Bellis v Burgoyne [2003] NTSC 103

PARTIES:	MATTHEW CONWAY BELLIS
	v
	ROBERT ROLAND BURGOYNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	20214041, 20217167, 20217172 and 20314724 (JA 41/2003)
DELIVERED:	24 OCTOBER 2003
HEARING DATES:	13 OCTOBER 2003
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW - Particular offences - Offences against peace and public order - Assault police - Appeal against sentence - Breach with further similar offences committed - Whether tariff exists - Whether sentences manifestly excessive

REPRESENTATION:

Counsel:

Appellant:	A Hopkins
Respondent:	R Noble

Solicitors:

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

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

Bellis v Burgoyne [2003] NTSC 103

Nos. 20214041, 20217167, 20217172
and 20314724 (JA 41/2003)

BETWEEN:

MATTHEW CONWAY BELLIS
Appellant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 24 October 2003)

[1] This is an appeal against sentence from the Court of Summary Jurisdiction sitting at Alice Springs.

[2] On 20 January 2003, the appellant was dealt with for the following offences:

File No.	Count No.	Offence Date	Offence	Disposition
20214041	1	20/09/2002	Failed to leave licensed premises (Liquor Act, s 121(2))	Dismissed

File No.	Count No.	Offence Date	Offence	Disposition
20214041	2	20/09/2002	Resist police in execution of duty (Police Administration Act, s 158)	Convicted on each count; aggregate sentence of imprisonment for 1 month fully suspended; operative period of 2 years
20214041	3	20/09/2002	Threatening behaviour on licensed premises (Summary Offences Act, s 53(7)(a))	

[3] During the operative period, the appellant committed further offences. On 8 August 2003, the Court dealt with the breach of the suspended sentence, and also dealt with the fresh offences as follows:

No.	File No.	Count No.	Offence Date	Offence	Disposition
1	20214041	1-3	20/09/2002	Breach of suspended sentence	Committed to imprisonment 1 month
2	20217167	1	16/11/2002	Resist police in execution of duty (Police Administration Act, s 158)	2 months cumulative on 1 above
3	20217167	2	16/11/2002	Failed to leave licensed premises (Liquor Act, s 121(2))	Aggregate 1 month sentence concurrent with 2 above
4	20217167	3	16/11/2002	Disorderly behaviour (Summary Offences Act, s 47(a)	
5	20217167	4	16/11/2002	Disorderly behaviour in a police station (Summary Offences Act, s 47(c))	Aggregate sentence with 2 above
6	20217167	5	16/11/2002	Offensive behaviour in a police station (Summary Offences Act, s 47)	Withdrawn

No.	File No.	Count No.	Offence Date	Offence	Disposition
7	20217172	1	16/11/2002	Assault police (Criminal Code, s 189A)	Imprisonment for 4 months concurrent with 2 above
8	20217172	2	16/11/2002	Resist police (Police Administration Act, s 158)	Imprisonment for 2 months concurrent with 7 above
9	20314724	1	02/08/2003	Assault police (Criminal Code, s 189A)	6 months concurrent with 10 below
10	20314724	2	02/08/2003	Assault police (Criminal Code, s 189A)	10 months cumulative on 2 above and 7 above
11	20314724	3	02/08/2003	Resist police (Police Administration Act, s 158)	2 months concurrent with 10 above (aggregate sentence)
12	20314724	4	02/08/2003	Disorderly behaviour in a police station (Summary Offences Act, s 47(c))	

[4] The total effective period of actual imprisonment was said to be 15 months. It was ordered to be suspended after 6 months. An operative period of 2 years was fixed.

[5] The sole ground of appeal is that the sentences imposed by the learned magistrate were manifestly excessive. There is no appeal against the revocation and restoration of the suspended sentence. The appellant's submissions focussed entirely on the sentences imposed for assaulting police in the execution of their duty, contrary to s 189A of the Criminal Code.

[6] Because of the way the sentences were structured, the 15 months ordered to be served is made up of:

1. the 1-month restored sentence;

2. the 4-month cumulative sentence for assault police on file 20217172; and

3. the 10-month sentence on file 20314724 for assault police.

The other sentences were made concurrent with one or other of these sentences. In particular, the sentence of 6 months for assault police on count 1 of file 20314724 (No. 9) is concurrent with the 10-month sentence on the same file. Unless the 10-month sentence is able to be successfully attacked, there would be no point in considering the 6-month sentence. Nevertheless, it is appropriate to consider the facts and circumstances relating to the whole offending.

The offences of 20 September 2002

[7] The facts of this offending are not known other than the offences occurred at Lasseter's Casino.

The offences of 16 November 2002

[8] At 1.45 am on Saturday, 16 November 2002, the appellant was at the Lasseter's Casino. He had first been banned from the Casino on 20 May 2002, and it appears that, notwithstanding that ban, he had continued to attend the Casino on a number of occasions. He had been at the Casino for some hours gambling and was quite intoxicated when management made a decision to bar the appellant from the premises, and he was served with a letter and trespass notice and asked to leave the premises. The appellant refused, saying, "I'm not fucking going anywhere." He caused a disturbance

by yelling obscenities at staff and patrons. He was again asked to leave by security staff. He again refused and continued to yell obscenities, including, "You fucking cunts" and "Who the fuck do you think you are?" Security staff were eventually able to escort him outside the Casino building. When police arrived, he was still sitting outside the main entrance yelling abuse at the Casino staff, calling them "Fucking gutless cunts." The appellant was informed by the security manager that he was banned for life. He was arrested and taken to the Alice Springs watchhouse. While the appellant was being escorted into the watchhouse reception area, he raised his right arm in an aggressive manner at Police Officer Dupont and had to be restrained by two officers, one holding each arm. He was constantly restrained due to his aggressive behaviour and struggled whilst being searched by staff. The appellant was yelling at officers, "Let go of my fucking hands, you cunts, or I'm going to smash you", several times. Once in the cell, the appellant again struggled with police officers and had to be placed on his knees for the staff to vacate the cell. Whilst in the cell, the appellant was constantly kicking at his cell door and windows with his feet and yelling, "You cunts, just fucking wait, you cunts." The appellant proceeded to urinate on the cell floor while standing near the door. The appellant continually banged his feet and fists on the cell's perspex windows and abused a member by stating, "Hurry up and process me, you baldy-headed fuck, or I'll slap you round the head." When attempting to charge the appellant, he kept stating, "Bullshit." When he was told at 9 am that bail

was refused, the appellant screamed out, "Fucking bullshit", and charged at the door. Members had to use some force to close the door and the appellant repeatedly yelled out, "Bullshit fucking knobs." The appellant repeatedly yelled out, "Bullshit fucking knobs, I want a fucking mattress in here, you fucking cunt. You fucking little rats. You fucking cunts." The appellant again started banging on the meal hatch with some force. At about 9 am that morning, the appellant was being spoken to by his legal representative and, at the conclusion of this, he was requested by the watchhouse staff to return to his cell. The appellant became aggressive and stated, "I beg your fucking pardon", to two police officers nearby. The appellant became more agitated and refused to enter the cell when asked again. The appellant was then directed to the cell by two police members and he resisted their efforts by struggling and attempting to release him from their hold. The appellant was placed into his cell by three police officers and restrained on the bed as police believed he was attempting to spit at them. As the police officers attempted to exit the cell, the appellant jumped up quickly and, with his right hand, forcefully pushed Auxiliary Gary Wilson once in the chest region, causing him to take a step backwards. No injuries were sustained as a result of this assault.

[9] It is to be noted that these offences all occurred whilst on a suspended sentence for similar offending. It was put, on the appellant's behalf, that the appellant's perception was, at the time, that security staff would take no

action to enforce the ban until he had run out of money. Other matters put on his behalf have relevance to all of his offending.

The offences of 2 August 2003

[10] At 12.49 am on Friday, 2 August 2003, the appellant was drinking with friends at Unit 14, 107 Bloomfield Street, which is his place of residence. The appellant approached two police officers who were at Unit 12, 107 Bloomfield Street, investigating a report of a broken window. Another person, Nathaniel Thompson, who had also been drinking at Unit 14, joined the appellant. The appellant said to police, "You may as well arrest me now." Police said, "Why did you do it?" The appellant said, "What are you saying?" Thompson was agitated and said to police, "What you doing coming here with your van and shit?" The appellant was unsteady on his feet and stumbled into Thompson. They held each other for support. Police advised both the appellant and Thompson that they best return home due to their state of intoxication. The appellant stood still, supporting himself on Thompson. Police informed the appellant of the legislation regarding protective custody. Thompson grabbed hold of the appellant and started to nod and motion towards the officer. Thompson was informed he was being placed into protective custody. The appellant walked off towards the rear of the police car, with Thompson close behind. Police opened the door of the cage and the appellant climbed in without saying anything. Thompson stood at the rear of the cage refusing to get in. At this stage, the appellant was not under arrest. As police attempted to place Thompson in the rear of the cage,

the appellant became angry and threatened police, saying, "Don't fucking do that or I'll smash you", pointing at Senior Constable Robertson. The officer instructed Thompson to get in the rear of the cage and the appellant again threatened police and said, "I'm going to get you." The appellant lurched out of the rear of the cage, grabbing Senior Constable Robertson with his left hand and swinging at him with his right hand in a fist, which glanced off Robertson's right shoulder. He continued his body forward, almost head-butting Robertson. Following this, the police intention was to arrest the appellant for assault police. The appellant resisted and both he and Thompson became involved in a wrestle, grabbing hold of the police members' jackets, trying to force them to be ground. The appellant was sprayed with OC spray in the eyes and mouth and fell to the ground, and was restrained by Constable Dwyer. The appellant was given OC spray after-care, and placed in the rear of the police car and was taken back to the Alice Springs watchhouse. Once back at the watchhouse, he was provided with further care and, during this second period of care, the appellant stood up from the water fountain, looked at the police officer on his left-hand side, who was Senior Sergeant Nixon, and lurched to his left-hand side, head-butting Senior Sergeant Nixon below his right eye with his forehead. The appellant also spat on the windows of the watchhouse as he entered it. While being searched at the front counter of the watchhouse, the appellant turned to his left, facing Senior Sergeant Nixon, who was restraining him, and said, "I should spit at you." He then made the motions of spitting,

before saying, "Then if I did, it would be a further charge." The appellant was placed in his cell. Once he was in the cell, he stood in the middle of the cell and urinated on the floor. As a result of the incident, Senior Sergeant Nixon suffered reddening and pain to his face under his right eye. At no time was the appellant given permission to assault either of the police officers. These offences occurred whilst on bail for the offences which occurred on 16 November 2002.

Appellant's circumstances

[11] The appellant is a 26 year old single man of Aboriginal descent, who was born in Bega, New South Wales, and grew up in Eden. He had a happy childhood until his parents separated when he was 10 years of age. His mother, who comes from the Northern Territory, returned to Alice Springs with he and his brother. At first they lived with relatives at Charles Creek. This was a "culture shock" to him and he was exposed to virtually constant police intervention in everyday life. As a result, he developed an animosity towards police as a result of perceived injustices he had witnessed.

[12] The appellant attended school at Alice Springs and, after leaving school, obtained reasonably constant work of an unskilled kind since early adulthood.

[13] The appellant, through his counsel, expressed his remorse and his desire to obtain anger management counselling. It was put that the appellant was intelligent and had insight into his offending behaviour. He had family

support. Upon release from custody, he intended to resume gold prospecting. The appellant's counsel asked for a short term of imprisonment of 1 month to be served concurrently with the restored sentence.

Sentencing guidelines

[14] Prior to 1994, the offence of assaulting a police officer in the execution of his duty was to be found in s 158 of the Police Administration Act, which fixed a maximum penalty of $1000 or imprisonment for 6 months. In *Robertson v Flood* (1992) 111 FLR 177 at 188, I observed:

> "It is somewhat odd that s 188(1) of the Criminal Code imposes a maximum penalty of one year's imprisonment for common assault, and a maximum of five years' imprisonment if an assault is committed upon a person doing an act in the execution of his duty or if the person is a public servant acting in the execution of his duty; yet the maximum penalty fixed by s 158 of the Police Administration Act is only six months' imprisonment. Perhaps the reason for this attitude by the legislature is that assaulting a police officer is an occupational hazard for which they are trained to deal."

[15] In 1994, the legislature repealed so much of s 158 of the Police Administration Act as dealt with assaulting a police officer in the execution of his duty, and introduced a new provision, s 189A, into the Criminal Code. That section provides:

> "**189A. Assaults on police**
>
> (1) Any person who unlawfully assaults a police officer in the execution of the officer's duty is guilty of a crime and is liable to imprisonment for 5 years or, upon being found guilty summarily, to imprisonment for 2 years.
>
> (2) If the police officer assaulted –

(a) suffers bodily harm, the offender is liable to imprisonment for 7 years or, upon being found guilty summarily, to imprisonment for 3 years; or

(b) suffers grievous harm, the offender is liable to imprisonment for 16 years."

[16] Clearly, s 189A raised the bar considerably. In particular, it is to be noted that the offence of assaulting a police officer in the execution of his duty, without the circumstance of aggravation of causing bodily harm, carries a maximum, now, of imprisonment for 5 years. In *Clark v Trenerry* (unreported, 17/1/96, BC9601976), B F Martin CJ said, after referring to s 189A:

> "Given that the principle role of sentencing is the protection of the community, the Courts would be lacking in their responsibility in that regard if they failed to do as much as is in their legitimate power to protect the police, who have a more direct and vulnerable role in achieving that same objective. That protection can be given, in part, by consistently imposing condign punishment upon those who assault police in the execution of their duty. The Court of Summary Jurisdiction and this Court have indicated that assaulting a police officer in those circumstances invites a gaol sentence and the legislature has since these events also recognised that need as evidenced by the amendments to which reference has been made. It is to be expected, in the light of those amendments, that penalties imposed by way of prison sentences upon conviction for offences such as these will increase substantially, taking into account the much higher maximum penalties."

[17] There are a number of guidelines which can be distilled from previous authorities which are relevant when courts are required to sentence offenders on pleas of guilty for assaulting police:

1. Each case requires individual assessment and treatment:

   (*Yardley v Betts* (1979) 1 A Crim R 329 at 334: applied by Kearney J in *Golder v Pryce* (unreported, 24/12/97)).

2. There is no presumption that there must be a gaol term: (*Robertson v Hood* (1992) 111 FLR 177 at 188: *Casey v Haywood* per Kearney J 12/3/97, unreported).

3. However, an immediate gaol sentence can generally be expected where:

   (a) The offender deliberately assaults police in order to impede them from performing their work: *Hayes v Trenerry* (unreported, Kearney J 13/3/95, para 18).

   (b) There is some other aggravating feature about the case, for example: the appellant may have a prior conviction for assault police or for violence; or the appellant may have used or threatened to use a weapon: see *Ferguson v Chute* (unreported, Mildren J 3/6/92), applied in *Casey v Hayward* (unreported, Kearney J 12/3/9). I would add to this category cases where the police officer has suffered bodily or grievous harm, or has been put in fear of his safety, or has suffered psychological trauma as a result of the attack.

   (c) Where the offence took place in circumstances where the police were outnumbered, or in a remote location away from assistance: *Kumantjara v Harris* (1992) 109 FLR 400 at 409.

4. Obviously, there may be mitigating circumstances which may persuade the sentencer to suspend the sentence fully or to impose a home detention order or community service order or fine. Commonly, 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, for example.

[18] It would also be relevant to consider whether or not the sentence fell within or without any tariff which may have been set. No material has been put before me of recent penalties to establish whether there is a tariff in the Court of Summary Jurisdiction. I was referred to my observations in *Ferguson v Chute*, supra, as to what the statistics revealed in 1992. However, that material is now very old and predates the enactment of s 189A of the Criminal Code. In *Casey v Haywood*, supra, Kearney J expressed the view that there is no sentencing tariff for assault police, a view followed by Thomas J in *Lansen v Marshall* (unreported, 25/2/03, BC200300436). In my opinion, having regard to the very wide range of circumstances of this offence and of the offender which may fall to be considered, the views of Kearney and Thomas JJ are plainly correct.

Submissions by appellant

[19] It was submitted, on the appellant's behalf, that there was an almost complete absence of aggravating features about the assaults in this case such

as to warrant a significant gaol term. The appellant, although he had a prior conviction for resist police, had no priors for assault police. In no case was the appellant charged with causing bodily harm (an aggravating circumstance which must be pleaded but was not). There was no evidence of any psychological harm, and such harm as occurred to Senior Sergeant Nixon was minor. In each case, the appellant was outnumbered and easily subdued by police. The assaults did not occur in a remote area or in circumstances where the assaults were likely to encourage others to join in. On no occasion was a weapon used, nor was any police officer threatened with a weapon. The acts were spontaneous, rather than deliberate acts of thuggery.

Submissions by Respondent

[20] On the other hand, the offences on 16 November 2002 occurred when the appellant was serving a suspended sentence for resist police, and the offences on 2/8/03 occurred whilst the appellant was on bail for similar offences. These are plainly aggravating factors. The appellant's plea of guilty and willingness to undergo anger management indicated remorse and a willingness to change. The learned magistrate reflected this by suspending a significant part of the sentences on conditions designed to enhance the appellant's rehabilitation. Mr Noble, for the respondent, submitted that the head-butting attack on Senior Sergeant Nixon was not spontaneous. He submitted, also, that the sentences had to be seen in the context of all of the

offending, bearing in mind that a number of concurrent sentences were imposed.

Conclusions

[21] It is well established that, in order to succeed on the ground that the sentences are manifestly excessive, the appellant must show not only that the sentences are excessive, but also that they are manifestly so. The sentencing magistrate had a wide discretion. It is not sufficient that I might have imposed a lesser sentence had I sat on this case at first instance.

[22] I accept that, seen in isolation, the first of the two assault police charges did not have any aggravating features, except for the fact that the assault occurred whilst the appellant was serving a suspended sentence. However, that assault occurred well after the appellant had sobered up and had had an opportunity to obtain legal advice. He was, moreover, in custody at the time. The assault occurred in a police cell after he had had to be restrained. Given that this assault occurred well after the events which formed counts 1-5 (for which he received a total sentence of 2 months' imprisonment), the appellant could not have complained if he had received 2 months cumulative on counts 1 and 2 on file 20217172. Whilst the sentence of 4 months, looked at in isolation, is excessive, I do not consider that any injustice has occurred because the total sentences received are, in my opinion, well within the range.

[23] As to the second assault police, the sentence of 10 months for head-butting the Senior Sergeant, whilst stern, was warranted and not, in my opinion, manifestly excessive. The head-butting plainly did cause some pain and discomfort to the Senior Sergeant. It was deliberately aimed at the Senior Sergeant, who was involved in providing him with OC spray after-care. By this time the appellant had been removed from the scene of the scuffle which occurred outside the flats. It was made worse by the fact that he was on bail for similar offending at the time.

[24] In these circumstances, I am satisfied that, to the extent that the appellant might have been able to have succeeded on at least one of the counts, no substantial miscarriage of justice has actually occurred (Justices Act, s 177(2)(f)). I regard the fact that his Worship partly suspended the sentence on conditions designed to foster the appellant's rehabilitation as entirely appropriate. It cannot be argued that the actual time in custody of 6 months is manifestly excessive in itself. The appeal must therefore be dismissed.

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