

*Finlay v Materna* [2006] NTSC 9

PARTIES: FINLAY, Marcus Duane

v

MATERNA, Robert Bruce

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING APPELLATE  
JURISDICTION

FILE NO: JA 46/2005 (20526761)

DELIVERED: 13 February 2006

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JUDGMENT OF: SOUTHWOOD J

**CATCHWORDS:**

Magistrates – appeal against sentence – alcohol – manifestly excessive –  
appeal dismissed

*R v Anzac* 50 NTR 6; *Cranssen v The King* (1936) 55 CLR 509; *House v The King* (1936) 55 CLR 499; *Innes v Wurrumara* (1999) 105 A Crim R 512  
*Najpurki v Luker* (1993) 117 FLR 148 at 152 applied

*Pappin v The Queen* [2005] NTCCA 2; *Patrick v Baum* [2003] NTSC 59,  
referred to

**REPRESENTATION:**

*Counsel:*

Appellant: T Aickin  
Respondent: C W Roberts

*Solicitors:*

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

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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Finlay v Materna* [2006] NTSC 9  
No. JA 46/2005 (20526761)

BETWEEN:

**MARCUS DUANE FINLAY**  
Appellant

AND:

**ROBERT BRUCE MATERNA**  
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 13 February 2006)

**Introduction**

- [1] This is an appeal against a sentence of one month and 14 days imprisonment, to be suspended after 10 days, that was imposed on the appellant by the Court of Summary Jurisdiction on 11 November 2005 for the crime of assault on a female involving the use of a 30 centimetre kitchen knife. The sentence was suspended on condition that, during the operational period of the sentence, the appellant be supervised by the Director of Correctional Services and is to obey his lawful directions with respect to substance abuse and use, residence, anger management, counselling, employment and reporting. The period specified under s 40(6) Sentencing Act is 12 months from 11 November 2005.

- [2] The appeal is brought pursuant to s 163 Justices Act by a notice of appeal dated 11 November 2005. The appellant relies on three grounds of appeal. First, the Court of Summary Jurisdiction erred in not suspending the head sentence that was imposed in full. Second, the Court of Summary Jurisdiction imposed a sentence of imprisonment on the appellant that was manifestly excessive. Third, the Court of Summary Jurisdiction erred in principle by not treating the fact that the appellant was drunk as a mitigating factor.
- [3] The first and second grounds of appeal are essentially the same ground of appeal. The appellant contests the actual period of imprisonment imposed by the Court of Summary Jurisdiction.

### **Nature of the appeal**

- [4] An appeal against sentence is an appeal against the exercise of a judicial discretion. A decision of the Court of Summary Jurisdiction on sentence will not be disturbed unless an error in the findings or interpretation of the law or in exercising the sentencing discretion is shown. The Supreme Court may intervene and exercise its own discretion in an appeal against sentence from the Court of Summary Jurisdiction if a sentencing magistrate acts upon a wrong principle, if the magistrate allows extraneous or irrelevant matters to guide or affect the sentence that is imposed, if the magistrate mistakes the facts or if the magistrate does not take into account some material consideration: *House v The King* (1936) 55 CLR 499 at 505.

[5] On occasion it may not appear how the sentencing magistrate has reached the result embodied in the sentence subject to appeal, but, if upon the facts it is unreasonable or plainly unjust, the Supreme Court may infer that in some way there has been a failure to exercise properly the discretion that the law reposes in the Court of Summary Jurisdiction. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred: *House v The King* (supra) at 505. For a substantial wrong to be established, the appellant must show that the sentence was clearly and obviously and not just arguably excessive: *Cranssen v The King* (1936) 55 CLR 509 at 520. There is a strong presumption that the sentence imposed by the Court of Summary Jurisdiction is correct: *R v Anzac* 50 NTR 6 at 11.

#### **Alcohol – mitigating or aggravating factor**

[6] Alcohol may be a mitigating factor. In *Pappin v The Queen* [2005] NTCCA 2, Martin CJ stated at [23] to [24] as follows:

The appellant drank to excess only on infrequent occasions and was not usually a person who became violent. He was a person of prior good character. By reason of intoxication he acted on the spur of the moment in a manner that was quite out of character. It is this combination of circumstances that justifies the court treating intoxication as relevant to moral culpability of the appellant and subject to the observations that follow as having a mitigatory effect.

The fact that intoxication has a mitigatory effect in the particular circumstances of the appellant is not to use intoxication as an excuse. Nor does it necessarily follow that the mitigatory effect of intoxication will be of significant weight each case must be determined according to its particular circumstances. For example, considerable weight might be given to intoxication as a matter of

mitigation where an offender of previously unblemished character commits a minor offence which was totally out of character by reason of intoxication. At the other end of the scale, very little weight can be given if, by reason of intoxication, the same person acts out of character and commits a particularly serious crime of violence.

### **The appellant's argument**

- [7] In support of the first and second grounds of appeal the appellant argues that the sentence imposed was manifestly excessive because this was an inappropriate case for allowing general deterrence to outweigh the effect of the mitigatory circumstances: *Patrick v Baum* [2003] NTSC 59 In this regard the appellant relies on the appellant's age, his previous positive good character, his contribution to the community, the fact that the appellant's conduct was out of character, that no harm is alleged to have been sustained by the victim and that instead of using the kitchen knife the appellant ultimately threw the knife to the ground. At no stage did he intend to harm the victim with the knife. It was submitted that the sentencing magistrate placed too much emphasis on deterrence and the use of the kitchen knife and insufficient emphasis on the other relevant factors.
- [8] In support of the third ground of appeal the appellant argues that the fact the appellant did not ordinarily get as drunk as he did prior to committing the assault on his wife is a mitigating factor. The appellant normally drinks beer. On this occasion he drank moselle and he mixed his drinks. This caused him to be more intoxicated than usual and to behave out of character.

## **The facts**

[9] The facts are as follows. The appellant is a 23 year old aboriginal man who lives at Wuppa Camp in Tennant Creek. He was born in Katherine. He grew up in Tennant Creek and Borroloola. He went to school in Tennant Creek and he completed year 10 of High School. The appellant can read and write. He is married to the victim. They have been married for five years and they have two young children, a two year old and a nine month old. He does CDEP work at Wilson River. He works fixing cars and he also does yard work. He generally works Monday to Friday. He earns \$180 per week. He occupies his spare time productively. He plays lead guitar and does some singing in a band called the Barkley Boys. The band usually plays at the Barkley Arts Centre. The band has been in Battle of the Bands and the band is thinking about producing a CD.

[10] On 5 November 2005 the appellant was having a drink with some friends at the Wuppa Camp. He was drinking VB and he also drank Fruity Moselle which is something that he does not usually drink. They started drinking around 12.00 pm. During the course of the day the appellant went home to see his wife who was at home looking after their children. When he arrived home he was intoxicated. At about 10.00 pm he and his wife were in their bedroom. He asked his wife for a cigarette. His wife would not give him a cigarette or would not get him a cigarette and they had an argument. He became aggressive and he twice punched his wife with a closed fist, once to the mouth and once to the back of the head. His wife then left the bedroom.

He followed her out of the house. They were still arguing. The appellant then went inside to the kitchen where he grabbed a 30 centimetre long black-handled kitchen knife. He took the knife outside and he confronted his wife with the knife by his side. He continued to argue loudly with his wife before throwing the knife to the ground. The police attended their house. When they did so the appellant walked to the police vehicle. He was arrested and conveyed to the Tennant Creek Watch House where, after he had sobered up, he took part in an electronically recorded interview with police. When asked why he punched his wife the appellant said, "I do not know. Probably that cigarette." When asked why he picked up the knife the appellant replied, "No reason." He also said, "I was not going to cut her or do anything."

- [11] The appellant has apologised to his wife and she has accepted his apology. He is very sorry for what he did. He shocked himself by what he did. He has decided that there will be no more drinking with his friends on Saturdays. The appellant pleaded guilty at the first opportunity to do so.

### **Conclusion**

- [12] The arguments made on behalf of the appellant cannot be sustained. The sentencing magistrate accurately described the nature of the appellant's offending and carefully analysed all of the circumstances of the case. The appellant was an experienced drinker. The submissions made on his behalf in the Court of Summary Jurisdiction reveal that he was a regular drinker

and that he regularly drank on Saturdays. The “exceptional circumstance” on the occasion of his offending was that he drank moselle wine as well as beer and as a result he became more intoxicated than usual. Having got into an intoxicated state the appellant returned home to where his wife was caring for their two young children. He then started an argument about a cigarette which resulted in him punching his wife to the mouth and to the head and confronting her with a knife held by his side. Such conduct is serious. Although the appellant was disinhibited by alcohol and his conduct was impulsive and fortunately his wife was not seriously injured, he persisted with his criminal conduct for a significant period of time and he went out of his way to obtain the 30 centimetre kitchen knife. Such offending is prevalent. It was yet another assault by an aboriginal man on an aboriginal woman involving a weapon following a petty argument where the man had made a demand on the woman that she was not prepared to meet. In the circumstances very little weight can be given to the fact that the appellant was intoxicated. The sentencing magistrate’s remarks do not indicate that she treated the appellant’s consumption of alcohol as an aggravating factor. She simply saw the appellant’s intoxication as part of the circumstances in which the offending arose.

- [13] The sentencing magistrate was entitled to give considerable weight to general deterrence and to denunciation. Courts must do what they can to see that the pervasive violence against women in aboriginal communities is reduced: *Innes v Wurramara* (1999) 105 A Crim R 512. There are offences

in which the deterrent purpose of punishment must take priority and where a sentence of imprisonment will be appropriate even in the case of a first offender of good character: *Najpurki v Luker* (1993) 117 FLR 148 at 152

[14] The sentence of imprisonment is proportional to all the circumstances of the case. It is in no sense crushing nor will it inhibit the rehabilitation of the appellant or harm any reconciliation with his wife.

[15] The appeal is dismissed. I will hear the parties as to costs.