White v Brown [2003] NTSC 51

PARTIES:	MICHAEL JOHN WHITE
	v
	PADDY BROWN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No. 20210067 JA15/2003
DELIVERED:	9 May 2003
HEARING DATES:	23 April 2003
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Appeal – Criminal Law – Crown appeal - Sentencing – Mandatory minimum sentence for violent offence – Sentence of 3 months imprisonment suspended after 10 minutes - whether prisoner "served a term of imprisonment that is suspended partially but not wholly" - whether sentence manifestly inadequate.

Statutes:

Criminal Code, s 188
Interpretation Act, s 62B
Sentencing Act, s 78BA

Cases:

Hales v Jamilmira (2003) NTCA 9, referred to.
Harriss v Walker (1996) 89 A Crim R 257 at 261-262, followed.
Inness Wurramara (1999) 105 A Crim R 513, referred to.
Knight v Birch (1992) 106 FLR 109 at 119, referred to.
Reg v Cutbush LR 2QB 379, followed

R v Harrop [1979] VR 549 at 552-553, followed
Reggett v Douglas & Miller (1990) 50 A Crim R 41, referred to
Rex v Martin [1911] 2 KB 450, followed

REPRESENTATION:

Counsel:

Appellant:	M Carey
Respondent:	D Woodroffe

Solicitors:

Appellant:	Director of Public Prosecutions
Respondent:	North Australian Aboriginal Legal Aid Service

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

White v Brown [2003] NTSC 51
No. 20210067 JA15/2003

BETWEEN:

MICHAEL JOHN WHITE
Appellant

AND:

PADDY BROWN
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 9 May 2003)

[1] This is an appeal against sentence brought by the prosecution pursuant to s 163 of the Justices Act.

[2] The respondent was charged with one count of unlawfully assaulting Clara Brown, his wife, the only circumstance of aggravation alleged being that he was a male and Clara Brown was a female: s 188(2)(b) of the Criminal Code.

[3] It was common ground that the respondent had a prior conviction for an offence against s 188 of the Criminal Code. Therefore, pursuant to s 78BA of the Sentencing Act, the Court of Summary Jurisdiction was required to

record a conviction and order that the respondent serve either "a term of actual imprisonment" or "a term of imprisonment that is suspended partly but not wholly".

[4] The Crown facts in relation to the offence for which the respondent pleaded guilty, are not known with any precision. There is no transcript of the proceedings available at the time when the respondent pleaded guilty and when the Crown facts were read and when submissions were made relevant to sentence. There is however a transcript of the adjourned proceedings held before the learned Magistrate at the time when sentence was passed. It is apparent that the reason why the matter proceeded in this way is that the learned Magistrate ordered a presentence report which meant that the proceedings before him had to be adjourned until the presentence report was available.

[5] Regrettably the facts relating to the circumstances of this offence are not dealt with in his Worship's sentencing remarks. Neither side has seen fit to put before me exactly what is alleged to have occurred. The sentence which the learned Magistrate imposed was one of a term of imprisonment for three months to be suspended from 11.15 am on the date upon which that sentence was imposed, subject to a number of conditions including an operational period of three years from that date. The conditions included a period of supervision during the operational period of three years; that the respondent obey all reasonable directions of the Director or his delegate regarding employment, residence and associates; that the respondent was not to

consume any alcohol; that the respondent was to submit to any tests for the purposes of detecting alcohol consumption whenever required by his supervisor; and that the respondent was to undertake such assessment and treatment, including counselling for substance, abuse primarily alcohol but not limited to alcohol, as directed by his supervisor.

[6] Notwithstanding the absence of the Crown facts, some facts are set out in the presentence report as follows:

> Brown reported that on 1 July 2002, he was at his residence at Town Camp, Jabiru. A group of family members approached him and requested that he drive them to the Bark Hut Inn. He initially refused, however due to the constant harassment during that day, he decided to take them there. He had used his car in the past to obtain alcohol from the Bark Hut Inn. He arrived back at the Town Camp and was given a carton of beer for his troubles. He advised he did not want a drink, however claimed that "they forced me to drink".
>
> During the early hours of the morning, a conversation between his wife and another woman occurred. Brown asked to join in the conversation, however they would not tell him what they were talking about. At the time he believed something was happening that he should know about, he did not like the other woman and claimed she had caused problems between him and his wife in the past.
>
> The offender then blamed his wife for having another boyfriend. He became angry and the assault took place.
>
> The offender advised that he was sorry for what he did to his wife. He believes alcohol played a big part in the assault. He reported some times he becomes jealous of her when they drink together. He claimed jealousy is not a problem when he is sober. Brown advised he had no intentions of hitting his wife, he just became angry and lashed out.

[7] The respondent is an Aboriginal man born on 1 July 1960 and was, at the date of the offence (which I note was his 42nd birthday), married to the complainant according to Aboriginal tradition. The respondent grew up in Maningrida. He attended school at Mudginberri Community many years ago. Although he claimed to have completed year 10, his reported literacy and numeracy skills were poor with an inability to read and write. English is his second language. He speaks "basic" English. In the opinion of the Senior Probation and Parole Officer the respondent had difficulty with understanding the English language and at times became confused about what was being said to him, with the result that questions needed to be repeated until he grasped the meaning.

[8] The respondent and his wife had six children living with them. They had been married for approximately 20 years. There were no problems within the marriage until the year 2001. According to the Pastor of the Uniting Church, the family started having trouble when the respondent's father passed away and there was a lot of stress within the family unit which lead to more consumption of alcohol than was normal. Until 18 December 2001, the respondent had no prior convictions of any kind. Counsel for the appellant outlined the history of the respondent's association with the justice system since that time. Counsel for the respondent agreed that the history given was correct. That history was as follows.

[9] On 24 July 2001, the respondent's wife applied for and obtained a domestic violence order against the respondent. Under the terms of the order, contact between the respondent and his wife was permitted.

[10] On 30 November 2001, the respondent assaulted the complainant and was prosecuted for a breach of the domestic violence order. The respondent was not charged with assault.

[11] On 18 December 2001, the respondent pleaded guilty to the breach and was given a s 13 bond for a period of 12 months in his own recognizance in the sum of $500 to be of good behaviour and to appear if called upon.

[12] On 21 December 2001, the respondent assaulted the complainant with a stick and caused her bodily harm. On this occasion he was charged with aggravated assault, as well as with a breach of the bond. On 24 December 2001, he pleaded guilty and was remanded in custody until 1 February 2002 for sentence. Whilst on remand, the domestic violence order expired on 23 January 2002.

[13] On 1 February 2002 the respondent was sentenced to a term of imprisonment for three months backdated to 24 December 2001 for the assault, and also to a sentence of imprisonment for one month concurrent for the breach of the domestic violence order, both sentences to be suspended from 1 February 2002. An operational period of 12 months was imposed. No action was taken for breach of the s 13 bond.

[14] On 26 March 2002, the respondent pleaded guilty to a breach of the conditions of his suspended sentence in that he had not undertaken counselling as required and he had a bottle of rum in his possession. The operational period of the suspended sentence was extended from 12 months to 15 months.

[15] The offence of 2 July 2002 resulted from a single punch to the face causing swelling and a bruise to the eye.

[16] The grounds of the appeal as set out in the notice of appeal, are as follows:

> 1. That the sentence imposed does not satisfy the requirements of s 78BA(1) of the Sentencing Act, and
>
> 2. That the sentence was manifestly inadequate in the circumstances of the case.

Does the sentence satisfy the requirements of s 78BA(1) of the Sentencing Act?

[17] The position of the appellant is that a suspended sentence requiring the respondent to be imprisoned to the rising of the Court after ten minutes, does not satisfy the requirements of s 78BA(1) of the Sentencing Act. Mr Carey sought to refer to the Minister's second reading speech. Section 62B of the Interpretation Act provides as follows:

> (1) In interpreting a provision of an Act, if material not forming part of the Act is capable of assisting in ascertaining the meaning of the provision, the material may be considered –
>
> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into

account its context in the Act and the purpose or object underlying the Act; or

(b) to determine the meaning of the provision when –

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

[18] I do not consider that there is anything in s 78BA which is ambiguous or obscure, nor do I consider that the ordinary meaning conveyed by the text of s 78BA leads to a result that is manifestly absurd or is unreasonable.

[19] There is no doubt that the learned Magistrate imposed a term of imprisonment. Clearly a sentence in effect to the rising of the Court is a sentence to a term of imprisonment: see *Harriss v Walker* (1996) 89 A Crim R 257 at 261-262; *Reg v Cutbush* LR 2QB 379; *Rex v Martin* [1911] 2 KB 450; *R v Harrop* [1979] VR 549 at 552-553. There is no doubt also that the learned Magistrate did not wholly suspend the term of imprisonment that he imposed. Therefore, so far as the argument based on ground 1 of the notice of appeal is concerned, I find against the appellant.

Is the sentence manifestly inadequate?

[20] The principles upon which the Court considers Crown appeals against sentence on the ground that the sentence imposed was manifestly inadequate, have been thoroughly agitated in the Court of Criminal Appeal

in *Raggett Douglas & Miller* (1990) 50 A Crim R 41. It is unnecessary to repeat everything referred to in the judgment of Kearney J, with whom Martin and Angel JJ agreed, but it is clear that in order to establish the existence of necessary and unidentified error the Crown must show that the sentences are not just arguably inadequate, but that they are so very obviously inadequate they are unreasonable or plainly unjust. Furthermore, Kearney J said at p 48:

> The proper role and function of Crown appeals is, I think, best stated by King CJ in *Osenkowski* (1982) 30 SASR 212 at 212-213:
>
> > It is important that prosecution appeals should not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offenders life might lead to reform. *The proper role for prosecution appeals, in my view, is (1) to enable the Courts to establish and maintain adequate standards of punishment for crime, (2) to enable idiosyncratic views of individual judges as to particular crimes or types of crimes to be corrected, and (3) occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.* [Emphasis mine.]

[21] The argument of the appellant is that the learned Magistrate did not give proper weight to all matters; that he gave too much weight to subjective factors and not enough weight to deterrence. In particular, it was put that the learned Magistrate erred in finding that he did not consider the respondent to be a vehicle for special deterrence. This was the third assault

on the complainant within a year and, so the argument went, the respondent was a prime candidate for a deterrent sentence. Emphasis was also placed upon the decision of the Court of Criminal Appeal in *Inness Wurramara* (1999) 105 A Crim R 512, where the Court emphasized that Aboriginal offenders are not to be treated differently from other offenders in the wider community for violent crimes of serious offending against Aboriginal women and children which call for condign punishment.

[22] Counsel for the appellant relied upon an observation of Cox J in *Harriss v Walker*, supra, where his Honour said at 262:

> In the light of the authorities mentioned above dealing with the seriousness of an offence such as this, especially when repeated, a nominal sentence such as the one imposed completely failed to reflect the gravity of the respondent's conduct and failed to acknowledge the need for a penalty of general and personal deterrence. Such penalties, if used inappropriately and as a means of circumventing Parliament's clearly expressed intention of deterring offenders by mandatory prison sentences, bring the law into disrepute.

[23] Further reference was made to the observations of Miles CJ in *Knight v Birch* (1992) 106 FLR 109 at 119;

> Nominal sentences such as sentencing to the rising of the Court are almost never appropriate for serious offences for the reasons given in *R v Kelly* (unreported, Federal Court, 20 December 1989) and are not appropriate for the offences in the present case.

[24] The case of *R v Kelly* to which Miles CJ referred, is the case of *Re: The Queen v Neal Edward Kelly & Others*, delivered on 20 December 1989, a Crown appeal from the decision of the Supreme Court of the ACT. That

case was not in fact a case about mandatory minimum sentences, nor was it in fact a case about nominal sentences such as a sentence to the rising of the Court. It concerned a quite different problem where the sentencing Judge when dealing with a number of offences for rape, imposed sentences for some of the offences and, in relation to one of the offences, declined to pass sentence at all. An appeal was allowed by the majority (Pincus and Miles JJ), Morling J dissenting.

[25] However, the instant offending was not so serious that a sentence of imprisonment suspended after the rising of the Court was not at least one of the options potentially available depending on the whole of the circumstances. In *Hales v Jamilmira* (2003) NTCA 9, I said that a minimal sentence such as a sentence of one day, as it is the minimum sentence permitted by law should be reserved for those rare cases which fall at the very bottom of the scale of seriousness. However, that statement is potentially inaccurate. The true position is as described by Fox and Frieberg, *Sentencing State and Federal Law in Victoria,* 2nd Edn., at para 9.210:

> The principal justification for awarding a minimal custodial sentence…is that it marks the gravity of the crime by ensuring that the formal stigma of conviction and imprisonment attaches to the accused, while acknowledging significant mitigating factors which justify minimising further punishment or control. The class of crime in question will be one normally regarded very seriously and deserving of some mark of social disapprobation, even though the accused's conduct represents the lowest level of culpability. Even if the seriousness of the crime and the offender's culpability are high, a court may be persuaded to apply a custodial sentence of only symbolic value because of the presence of powerful mitigating

> factors. These need not be personal to the accused. They can include such matters as major delays by the crown in bringing the person to trial…

[26] The objective facts of this particular assault were not such as to call for condign punishment. Nevertheless, they were serious enough to warrant a term of imprisonment as the sentence imposed by the learned Magistrate recognised.

[27] The question then is whether the learned Magistrate erred in imposing the minimal actual sentence to be served and suspending the balance. Was there material before the learned Magistrate which warranted this course? There was a great deal of evidence before the learned Magistrate to the general affect that the respondent had taken some rather extraordinary steps to stay sober. In this regard, the learned Magistrate had the benefit of hearing the evidence of the Reverend Dean Whittaker, the transcript of which is not available to me. There is however a report from that gentleman which was tendered and I think it is possible for me to arrive at the facts which obviously impressed the Magistrate, which showed that the respondent was genuine in his attempts to recognise his problem with alcohol and his attempts to deal with that problem which persuaded the Magistrate that the respondent had, to quote the learned Magistrate's words, "attempted, or has taken some very extreme measures". The learned Magistrate said he was very impressed by the respondent's resolve.

[28] The particular facts in question may be summarised thus. The respondent had only recently become a drinker. After his release from prison, he resumed cohabitation with his wife and family at the Town Camp. He found it difficult living in that environment and on numerous occasions requested that he be removed from the Camp, but there was no other place of residence available for him and his family. The reason for the respondent's complaint about his place of residence was due to the high volume of people who consumed alcohol on a daily basis and the amount of trouble caused within the Camp as a result. The respondent had on occasions removed his family from the Camp and temporarily resided in a tin shed situated near the airport, but the shed was not equipped with any amenities and was considered unsuitable for permanent residence. When extended family members came into Jabiru to visit with the respondent and his family, the respondent and his family moved into the women's shelter until the visitors had departed in order to stay away from alcohol abuse.

[29] There did not seem to be any other options for accommodation for the respondent. He had made inquiries about a possible move to an outstation but there did not seem to be any available to him, although the family previously resided at Maningrida with the complainant's family. However due to family arguments this was no longer an option. The respondent went so far as to purchase a mobile telephone so that he could call the police if drunken people came to his premises. This had often occurred at night and the respondent found that his calls went to Darwin police who would ask for

information and for spelling that the respondent found difficult to address appropriately because of his lack of education. As a result, the respondent began ringing the Uniting Church Minister in Jabiru for his assistance. On some occasions when the Minister had rung the police at the respondent's request, there were no police rostered on duty available to attend and support the respondent in keeping drunken people away from his place.

[30] The respondent attended a Gun Banang Action Group meeting in the hope that the group might be able to assist him in keeping the drunks away, but at that meeting he was told that nothing could be done to address his concerns. He then attended a Katherine Christian Convention in May 2002 with a contingent from the Jabiru Uniting Church, part of the motivation of which was to get away from drinkers who were trying to entice him back into drinking.

[31] On one occasion, the Reverend Whittaker had, at the respondent's request, taken the respondent and his family to investigate a potential permanent new camp out bush but within mobile telephone range, but because of health issues, the respondent was not able to proceed with that plan. There is also evidence that the respondent had suffered a heart attack in April 2002.

[32] On three occasions the respondent had telephoned and asked the Reverend Whittaker to take him and his family out to Gulungul Creek and drop them off because there had been drunks at his house that he had been keen to

avoid. On these occasions the Reverend had returned to pick them up some hours later when things seemed quiet at home.

[33] The evidence was that the respondent had also maintained regular contact with the Kakadu Health Services drug and alcohol worker, Mr Gavan Curry, whose reports indicated that the respondent had not consumed alcohol since the evening of 1 July 2002 and had stabilised his life from that point onwards. Mr Curry observed that the respondent had taken:

> several practical steps to separate himself and his family from the consequences of his own and others drinking behaviors (sic) He is now employed full-time with his eldest son and others on the CDEP rubbish removal team, he is the driver, a position he held prior to going to prison. Mr Brown has organised a petition and meetings with the police to reestablish the dry area where he lives at Manaburduma and has been successful in this. The family has lived in an unserviced hut some 8 kilometres from his home on weekends to avoid contact with drinkers and at times during the week when he has felt the home area was unsafe ... Mr Brown also states that he has spoken to drinking friends and asked them to avoid his home when intoxicated, he no longer assist (sic) in purchasing bulk buys of alcohol from hotels outside the Kakadu Park. Other indicators of recovery can [be] seen in his improved upkeep of his home and garden, increased hunting trips and plans to improve the facilities at the remote camp he uses out on the Magella Creek.

[34] In my view, this is a case where the observations of King CJ in *Osenkowski*, supra, concerning a place for the leniency traditionally extended even to offenders with bad records when the Judge forms the view that leniency at that stage might lead to reform, have significance.

[35] I do not consider that the learned Magistrate's sentence has been demonstrated to be manifestly inadequate. On the contrary, I consider it to

be humane and a reasonable disposition of what was an unusual case, especially bearing in mind that the respondent's wife specifically requested in her victim impact statement that she did not wish the respondent to go to jail:

> I want him to stay with me and the children, because we have no family staying with me and the children. I am afraid that if Paddy goes to Berrimah, drunken men from Town Camp will hurt me and rape me, this is why I want Paddy to stay with me. He has stopped drinking now. Since the incident, we have been to 009 to fish and hunt.

[36] The appeal must be dismissed.
