened with an offensive weapon, namely an iron bar and hot water and that the appellant was male and the victim was female), contrary to s 188(2) of the Criminal Code.

[3] On 1 November 2000, the appellant was sentenced. The learned Magistrate imposed a sentence of 18 months imprisonment in respect of each offence, and then ordered that the second term of imprisonment be served cumulatively upon the first. The sentence was ordered to be backdated to 18 September 2000, the date upon which the appellant was taken into custody. The learned Magistrate then ordered that the sentence of three years be suspended after 12 months upon condition that the appellant be of good behaviour for two years and not assault the victim.

[4] The facts presented to his Worship in respect of the earlier offence follow.

[5] At 5.30pm on 29 October 1998 the defendant went looking for the victim, and located her at Hidden Valley Camp. He had an argument with her and punched her in the face and mouth with a clenched fist.

[6] They then left Hidden Valley Camp and walked in the direction of the Power Station. As they passed the Power Station the defendant picked up a wooden marker post, approximately 175 centimetres long and 10 centimetres in diameter. With both hands he swung the post baseball style and hit the victim in her leg. The victim attempted to get away, and the defendant chased after her, trying to get her to stop. It is then alleged he picked up a quartz rock and threw it at her, striking her in the head.

[7] She collapsed to the ground and the defendant tried to carry her further along Berger Court. When he realised she was not going to stand up, he picked up a rock again and threw it, hitting her in the head. He yelled at her to get up. When she failed to do so he picked up a rock and threw it at her, hitting her in the head a third time. Employees of the Power Station observed the actions and notified police and St Johns Ambulance who arrived a short time later. As this was happening the defendant walked back to where the Power Station employees were and asked them to call the police and ambulance. He asked for some water and they provided him with a two-litre bottle of water.

[8] He took it back to the victim and poured it over her head. When police arrived the victim told them that the defendant had broken her leg. Asked if that was correct he replied: "Yes". He was arrested and taken back to the police station. St Johns attended. She was conveyed to the hospital. The defendant was then re-cautioned. He was taken out of the police van and asked to walk through what had happened. He walked the attending

members through the scene, identifying the post and the rock, which was seized and exhibited.

[9] He was placed back in the police van and conveyed to the police station. He later took part in a formal record of interview. He made full admissions to the offences. Asked why he had injured the victim, he replied: "I was trying to learn her not to leave me and go with another man". Asked why he had thrown the rock he replied: "I tried to hit her, make her get up". As a result of the incident the victim received a seriously broken lower leg, several lacerations to the scalp which required stitching, a split lip and severe bruising and swelling.

[10] The appellant was granted bail to appear before the Court on 5 November 1998. He failed to appear and an order was made that a warrant issue for his arrest. He was not arrested on that warrant, but was arrested on 18 September after committing the second offence.

[11] The facts put to his Worship in relation to the second offence follow. On 17 September 2000 the appellant was with the victim at Hermannsburg. He had been sniffing petrol throughout the evening. At a time between 8pm and 9am between 17 and 18 September the appellant became angry with the victim who had been drinking heavily.

[12] He picked up a 1.6 metre long iron bar and using both hands swung the bar at the victim several times, hitting her on the head, the left knee and right arm. The victim fell to the ground and was unable to seek assistance due to

the extent of her injuries. Whilst there the appellant poured hot water over the victim causing burns to her chest and head region. He left the yard and went to another unspecified house in the community where he continued to sniff petrol. The victim remained in the yard until located by relatives who alerted police and medical staff.

[13] The appellant was arrested by police on 18 September and conveyed to Alice Springs where he made full admissions to the police about the assault. The victim suffered lacerations to the head and face, extensive bruising to the majority of the torso and to her arms. She also suffered burns to her chest and head.

[14] Whilst being addressed by counsel for the appellant, his Worship said that he did not really regard the pouring of cold water upon the victim on the first occasion as being part of the assault, but rather that the appellant was then trying to do something to help the victim. There was discussion between his Worship and counsel for the appellant regarding the hot water which was poured over the victim on the second occasion. Although a threat with hot water was charged as one of the circumstances of aggravation, it does not seem to me that hot water falls within the usual meaning of a "weapon" nor the definition of "offensive weapon" in s 1 of the Criminal Code. It might also be doubted that the victim was threatened with the hot water since it was in fact poured over her body. In any event, his Worship accepted that the appellant may not have intended harm when he threw the hot water over the victim, but rather that he was trying to revive her after he

had beaten her. His Worship continued that he could not entirely overlook the combined result of the beating and the throwing of the hot water in that the appellant would not have felt it necessary to throw the water had it not been for the beating. It will be recalled that the appellant had pleaded guilty to the circumstances of aggravation, but his Worship seems to have treated the hot water as being part of the assault, rather than as a circumstance of aggravation of it. It is not suggested on this appeal that his Worship erred in the way in which he treated that matter.

[15] As to the assaults, counsel for the appellant before his Worship conceded that they were "serious matters" and that a term of imprisonment was warranted. He came from Warakurna, Western Australia, and had entered into a relationship ("Aboriginal way") with the victim a couple of years prior to the first offence. They had gone to Hermannsburg intending to stay there for a while. She had convinced him to go there, but she left and went into Alice Springs. According to the appellant she had a problem with alcohol and had gone to Alice Springs to drink. He felt that he had been abandoned in Hermannsburg, he followed her to Alice Springs and an argument broke out. He was drunk at the time. He showed remorse immediately after the first assault by endeavouring to assist her with the cold water and by asking the Power Station employees to call the police and ambulance.

[16] As to the second offence, the appellant's counsel had been instructed that again there had been an argument, the victim had been drinking heavily, she struck and swore at the appellant and he responded in the way described.

[17] The appellant was born on 4 July 1973 and reported having completed year 7 at primary school. He is fluent in oral English and says that his upbringing was a blend of traditional Aboriginal culture and non-Aboriginal formal education. He commenced petrol sniffing as a child. He also drank alcohol to excess and told a psychologist, whose report was before his Worship, that when intoxicated either from alcohol or inhalants he loses control, "I can't help it when I'm drunk, I get mad real easy and I goes off". He had been employed in the CDEP programme at Hermannsburg.

[18] The psychologist reported that the appellant had a capacity for cause and effect reasoning. He had given her a history of inhalants and alcohol misuse over a decade and he had issues with anger management.

[19] When sentencing the appellant his Worship reviewed the facts in relation to each of the offences and the appellant's personal circumstances. He noted that the appellant had only one prior conviction, that being in 1998 for possession of an offensive weapon, immediately following by saying "Beatings of this kind of other people, particularly of virtually defenceless women, must result in substantial terms of imprisonment". That was particularly so where weapons were used and significant injuries resulted. Exception is taken on appeal to his Worship's comment that the first assault

was “on the borderline of infliction of grievous bodily harm”. In my opinion, his Worship was not in error in so categorising a “seriously broken lower leg” as being at least likely to cause permanent injury to health.

[20] His Worship referred to mitigatory circumstances including the appellant’s age, comparatively good record, that he pleaded guilty and that he had called for help after the first assault. There was put in argument that his Worship had erred in failing to indicate the extent to which, and the manner in which, a plea of guilty had been given any weight as a mitigating factor (*Kelly v The Queen*, Northern Territory Court of Criminal Appeal, unreported, 30 June 2000 at par 27). I am unable to accept that submission, for having dealt with the mitigating circumstances, his Worship immediately went on to say that had “it not been for those factors I would have either imposed the maximum penalty, which I could impose, or decline to deal with the matter summarily”. The maximum penalty for aggravated assault is five years imprisonment, but if dealt with summarily there is a jurisdictional limit of a maximum of two years. Clearly, his Worship indicated the extent of the benefit.

[21] His Worship also took into account, no doubt as against the appellant, the fact that he was on bail in relation to the first offence when he committed the second, and he also noted that the two offences were separated by a space of two years (to be precise it was about one month short of that).

[22] The grounds of appeal are:

1. That the learned Magistrate erred in accumulating the sentence.

2. That the learned Magistrate erred in not taking sufficient account of the principal of totality.

3. That the learned Magistrate erred in failing to give sufficient weight to mitigating factors in the appellant's favour, namely that the appellant pleaded guilty.

4. That the sentence was manifestly excessive having regard to the objective seriousness of the offences.

5. That the learned Magistrate failed to give weight to the appellant's absence of prior convictions for assault and favourable prospects for rehabilitation.

[23] Counsel for each of the parties filed extensive written submissions which were amplified in the course of oral argument.

[24] For the appellant, submissions went to each of the grounds of appeal taking ground 4 first. It was submitted that in assessing the objective seriousness of the offence the learned Magistrate was entitled to have regard to a range of relevant factors including, amongst others, the length and duration of the assault, the impact of the offence upon the victim, the nature of any weapon used, whether the attack was premeditated or committed on the spur of the moment and the degree of seriousness of any injury sustained. Reliance was

placed upon the well-known observations by King CJ in *Yardley v Betts* (1979) 22 SASR 108 at pp 112 and 113.

[25] A review of the facts leading to the charge in each case provides the answer to the factors outlined by the appellant. Each of the assaults was prolonged, the impact upon the victim was significant and a variety of weapons (even excluding cold water and hot water) were used. The seriousness of the injuries sustained by the victim speak for themselves. It may be that neither attack was pre-meditated, but rather committed on the spur of the moment, but once commenced continued in each case even though the victim had been disabled. She was clearly in no position to defend herself. Whatever may have been the nature of the argument between the appellant and his wife, it can provide no excuse for what he did. Adapting what was said by Chief Justice King, the assaults in this case were terrifying and cowardly examples of violence. In fixing the sentence for the second offence his Worship was entitled to take account of the fact that the appellant was then on bail, *R v Gray* [1977] VR 225.

[26] For the Crown, attention was drawn to what fell from Justice Kearney in *Cook v Shute*, unreported, 16 June 1997 where he said, amongst other things:

> "It has been said by this Court on many occasions that where members of the public wish to resort to violence, and especially violence with weapons, this Court will often imprison a first offender. … The danger and resort to violence must all be discouraged if possible".

[27] Other members of this Court have often commented to like effect and in *Najpurki v Luker*, unreported, 6 August 1993, I drew attention to the necessity to give weight to deterrence both personal and general as part of the sentencing regime particularly where assaults are accompanied with weapons and the person upon whom the assault is perpetrated is defenceless.

[28] The onus is on the appellant to show that the sentencing discretion that the learned Magistrate used was improperly exercised (*The Queen v Tait* (1979) 46 FLR 386; *Burrenjuck v Garner* (1999) NTSC 66). To determine whether a sentence is excessive it is necessary to view it in the perspective of the maximum sentence prescribed by law for the crime, the standard of sentencing customarily observed with respect to the crime, the place which the criminal conduct occupies in the scale of seriousness of crimes of that type and the personal circumstances of the offender.

[29] I am far from satisfied that the penalty imposed in respect of each of these offences was manifestly excessive.

[30] Nor do I consider that his Worship's decision to accumulate the two terms of imprisonment was an error. When looking at questions of concurrence, the circumstances in this case do not fall within any of the commonly recognised factors, such as, offences arising out of the same facts, or part of a continuing episode, or part of the one transaction, nor were these two offences committed within a short period of time. In my view, it was open

to his Worship to depart from the statutory rule of concurrency (Sentencing Act 1995 (NT), s 50).

[31] Having decided to accumulate the two sentences, it was his Worship's duty then to consider whether the accumulation should be total or partial, and in either case to look at the result and decide whether the total sentence so derived is just and appropriate, or, as it was put by D A Thomas in Principles of Sentencing, 2nd Ed, 1979, approved in *Mill v R* (1988) 166 CLR 59, "The final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive". There is no express indication in the sentencing remarks that his Worship did that. I do not consider that it can be safely inferred that his Worship did in fact review the aggregate sentence and consider whether it was just and appropriate. The necessity for the court "to take a last look at the total just to see whether it looks wrong" was not demonstrated on the face of the record. I consider that for that reason it has been made out that his Worship erred.

[32] It is necessary for me therefore to consider whether, notwithstanding the error, the sentence should stand or whether it should be reduced by taking into account the totality principle. Notwithstanding the very serious nature of these assaults, I consider that the total looks wrong. I would not adjust the individual sentences, but direct that the sentence of 18 months imposed in respect of the second offence start six months prior to the expiry of the term of imprisonment imposed for the first offence. The effective sentence therefore is two and a half years imprisonment.

[33] Before fixing the period after which the sentence would be suspended, his Worship observed that the appellant had a comparatively small criminal record and so decided to fix a relatively small period. I take it that by that his Worship was indicating that given the prior record the appellant's prospects of rehabilitation were good. But the period that must be served before the sentence is partly suspended may also serve the interests of the community in the same way as the head sentence can, by providing for some element of community protection as well as personal and general deterrence (*R v Hillsley* (1992) 105 ALR 560). The cases on this subject are all derived from the fixing of periods prior to which a prisoner would not be eligible to be released on parole, (for example see *Power v R* (1974) 131 CLR 623 and *Bugmy v R* (1990) 169 CLR 525), but I do not think that considerations other than those come to bear when fixing a period which must be served before a sentence is suspended. In either case the period must be that which the sentencer considers is the minimum period of imprisonment to be served that the crime committed calls for.

[34] I do not consider that his Worship erred in fixing a period of 12 months prior to which the sentence would not be suspended. It was within the range which was appropriate to all the circumstances.

[35] With respect, however, I consider that the interests of the community required that when the appellant was released from prison he should be under the supervision of a probation officer if he was suitable (Sentencing

Act, s 103). No report was called for and no point is made on this appeal about that.

[36] In the result the appeal is allowed, the sentence of three years is quashed. The sentence of 18 months imprisonment for each offence is confirmed. The direction for accumulation of the period of the second term upon expiry of the first term is quashed. In lieu thereof it is directed that the sentence imposed in respect of the second offence start six months prior to the expiry of the term of imprisonment imposed for the first offence. The order that the sentence be suspended after 12 months is confirmed.
