Dhamarrandji v Curtis [2014] NTSC 39

PARTIES:	Dhamarrandji, Nora Dhumudal v Curtis, Mickie Dean
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	21350450 (JA No. 13 of 2014)
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JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION (NHULUNBUY)

CATCHWORDS:

CRIMINAL LAW – Appeal against mandatory minimum term imposed by Magistrate – Availability and application of "exceptional circumstances" – "Level Five" assault – Minimum three month term of imprisonment – Submissions regarding "exceptional circumstances" and proportionality – Good character, personal circumstances and guilty plea relevant to "exceptional circumstances" – Appeal allowed –Resentenced – Term of imprisonment partly suspended – *Sentencing Act 1995* (NT), s 78DI.

Sentencing Act 1995 (NT) ss 5, 40, 78BA, 78D, 78DI, 78E.

BB v The Queen [2014] NTCCA 13; *Dinsdale v The Queen* (2000) 202 CLR 321; *Quadir v Rigby* [2012] NTSC 90; *Makarian v The Queen* (2005) 228 CLR 357; *Olsen v Sims* (2010) 28 NTLR 116; *R v Kelly* [2000] 1 QB 198, applied.

Muldrock v The Queen (2011) 244 CLR 120, referred to.

Fox and Freiberg's Sentencing, State and Federal Law in Victoria 3rd Edition (Thomson Reuters, 2014).

Northern Territory, *Parliamentary Debates*, Legislative Assembly 29 November 2012 (The Hon Johan Elferink, Attorney General).

REPRESENTATION:

Counsel:

Appellant:	J Hunyor
Respondent:	D Dalrymple

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

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

Dhamarrandji v Curtis [2014] NTSC 39
No. 21350450

BETWEEN:

NORA DHUMUDAL DHAMARRANDJI
Appellant

AND:

MICKIE DEAN CURTIS
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 29 August 2014)

Introduction

[1] This appeal primarily concerns the availability and application of the "exceptional circumstances" exemption in respect of a mandatory minimum term provided by s 78 DI of the *Sentencing Act*. These reasons are directed to the facts and considerations that arose in these particular proceedings before the Court of Summary Jurisdiction sitting at Nhulunbuy.

[2] After pleading guilty to one charge of aggravated assault, the appellant was convicted and sentenced to three months imprisonment. The court declined to find "exceptional circumstances" that would have enabled suspension of

part of the sentence. The applicable mandatory minimum term was three months imprisonment.

[3] The appellant alleged the learned sentencing Magistrate was in error with the approach taken to "exceptional circumstances". The respondent argued, however, that the learned sentencing Magistrate appropriately assessed the relevant competing considerations, determined the objective seriousness of the offending and concluded that the offending called for a sentence in excess of the mandatory minimum term. In those circumstances, coupled with further submissions dealt with later in these reasons, the respondent argued the appeal should not succeed.

Proceedings in the Court of Summary Jurisdiction

[4] The appellant pleaded guilty to one charge of assault with circumstances of aggravation: that the victim suffered harm; the victim was unable to defend herself; and that the victim was threatened with an offensive weapon, namely a stick. The stick was described as two feet long and two centimetres thick.

[5] The agreed sentencing facts were that on Monday, 11 November 2013, at about 3:30pm, the appellant was sitting at the front of her residence at House Two, Wallaby Beach. From this location she entered into a verbal argument with the victim, who was sitting under the verandah at a neighbouring residence at House Four, Wallaby Beach.

[6] After arguing with the victim for a period of time, the appellant got up and rushed over to the victim. The appellant was intercepted at this time by a family member and guided back to her own house. The appellant and victim then proceeded to argue again. The appellant again got up and approached the victim.

[7] The appellant located a stick on the ground approximately two feet long and two centimetres thick. The appellant armed herself with the stick and used it to strike the victim to the head twice. As the appellant intended to strike the victim a third time to the head area, the victim raised her arm to protect herself and as a result was struck with the stick to her left hand. The appellant was then coaxed away from the area by family members and returned to her residence where she awaited police. At 7:36 pm the appellant was arrested, charged and later bailed. As a result of the assault the victim suffered bruising and swelling to her forehead and head and a broken bone in her left hand that required a plaster cast.

[8] The tendered medical report stated the injuries were not life threatening but "would have caused pain and fits the definition of harm".

[9] On behalf of the appellant the court below was told the background to the offending was that the victim told the appellant that she could have the victim's house because she was leaving Wallaby Beach to move to Cairns permanently; and that the appellant's family went to the vacated house, moved the cars out, cleaned up the house, and were working on the garden.

The victim then returned from Cairns and wanted to move back into her house. At this stage the appellant and her daughter had already moved into the house and both were upset given the time they had spent preparing the property. There was a protracted argument about this problem. The appellant's daughter was present and tried to calm the situation however, the appellant became angry and committed the assault.

[10] The appellant's counsel told the Court of Summary Jurisdiction that she was regretful; that it was the first time she had ever hit someone; and that she had wanted to apologise to the victim when things had settled down, however, the victim had gone back to Cairns and had not returned.

[11] The court was told the appellant was 57 years old; identified as a Christian person who did not drink alcohol; she had 10 grandchildren; and had lived at Wallaby Beach Community for a long period of time and worked with children in the community, previously with Anglicare. She had a "working with children" card and worked informally helping to get children to school. She tried to assist and support families to make sure the children of the community attended school. She also assisted her family to operate a tourism enterprise where tourists learn about Yolngu culture. In terms of her health, the appellant was described as an old lady, who suffered from diabetes, and had a stent in her heart from a previous heart attack. The appellant was arrested and it was the first time she had "been in trouble of any kind", "certainly of this kind of seriousness".

[12] Counsel for the appellant submitted a sentence of imprisonment that was suspended would be an appropriate disposition given the seriousness of the assault balanced against the reason the appellant became angry, as well as the appellant's age and good character. Counsel submitted "exceptional circumstances" existed on the basis of proportionality, and argued that the three month mandatory minimum, if actually served, would be disproportionate to the circumstances of the case. It was submitted that the "exceptional circumstances" exemption was intended to be broad and that the court could consider any matter it thought relevant. Further, it was argued that an assessment of whether a penalty was disproportionate to the offending included an assessment of the circumstances of the offender.

[13] The prosecution submission before the Court of Summary Jurisdiction was that the mandatory sentence applicable was three months imprisonment, and no "exceptional circumstances" had been shown.

[14] The learned sentencing Magistrate noted that the assault was serious and that there had been the family disagreement referred to by counsel, and that the victim came back to the house and wanted to take advantage of the work that had been done.

[15] The Magistrate observed that resorting to violence was an entirely inappropriate way to deal with the matter, particularly with the use of a weapon because of the greater risk of injury and here the victim had been significantly harmed. The Magistrate noted the appellant was 57 years of

age, had not been in trouble before and had brought up a number of children, including grandchildren and that she did very good voluntary work helping children get to school and talking to irresponsible parents about sending their children to school. Mention was also made of the family tourism business and the appellant's medical conditions.

[16] The sentencing Magistrate explained the scheme of categorising assaults in the *Sentencing Act*, observing the relevant charge was a "Level Five" assault as it involved a weapon and the victim suffered harm.

[17] On the issue of "exceptional circumstances" and whether it applied to this matter, the sentencing Magistrate said:

> The Sentencing Act then provides that if someone is found guilty of a level five offence and even if that person has never before been found guilty of a violent offence the court must impose a minimum sentence of three months actual imprisonment. The only circumstance in which the court is not to impose that term is if the court is satisfied that there are exceptional circumstances that apply in the case or that circumstances of the case are exceptional.
>
> I've given that some considerable thought because it's been suggested to me that there are – there is an exceptional circumstance of the case and that is that you are a person who has never been in trouble before. I'm afraid that I don't accept that can be an exceptional circumstance in this matter.
>
> It's very clear to me from looking at s 78(D) that the legislature has determined that it is to be three months actual imprisonment for a person who commits an assault that fits this category as a first time violent offence. So I don't see that being a first time offender even one of previous very good character and I accept that that's your case, can fit an exceptional circumstance provision because to do so would actually defeat the purpose of s 78(D). That being the case you will be convicted and sentenced to three months imprisonment.

I've made this allowance, Ms Dhamarrandji, had it not been for the need to impose three months actual imprisonment, I would have considered that this was an offence that warranted a much more lengthy period of imprisonment to reflect the seriousness of the offending. But in circumstances where the court had full discretion I would have been prepared to suspend at least part of that sentence or perhaps all of it.

So I've decided that as you will be serving three months actual imprisonment I will not go past that amount in order that there is no further restraint on you once you are released taking into account your previous good character.

Exceptional Circumstances

[18] Section 78DI of the *Sentencing Act* governs the "exceptional circumstances" exemption. Section 78DI provides as follows:

(1) This section applies if:
  (a) a court is required to impose a minimum sentence of a specified period of actual imprisonment for an offence; and
  (b) the court is satisfied that the circumstances of the case are exceptional.

(2) If this section applies:
  (a) a provision of this subdivision requiring a court to impose a minimum sentence of a specified period does not apply in relation to the offender; and
  (b) the court must instead comply with section 78DG as if that section applied to the case.

(3) In deciding whether it is satisfied as mentioned in subsection (1)(b), the court may have regard to:
  (a) any victim impact statement or victim report presented to the court under section 106B; and
  (b) any other matter the court considers relevant.

(4) For subsection (1)(b), the following do not constitute exceptional circumstances:
  (a) that the offender was voluntarily intoxicated by alcohol, drugs or a combination of alcohol and drugs at the time the offender committed the offence;

(b) that another person:
(i) was involved in the commission of the offence; or
(ii) coerced the person to commit the offence.

[19] On its face, s 78DI grants a court the power not to impose a mandatory minimum term if it is satisfied that the "circumstances of the case are exceptional". This particular case does not require an exhaustive analysis of what may or may not satisfy a court of "exceptional circumstances".

[20] No doubt the phrase "satisfied that the circumstances of the case are exceptional" will be the subject of much discussion in future cases. I set out my own understanding of how s 78DI of the *Sentencing Act* is to be applied simply for the purpose of explaining my approach to the questions that arise in this appeal.

[21] I am content to accept the approach taken in *R v Kelly*[1] concerning the plain meaning of "exceptional". Lord Bingham of Cornhill CJ stated:

> "We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare, but it cannot be one that is regularly, or routinely, or normally encountered."

[22] The relevant sentencing principles provided in the *Sentencing Act* may also assist to inform the question of whether a case is "exceptional". Logically those principles form a source of relevant factors in all sentencing cases. Clearly each case must turn on its own facts and circumstances. Apart from

[1] [2000] 1 QB 198.

the factors expressly excluded under s 78DI(4), (that are not relevant in this case) the court may have regard to any victim impact statement or victim report (again not relevant here), and "any other matter the court considers relevant" pursuant to s 78DI(3)(b).

[23] Both parties have referred to the relevant Second Reading Speech.[2] The appellant has referred to those parts of the Second Reading Speech that indicate a broad approach may be taken to "exceptional circumstances". The respondent emphasised the parts of the Second Reading Speech that express an expectation that the usual outcome in relation to sentencing for a "Level Five" offence will be a minimum term of three months. The relevant parts of the Second Reading Speech referred to in these proceedings are as follows:

> "Section 78D and 78DA provide for the consequences of conviction of a level 5 offence. If an offender is convicted of a level 5 offence and it is his or her first violent offence, the offender must receive a minimum sentence of three months of actual imprisonment.
>
> This gives the effect to the election commitment to remove the ability of the courts to suspend a sentence for a serious assault, but also permits the court to suspend the sentence after a three month period."
>
> [The Second Reading Speech then deals with other levels of offending and matters of definition.]
>
> "Additionally, the bill provides for an exceptional circumstances exemption in the new section 78DI. This exemption provides that where a court is satisfied that exceptional circumstances exist, the

[2] Northern Territory, *Parliamentary Debates*, Legislative Assembly 29 November 2012 (The Hon Johan Elferink, Attorney General).

> court will not have to impose the mandatory minimum term of imprisonment of three or 12 months. The court will still have to order actual imprisonment, but that can be partly, but not wholly, suspended as is currently the case under section 78BA. The exceptional circumstances exemption is intended to be broad and the court may consider any matters that it considers relevant."

[24] Although as a practical matter, a finding of "exceptional circumstances", as contended on behalf of the respondent, may well be an unusual outcome, it is clear that each case must be considered individually. There is no reason that can be discerned from the *Sentencing Act,* that a broad approach is impermissible. A court may have regard to any matter or matters considered to be exceptional, provided they are not excluded.

[25] Aside from the factors expressly included and excluded, by sub-sections 78DI(3) and (4) respectively, I see no reason to refrain from considering the sentencing factors as set out in s 5 of the *Sentencing Act*, and relevant common law principles, in determining whether "the circumstances of the case" are, or are not, "exceptional". A sentencing court is still required, pursuant to the *Sentencing Act*, to punish offenders "to an extent or in a way that is just in all of the circumstances".[3] That sentencing purpose reflects the principle of proportionality and may be displaced only to the extent necessary by clear statutory warrant.[4]

[26] Superimposed on general sentencing law are minimum mandatory terms such as s 78D which must be given their full effect, however, this includes

[3] *Sentencing Act*, s 5(1)(a).
[4] *Olsen v Sims* (2010) 28 NTLR 116, per Southwood J, albeit in a different context, at paras [50], [54] – [63].

giving full effect to the broadly based "exceptional circumstance" provision. In my opinion there is no warrant to read "exceptional circumstances" narrowly or in a manner that is more restrictive than provided within Part 3, Division 6A, subdivision 2 of the *Sentencing Act*, s 78DI in particular. The circumstances of the case must amount to an exception, however, the factors relevant to that finding are not significantly confined.

[27] Section 78E of the *Sentencing Act* is of some marginal support for this general approach given it provides that Division 6A, of the *Sentencing Act* does not prevent a court from exercising any of its powers that may be exercised consistently with the mandatory sentencing provisions.

[28] The general principle constraining punishment to an extent or in a way that is just in all the circumstances, as required by s 5(1)(a) *Sentencing Act*, is displaced only to the extent necessary to apply the mandatory minimum term. I agree that if the mandatory minimum term is disproportionate to the overall circumstances of the case, that may well enliven "exceptional circumstances". It seems that was the initial approach taken in the Court of Summary Jurisdiction here.

[29] During argument about proportionality and its role in informing "exceptional circumstances", the sentencing Magistrate indicated that proportionality applied where the nature of the assault was such that the sentence would be disproportionate to what had occurred. As pointed out by the respondent on appeal, clearly a term of imprisonment for three months or

more was proportionate to the offending. That is undoubtedly the case, however, the question of setting the term of imprisonment and the question of whether any part of the term should be suspended are both matters calling for a consideration of proportionality, or, in the words of the *Sentencing Act*, sentencing "to an extent *or in a way* [emphasis added] that is just in all the circumstances". Reference was made in passing by the learned sentencing Magistrate that the question of suspension of a sentence went to prospects of rehabilitation, not to proportionality. The learned sentencing Magistrate later referred to reducing the head term of imprisonment because the court did not possess the full discretion to suspend the sentence.

[30] Although considerations of proportionality in some jurisdictions have tended to focus on the objective circumstances,[5] the instinctive synthesis approach requires consideration of at least some subjective factors.[6] Clearly the decision to suspend a sentence is not confined by considerations relating solely to rehabilitation.[7] The first determination to be made when setting a suspended sentence is to determine whether a sentence of imprisonment and not some lesser sentence is considered the appropriate disposition. The second question is whether the term set should be suspended for a period set by the court.[8] In cases of mandatory minimum sentencing, this second step can only proceed to resolution if in respect of the minimum term "exceptional circumstances" are found. As the imposition of a sentence of

[5] *Muldrock v The Queen* (2011) 244 CLR 120.
[6] *Makarian v The Queen* (2005) 228 CLR 357; *Mununggurritj v The Queen* [2010] NTCCA 17 at [26].
[7] *Dinsdale v The Queen* (2000) 202 CLR 321, per Gleeson CJ and Hayne J at [18].
[8] *Sentencing Act*, s 40(3); *Dinsdale v The Queen* (2000) 202 CLR 321, Gaudron and Gummow JJ at [15]; Kirby at [79].

imprisonment is a significant punishment in itself, in principle "[t]he length should be no greater than the length of the sentence of imprisonment that would have been imposed if no suspension were permitted".[9] An approach that seeks to lessen the length of an otherwise proportionate sentence, given a perceived apparent inability to suspend all or part of it, appears to distort the process of setting suspended sentences as outlined in *Dinsdale v The Queen*. If the length of the appropriate sentence was unwarranted, that may be a matter relevant to the question of whether "exceptional circumstances" exist.

[31] The factors that exceptionally may lead to a reduction of the term of imprisonment may well either individually or together with other "circumstances of the case" be relevant to an assessment of "exceptional circumstances". There is no need to confine the assessment of "exceptional circumstances" to what classically have been known as "objective circumstances". Subjective matters are also relevant. A consideration of both is consistent with the instinctive synthesis approach to sentencing. Indeed s 78DI requires consideration of "the circumstances of the case" which necessarily invites consideration of proportionality.

Ground One: Good character as an "exceptional circumstance"

[32] The respondent does not dispute that prior good character can be a relevant matter to be taken into account in the determination of "exceptional

[9] Fox and Freiberg's Sentencing, State and Federal Law in Victoria, 3rd edition, at 757; *BB v The Queen* [2014] NTCCA 13.

circumstances" provided under s 78DI of the *Sentencing Act*. The respondent however, argued that the sentencing remarks simply make the point that the circumstance of a defendant who has never been found guilty previously of a violent offence could not of itself constitute "exceptional circumstances". The respondent submitted first time violent offenders constitute a class from amongst whom a very small number may be eligible for the exercise of the s 78DI *Sentencing Act* discretion, so it is argued, their status as first time violent offenders cannot be a relevant "exceptional circumstances".

[33] A reading of the sentencing remarks in full makes it clear that the learned Magistrate did not accept that being a first time offender, "even one of previous very good character" could constitute "exceptional circumstances".

[34] As already observed, aside from a victim impact statement, the court may have regard to: "any other matter the court considers relevant". Good character was clearly relevant. Having regard to good character would not in my opinion, defeat the purposes of the legislation if it is a factor considered relevant to the existence of "exceptional circumstances". Amongst different offenders who may be of "good character", depending on the "circumstances of the case", their character may or may not be a determinative factor in an assessment of whether "exceptional circumstances" exist. Good character is not a factor expressly excluded, but other factors are. "Character" "must" be taken into account by a sentencing

court.[10] In appropriate cases it may well have weight in relation to the minimum term to be served, including an assessment of whether it is "exceptional".

[35] As between first offenders, there would doubtless be some diversity as to the extent and weight that might be given to "good character". In relation to first time violent offenders, some will have previous convictions for other types of offending, that may or may not be significant in a particular case. This appellant had no convictions of any type. Additionally, it was accepted by the sentencing Magistrate that this appellant had demonstrated positive good character. In the face of a very serious example of offending, "good character" may not have much weight at all in the determination of whether "exceptional circumstances" exist. Although this was significant offending, it was not to the point of rendering previous good character irrelevant or of little weight to the question.

[36] Section 78DI requires a court to consider the "circumstances of the case" as a whole. Although good character by itself may not in a particular case constitute exceptional circumstances, in combination with other factors and circumstances, it may lead to the conclusion that "exceptional circumstances" exist.

[37] In my opinion it is clear the learned Magistrate felt unnecessarily constrained and reasoned that good character either alone or in combination

[10] *Sentencing Act* s 5(2).

with other factors in the case could not constitute "exceptional circumstances". The sentencing remarks indicate that if the court had full discretion "at least part of that sentence or perhaps all of it" would be suspended. Although full discretion was not available, there was no reason why the appellant's positive good character could not have significantly informed the decision on whether "exceptional circumstances" existed. In my opinion the sentencing discretion miscarried.

[38] I will allow this ground and re-sentence the appellant.

Ground Two: Failure to take into account of the appellant's personal circumstances and plea of guilty

[39] The learned Magistrate clearly took these matters into account broadly in terms of setting the head sentence however, the only subjective factor that can be discerned as considered in relation to whether "exceptional circumstances" could apply was the appellant's good character. This was excluded. I am mindful that a failure to set out all the steps in judicial reasoning does not establish error.[11] I am acutely aware of the pressured pace in which Magistrates in regional courts must work and give decisions and reasons. Here however, after argument, there was no acknowledgement that the combination of factors that were capable of leading to a conclusion of excellent prospects of rehabilitation and a diminished need for specific deterrence were considered relevant beyond reducing the head sentence.

[11] *Quadir v Rigby* [2012] NTSC 90 at [32].

The subjective features appeared to have been taken into account only when setting the head term. I am satisfied that ground two has been made out. It is unnecessary to deal with ground three as the errors identified justify sentencing the appellant a fresh.

Re-Sentencing

[40] Taking all of the matters into account, I fully accept this was a relatively serious example of aggravated assault, with a weapon, causing harm. As a "Level Five" offence it attracts a minimum term unless "exceptional circumstances" exist. The background circumstances and explanation for the offending goes some way to explaining why a person who had not offended previously, came to offend in a most unacceptable way on this occasion. Specific deterrence would not appear to be a major factor, however general deterrence, given the prevalence of assaults in the Northern Territory, has significant operation.

[41] Taking into account the early plea of guilty; that the plea is indicative of remorse; the lack of prior convictions; and positive good character including the appellant's contribution to her family and community and the excellent prospects of rehabilitation, I am satisfied "exceptional circumstances" have been made out. This is so, even though the offending is significant.

[42] Needless to say there should still be a conviction and a head sentence of imprisonment. The appellant has spent two days in custody. In these

circumstances, the court must still order actual imprisonment but the sentence can be partly, but not wholly suspended.

[43] In my opinion, sentencing a fresh, the term of imprisonment should be more than three months due to the significance of the injury and the use of a weapon. Although I have not received specific submissions on this point, clearly in the argument before me, it was acknowledged the sentencing Magistrate thought the period of imprisonment should be greater than three months. I agree, however, for the reasons already stated, in my opinion, "exceptional circumstances" have been made out so as not to require service of the minimum term. In setting a new term, I allow an adjustment of about 25 per cent for the plea and attendant remorse.

[44] The appeal is allowed.

[45] The sentence imposed by the Court of Summary Jurisdiction is quashed. The appellant is re-sentenced. She is convicted and sentenced to a term of imprisonment for six months to be suspended after serving two days commencing 27 August 2014, noting that time is already served. The operational period will be 12 months from today during which the appellant is not to commit another offence punishable by imprisonment or she may be ordered to serve the term held in suspense.

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