CITATION:	*CI v Heath* [2017] NTSC 38
PARTIES:	CI
	v
	HEATH, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 7 of 2017 (21706613)
DELIVERED ON:	24 May 2017
DELIVERED AT:	Alice Springs
HEARING DATE:	17 May 2017
JUDGMENT OF:	RILEY J
APPEAL FROM:	Local Court

REPRESENTATION:

Counsel:

Appellant:	D Bhutani
Respondent:	R Micairan

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Ril1702
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

CI v Heath [2017] NTSC 38
No. 7 of 2017 (21706613)

BETWEEN:

CI

Appellant

AND:

HEATH, Andrew

Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT
(Delivered 24 May 2017)

[1] This is an appeal against sentence under the *Youth Justice Act*.

[2] On 1 March 2017 the appellant, a youth aged 15 years, was found guilty of one count of assaulting a police officer in the execution of his duty where the officer suffered harm, contrary to section 189A of the C*riminal Code*. The maximum penalty for the offence is imprisonment for seven years. The appellant was convicted and sentenced to 6 months in detention suspended after serving one month.

History of Proceedings

[3] On 8 February 2017 the appellant appeared in custody in the Youth Justice Court in Alice Springs on five separate files, three of which

related to breaches of community work orders, one to a breach of a bail undertaking, and finally the charge of assault police. He was granted bail and the matters were adjourned. The appellant failed to attend Court on 24 February 2017 and a warrant for his apprehension was issued. On 27 February 2017 the warrants were executed and he appeared in the Youth Justice Court on the matters mentioned above along with two further counts of breaching bail undertakings. On 27 February 2017, the Youth Justice Court found each of the offences proven. The presiding Judge ordered a community work assessment and adjourned the matter to 1 March 2017 when the appellant was sentenced.

Circumstances of the Offending

[4] The assault occurred a little after 10:30 pm on the night of 1 February 2017. Constable Muller and an Aboriginal Community Police Officer attended at a fast food outlet in Alice Springs where they saw a group of about thirty young people including two girls who were fighting. The girls were punching each other and pulling hair. Constable Muller approached them in order to break up the fight and, in doing so, took hold of one girl, the girlfriend of the appellant, to escort her to the police vehicle. The other girl was escorted in a different direction by the ACPO. In the course of being escorted to the police vehicle, the girl punched Constable Muller and endeavoured to kick him. He sought to ground stabilise her in order to gain control. The officer crouched down

over the girl while attempting to control her. As he was doing so, and while he was fully occupied in the process, the appellant, who was nearby and had been consuming alcohol, ran past the officer at speed and punched him to the left side of his head causing him immediate pain. This was, as the sentencing Judge observed, a cowardly attack. The appellant ran from the scene. He was later located and arrested and made admissions to his conduct.

[5] The sentencing Judge commented that the Police Officer suffered lacerations, bruising and some swelling and discomfort to his face. His Honour said:

> I have photographs which indicate the result of your punch to him. So, it must have been quite a blow, in my view, because a substantial part of his left side of face and his forehead area, including his nose and his lips, has been marked by that blow you struck him.

[6] The Judge noted that the officer had to have four days off work as a consequence of the assault and suffered constant headaches. The assault affected not only the officer but also members of his family who were concerned by his injuries and also the dangers his employment created.

[7] His Honour likened the assault to a “one punch attack” which, as his Honour observed, are prevalent at this time. Such assaults have resulted in deaths and serious injury.

[8] The appellant was not a young man of prior good character. He had previously been dealt with for engaging in violent conduct and his Honour was not satisfied that this type of conduct was out of character for him. Nevertheless the Judge concluded that the appellant had reasonable prospects of staying out of trouble in the future.

Imposition of a Conviction

[9] The first ground of appeal is that the sentencing Judge erred in imposing a conviction. It was submitted that his Honour should have been guided by the general observations of Barr J in *Verity v SB*[1] regarding the imposition of convictions on youth offenders and, in particular, the following comments:

> Rather than asking why a conviction should not be recorded, the Court might well ask itself why a conviction should be recorded.
>
> And:
>
> In youth sentencing therefore, a conviction is not a condition precedent to the imposition of even the most serious punishments. The power of the Youth Justice Court to punish, even severely, without recording a conviction, suggests that the Youth Justice Court may appropriately take into account quite separate and distinct considerations on the question whether or not to record a conviction to such considerations as the seriousness of the offence.

[10] It was submitted that the sentencing Judge only took into account the severity of the offence in determining whether to record a conviction

[1] [2011] NTSC 26 at [34] and [36].

rather than the wide range of matters which should be considered, including those listed in s 8 of the *Sentencing Act*.[2] The appellant contended that his Honour failed to give appropriate consideration to: the young age of the appellant; his reduced maturity; his limited education; the recent lack of stability in his life; his criminal history; his prospects for rehabilitation; and the circumstances surrounding the offending.

[11] While the sentencing Judge did make reference to the seriousness of the offending this occurred in the context of a wider consideration of factors relevant to sentence and, in particular, the recording of a conviction. His Honour said:

> I consider that in all of the circumstances, your assault upon the police officer is sufficiently serious to warrant the imposition of a period of detention. In my view it is also sufficiently serious, having weighed up the other matters that have been placed before me, to record a conviction for that trouble.

[12] In my opinion, it is plain that the sentencing Judge did not limit his consideration to the severity of the offence. Indeed, a review of the sentencing remarks reveals that his Honour considered a wide range of matters including: the appellant's criminal history (which was limited); that the appellant did not come with prior good character; that he had previously been dealt with for violent conduct; his "reasonable" prospects for rehabilitation; his future plans; his positive behaviour at

[2] *DD v Cahill* [2009] NTSC 62 at [14].

school; his remorse; his cooperation with the authorities and his current living circumstances. In addition his Honour took into account the circumstances in which the appellant committed the offence including that he was under the influence of alcohol and that he saw his girlfriend being restrained. The appellant acted on impulse.

[13] The complaint that the sentencing Judge erred by only taking into account the severity of the offence in determining whether to record a conviction is without foundation. It seems the complaint of the appellant really is to the weight placed by his Honour upon particular factors. This, of course, is a matter for the Judge and an appellate court "must be especially cautious not to substitute its own opinion for that of the judge in the absence of identifiable or manifest sentencing error".[3] In this case, while another judge may have come to a different conclusion, it cannot be said that the imposition of a conviction was beyond the scope of the sentencing discretion.

Failure to Order a Pre-Sentence Report

[14] Section 69 of the *Youth Justice Act* provides that where a Court is considering imposing a sentence of detention the Court must ensure that it is informed as to the circumstances of the youth. It must order a pre-sentence report. However, s 69(3) goes on to provide that, "if the Court is satisfied that it has the information necessary to determine an

[3] *Johnson v The Queen* [2012] NTCCA 14 at [25].

appropriate sentence, the Court may dispense with the need for a report".

[15] In the present case the sentencing Judge declined to order a pre-sentence report advising the appellant that there was "sufficient information before me about you and about the offending to determine an appropriate disposition in these matters".

[16] The appellant now complains that the sentencing Judge erred in relying upon a report from the appellant's teacher, a community work order assessment and a supervision assessment. It was submitted that the information available to the Court was not the equivalent of the detailed historical and personal information that would be obtained through the preparation of a pre-sentence report. However, the issue is whether the Court had before it "the information necessary to determine an appropriate sentence". Clearly the sentencing Judge considered that such information was available. His Honour said:

> I've had an opportunity to read the breach files which also contain further information about you and, being in receipt of all of that information, I am satisfied I have sufficient information before me about you and about the offending to determine an appropriate disposition in these matters, particularly that assault upon the police officer. I am also satisfied that I have sufficient information to make an appropriate determination as to what I consider to be your prospects for the future and general rehabilitation. For those reasons I am not ordering a presentence report; in particular, in regard to file ending 6613, the assault upon the police officer.

[17] Those observations were made in the context of his Honour having given consideration to a letter from a teacher with St Joseph's Catholic Flexible Learning Centre, an Assessment of Offender Suitability for Supervision Report, and an Assessment for Community Work Order along with receiving detailed submissions placed before the Youth Justice Court. Counsel who appeared on behalf of the appellant at that time referred to his living conditions, his remorse, his unsettled lifestyle, his education, his willingness to re-engage with his school, his engagement with a domestic violence counsellor, and his plans for the future. Counsel tendered and relied upon the letter from the teacher, which counsel described as "an in-depth letter".

[18] In my opinion, the conclusion of his Honour that the information necessary to determine an appropriate sentence was before the Court, was correct. I see no error in dispensing with the need for a further report.

Manifest excess

[19] The appellant submits that the sentencing Judge erred in imposing a sentence that was manifestly excessive in all the circumstances. The principles applicable to such an appeal are well settled.[4] An exercise of the sentencing discretion will not be disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error and the appellate court will not interfere merely because it is of the view that

[4] See for example: *Whitehurst v The Queen* [2011] NTCCA 11 at [12].

the sentence is insufficient or excessive. Interference will only occur if it be shown that the sentencing Judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing Judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. It is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so.

[20] In this case the appellant correctly submits that there is no presumption that there must be a gaol term for such offending. It was submitted that in circumstances where: the appellant was aged 15 years at the time of the offence; he pleaded guilty at an early opportunity; he made full admissions; he was remorseful; he had a limited criminal history with no convictions for like offending; and had prospects for rehabilitation, a term of actual imprisonment was inappropriate. The sentence of detention for a period of six months indicated a starting point, but for the usual discount for pleading guilty, of some eight months. It was contended that the sentence is manifestly excessive.

[21] The respondent submitted that the seriousness of the offending was reflected in the fact that the assault was upon a police officer acting in the course of his duty, and occurred in circumstances where the police officer was not in a position to defend himself and did not see the assault coming. The attack was to the head of the victim and delivered

with great force while the appellant was running at speed. The force of the punch was sufficiently significant to cause lacerations, bruising and subsequent headaches to the victim. Importantly, it was submitted, the blow was delivered in the presence of approximately thirty other young people some of whom had been engaged in or watching a violent episode. There was a real potential for the appellant's actions to incite others to engage in similar conduct. Further, the conduct constituted what has been colloquially described as a "coward's punch" or a "king hit". The danger associated with such assaults is well-known in the community and, unfortunately, such assaults have become commonplace. A single punch can cause catastrophic injuries and even death.

[22] The Courts have observed that in relation to assaults upon police officers, while there is no presumption that there must be a gaol term and each case must be considered on its own facts and circumstances, an immediate gaol sentence may be expected where police were outnumbered such as was the case in this matter. However, it has also been noted that "assaults at the lower end of the scale will not attract actual custodial sentences if the offender is a juvenile or youthful first offender who has pleaded guilty and is remorseful".[5]

[23] In my opinion, in the circumstances of this matter, the imposition of a period of detention of six months on a 15-year-old boy who

[5] *Bellis v Burgoyne* [2003] NTSC 103 at [17]

subsequently accepted responsibility for his conduct and expressed his remorse, and who has reasonable prospects for rehabilitation is manifestly excessive.

[24] I allow the appeal. The sentence will be set aside. It will be necessary to resentence the appellant.

[25] Given that this is a fresh sentencing exercise I have reconsidered all of the matters placed before the Court below, and the matters put to me in the course of the hearing.

[26] I am told that the appellant continues to attend his former school, the St Joseph's Catholic Flexible Learning Centre and, although his attendance is not as regular as it should be, he has a positive attitude towards his education. He now lives with his girlfriend and her grandmother and the grandmother provides some supervision of him. He has not been in trouble in the intervening period.

[27] He spent some 10 days in detention and found that to be a lonely and isolating experience which provided him with an opportunity to reflect. He does not want to return to detention and this is a change from the attitude expressed when the matter was before the Youth Justice Court. I have borne in mind that period in detention in determining an appropriate sentence.

[28] I ordered a report pursuant to s 71(1)(a) of the *Youth Justice Act* and the report is now to hand. He is suitable for supervision.

[29] While views may differ as to whether it is appropriate to record a conviction against the appellant, in all of the circumstances and in the exercise of my discretion, I will not do so. I am dealing with a 15-year-old in relation to whom there would seem to be no reason to record a conviction other than to further punish him. Given his circumstances, any adverse consequences of such a conviction would not be apparent to him at this time, and any future impact cannot reasonably be ascertained at present. A conviction is most unlikely to have any present impact upon him as a deterrent. It would be an additional punishment which may or may not impact upon him at some future time. Other sentencing options available to me are sufficient to deal with this matter without proceeding to conviction. In so concluding, I have borne in mind the observations in the cases of *DD v Cahill*[6]; *Verity v SB*[7] and *ON v Lyon*[8] regarding the recording of convictions for young offenders.

[30] Without proceeding to conviction, the appellant will be sentenced to detention for a period of three months dated from this day. The sentence will be suspended forthwith. It will be a condition of the suspension of the sentence that the appellant place himself under the

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6 [2009] NTSC 92.
7 [2011] NTSC 26.
8 [2016] NTSC 47.

supervision of Community Corrections for a period of 12 months from this day. The following conditions will apply:

- he must not, during the period of the order in force, commit another offence (whether in or outside the Territory) punishable on conviction by imprisonment;

- he is under the ongoing supervision of a probation and parole officer, must obey all reasonable directions from a probation and parole officer and must report to a probation and parole officer within two clear working days after the order comes into force;

- he must tell a probation and parole officer of any change of address or employment within two clear working days after the change;

- he must not leave the Territory except with the permission of a probation and parole officer;

- he will not purchase or consume alcohol, and will submit to testing as directed by a probation and parole officer or a police officer;

- he will participate in assessment, counselling and/or treatment as directed by a probation and parole officer.