Wilson v Marshall [1999] NTSC 14

PARTIES:	JOHNNY WILSON v ADRIAN ARTHUR MARSHALL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA96 OF 1998 (9813485)
DELIVERED:	23 February 1999
HEARING DATES:	15 February 1999
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	G. Dooley
Respondent:	P. Elliott

Solicitors:

Appellant:	Katherine Regional Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

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

Wilson v Marshall [1999] NTSC 14
No. JA96 of 1998

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal from a sentence imposed by the Court of Summary Jurisdiction

BETWEEN:

JOHNNY WILSON
Appellant

AND:

ADRIAN ARTHUR MARSHALL
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 23 February 1999)

[1] Johnny Wilson was sentenced on 23 October 1998 in relation to offences which occurred in June 1998. The offences and relevant sentences are as follows.

(a) One count of aggravated assault contrary to s188(2) of the *Criminal Code,* for which he was sentenced to 12 months imprisonment.

(b) One count of offensive behaviour in or about a dwelling house contrary to s47(d) of the *Summary Offences Act* for which he was sentenced to 3 months imprisonment.

(c) One count of driving whilst disqualified contrary to s31(1) of the *Traffic Act* for which he was sentenced to one month and 13 days imprisonment, the period of imprisonment being adjusted down from 2 months to take into account the fact that the prisoner had been in custody for some 18 days at an earlier time.

(d) One count of trespass contrary to s5 of the *Trespass Act* in relation to which he was sentenced to 2 months imprisonment.

[2] It was ordered that the sentences imposed in respect of the aggravated assault and offensive behaviour be served concurrently. The effective head sentence was therefore 15 months and 13 days. The sentencing Magistrate directed that the sentence be deemed to have commenced on 9 October 1998. His Worship declined to fix a non-parole period.

[3] The appellant has appealed against the sentence. At the hearing of the matter before me the grounds of appeal were amended, with the consent of the respondent, to provide as follows.

> "1. That the sentence imposed on the aggravated assault charge was manifestly excessive in all the circumstances.
>
> 2. That the learned magistrate erred in not setting a non-parole period in all the circumstances.
>
> 3. That the learned Magistrate erred in that he:
>
> - placed undue weight on the appellant's prior convictions;
> - placed undue weight on what he determined to be the appellant's attitude;

- unjustifiably formed an extremely negative view of the appellant's propensity to re-offend upon his eventual release."

[4] In the course of submissions made on behalf of the appellant, Mr Dooley addressed in general terms the penalties imposed in respect of all offences. He did not limit himself to the only sentence referred to in the amended grounds of appeal, being the sentence imposed in respect of the aggravated assault charge. Given that the notice of appeal was amended at the commencement of the hearing before me, presumably after full consideration by counsel appearing for the appellant, I propose to reconsider the sentence specifically raised in the Notice of Appeal and no other.

[5] The charge of aggravated assault arose out of an incident in which the appellant struck his former wife, Ms Neville, in an altercation that occurred at the former matrimonial home. There had been an argument with both the appellant and his wife using swear words and terms of abuse. I am told that the assault on Ms Neville that followed this argument consisted of three blows, being one to the face, one to the stomach and one to the back. In relation to the blow to the stomach it is relevant to note that the victim was, at the time, pregnant. His Worship described the assault as follows:

> "The assault was an assault in the context of a bullying empowering relationship. It was a serious assault committed by a man who broke into a house to effect the assault and held a child at the time of the assault."

[6] Elsewhere he said:

> "I categorise the assault as serious. The ingenuity of a mind can find redeeming features. Yes, there were only three blows. Yes, there was no weapon. Yes, there were no serious injuries and yes, the assault stopped without intervention. But the assault is serious. It is serious because it occurs in the context of a violent relationship. It is the third assault after two previous court warnings for assault on the same person. It was committed by a person who had a good reason not to commit an assault and the good reason being the administration of the previous court warnings. The assault is representative of a bullying empowering attitude."

[7] It seems that whilst his Worship categorised the assault as "serious", which it undoubtedly was, he was not treating it as an assault of the most serious kind which comes before the courts pursuant to s188(2) of the *Criminal Code*.

[8] The nature of an appeal against sentence was discussed by Kearney J in *Salmon v Chute & Anor* (1994) 94 NTR 1 at 24-25, where he referred to comments he had made in *Raggett, Douglas and Miller v R* (1990) 50 A Crim R 41 at 42 as follows:

> "It is fundamental that a trial Judge's (or Magistrate's) exercise of his sentencing discretion is not to be disturbed on appeal, unless error in that exercise is shown; *Griffiths v R* (1997) 15 ALR 1; 137 CLR 293 at 308-9, per Barwick CJ. The presumption is that there was no error."

[9] His Honour went on to refer to the decision of *R v Tait* (1979) 24 ALR 473 at 476 where the Full Court of the Federal Court adopted what his Honour described as the "fundamental rule on appeals against sentence":

> "The jurisdiction to revise such a discretion must be exercised in accordance with recognised principles. It is not enough that the members of the Court would themselves have imposed a less or different sentence, or that they think the sentence over severe…

…

> An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only 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…".

[10] In considering an appeal based upon the ground that the sentence was manifestly excessive in all the circumstances, the appeal court must evaluate the permissible range of sentences in light of all the admissible considerations affecting the case in hand, and drawing upon its own accumulated knowledge and experience, *R v Holder* (1983) 3 NSWLR 245 at 254. The appellant must show that the sentence is not just arguably excessive but so very obviously excessive that it is unreasonable or plainly unjust, *Salmon v Chute & Anor.* (supra at 24.)

[11] In this case the appellant having been found guilty of an offence against s188(2) of the *Criminal Code* was liable to imprisonment for 5 years or, in the event of the finding being a summary finding, to imprisonment for 2 years.

[12] It is clear that his Worship took a very poor view of the appellant. He characterised the conduct as "bullying empowering". He found the only sorrow that the appellant felt was likely to be "for himself". He said:

> "I accept that he is sorry, but I am not certain whether he is sorry for others. I consider him to be a bullying empowering man and he

> could very well be sorry for himself for the predicament that he now finds himself in. He says that he is sorry for his children. I scratch my head and I wonder at that. If he is sorry for his children, why hold a child while assaulting the child's mother."

[13] His Worship said that he was:

> "… firmly of the view that the defendant is a man who the community and Ms Neville needs protecting from. … I have no doubt, in view of the defendant's interest in his children, that he will maintain contact with Ms Neville, and I think it is only a matter of time after his release from gaol before there is another flare up between him and Ms Neville and before there is another assault. I have no doubt about that. I am very firm about that."

[14] His Worship went on to say:

> "I quite frankly fear for the future when Mr Wilson is released from gaol. I think he will offend again quite frankly. And I think the purpose of the gaol term in this case is two-fold, to give Ms Neville the security and the knowledge of knowing that at least for the time that he is in gaol she is safe. And secondly to hope, though I don't think it will work, but to hope that something happens in the defendant's mind and he decides that this bullying empowering behaviour cannot continue. I don't think the second will happen."

[15] The *Sentencing Act* provides that a purpose for which a sentence may be imposed on an offender includes "to protect the Territory community from the offender". His Worship did not err in taking this matter into account. Of course this consideration does not mean that an offender can be sentenced in advance for offences the Court may anticipate will occur upon the release of the offender from custody. Propensity may inhibit mitigation but, apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence, *Baumer v The Queen* (1988) 166 CLR 51 at 58. Whilst his Worship has placed a heavy emphasis

upon the future protection of the community and the particular victim, he has not, to my mind, ventured beyond what can properly be regarded as an appropriate sentence in all the circumstances.

[16] Although I regard the sentence of 12 months imprisonment imposed by his Worship as being at the top of the range of sentences available in the circumstances of this matter, I am unable to say that the sentence was so very obviously excessive that it is unreasonable or plainly unjust.

[17] Further, I am unable to say that the exercise of the sentencing discretion miscarried by virtue of the reasons set out in the third ground of the Notice of Appeal. It is true that the learned Magistrate took a very negative view of the appellant and that he placed emphasis on negative matters regarding the circumstances of the assault. He detailed his reasons for so doing and there is a basis for the views he formed. He appears to have paid due regard to those matters that he was required to pay regard to and, in my view, error has not been demonstrated.

[18] I was not referred to s58 of the *Sentencing Act* nor to the judgment of Angel J in *Ryden v Dredge and Winzar* (unreported, 8 December 1998). This, I expect, was because s58 has no application to the sentence imposed by his Worship. The operation of the section is restricted to circumstances where the Court is sentencing an offender "to a term of imprisonment of less than 12 months."

Failure to set a non-parole period

[19] His Worship declined to set a non-parole period and he did so for the following reasons:

> "I fear that he will offend again. I feel that there should be no non-parole period in this case. There should be no non-parole period for 2 reasons. One, to give Ms Neville some security, at least knowing that over the period of the gaol term he is in custody. And secondly because I fear that if I impose a non-parole period he will breach his parole. He has shown that now by three assaults, two breaches of bonds, three breaches of domestic violence orders and a failure to comply with bail conditions."

[20] Section 53 of the *Sentencing Act* provides that where a court sentences an offender to be imprisoned "for a period of 12 months or longer, that is not suspended in whole or in part, it shall, as part of the sentence, fix a period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case, make the fixing of such a period inappropriate".

[21] In the matter of *Sullivan v Rigby* (1987) 26 A Crim R 205 the Court of Criminal Appeal dealt with the predecessor to s53, being ss4(1) and 4(3) of the *Parole of Prisoners Act*. In that case the Court discussed the section and said (209):

> "In our view, these provisions are so structured as to create a prima facie obligation on the sentencing court to specify a non-parole period; it should not be declined except on substantial grounds of the character referred to in s4(3)."

[22] Later the Court said (210):

> "Given that there will rarely, if ever, be a case (life sentences apart) where there is only one period of imprisonment which a proper exercise of sentencing discretion will permit, a decision not to fix a parole period will almost certainly involve a judgment that the prisoner would not respond to appropriate conditions of parole."

[23] And later:

> "Of course, on at least two scores the community has a real interest in seeing that the parole system works: one is the saving of cost and the other the enhanced prospects of individual rehabilitation.
>
> It is clear that the criminal records of both men, particularly in the recent past, have much to do with a heavy dependence on drugs of one sort or another – in this instance, alcohol. If their antecedents are to be considered in determining whether to deprive them of the chance of parole, they have to be looked at in this light. It is a harsh judgment to conclude that they are and will forever remain beyond the reach of rehabilitative measures in this regard.
>
> In our opinion, the success of the parole system in the Northern Territory makes it desirable in the interests of society that parole remain an option wherever possible."

[24] In the present case, his Worship declined to direct a non-parole period for the reasons set out above. In relation to the protection of Ms Neville which, I assume, his Worship regarded as a relevant "circumstance of the particular case" for the purposes of s53, it would seem that her interests would be better served by the appellant being released into the community under terms and conditions which may be determined at the time of release rather than for him to be released at a later time without the advantages that flow from supervision. If it be thought appropriate at that time, conditions may be imposed upon him with regard to any continuing interaction he may have

with Ms Neville. Such an approach must provide better prospects for all concerned than a later, but unconditional, return to the community.

[25] As to the prospect that he will breach his parole, I note the comment of the Court of Criminal Appeal referred to above that it would be "a harsh judgment" to conclude that the appellant will forever remain beyond the reach of rehabilitative measures. Indeed, his Worship seemed to treat the appellant as being beyond redemption and he therefore disregarded any prospects of rehabilitation. He did not give weight to positive factors regarding the appellant eg his creditable employment history; the relationship between the appellant and his children; the fact that the relationship with Ms Neville had, it was said, been terminated and that the appellant wished to leave the Territory to start a new life; or the fact that the appellant and Ms Neville got together again after the assault and went out to the Bulla Community for a week as a family without any apparent problem.

[26] There are positive indications in regard to rehabilitation, not least being those arising from the cessation of the relationship between the appellant and Ms Neville and the fact that the appellant intends to leave the Katherine region. These matters were not given due weight by his Worship.

[27] In the terms of s53(1) of the *Sentencing Act*, I do not regard the nature of the offence, the past history of the offender or the circumstances of this case, as making the fixing of a non-parole period inappropriate. In all the

circumstances it is my view that his Worship erred in failing to fix a non-parole period and I propose to vary the sentence by so doing.

[28] I allow the appeal insofar as it relates to the failure to set a non-parole period. I vary the sentence imposed upon the appellant by setting a non-parole period of eight months.

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