Berry v Westphal & Berry v Cassidy [2011] NTSC 59

PARTIES:	Berry, Harold Nelson
	v
	Westphal, Lindsay
AND:	Berry, Harold Nelson
	v
	Cassidy, Craig
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA-AS 31 of 2011 (21110326) and JA-AS 32 of 2011 (21111120)
DELIVERED:	10 August 2011
HEARING DATES:	29 July 2011
JUDGMENT OF:	KELLY J
APPEAL FROM:	J NEILL SM

CATCHWORDS:

APPEAL AGAINST SENTENCE – Disorderly conduct – whether manifestly excessive – onus on appellant to establish range –unavailability of sentencing data – need to take into account maximum penalty established by legislature

Sentencing Act, s 5

Baumer v The Queen (1988) 166 CLR 51; *Bibi* (1980) 2 Cr App R (S) 177; *Freeman v Harris* [1980] VR 267; *Rory* (1992) 64 A Crim R 134; *Williscroft* [1975] VR 292, considered

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	M McColm

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	KEL 11014
Number of pages:	20

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Berry v Westphal & Berry v Cassidy [2011] NTSC 59
No. JA-AS 31 of 2011 (21110326) and JA-AS 32 of 2011 (21111120)

BETWEEN:

HAROLD NELSON BERRY
Appellant

AND:

LINDSAY WESTPHAL
Respondent

AND BETWEEN:

HAROLD NELSON BERRY
Appellant

AND:

CRAIG CASSIDY
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 10 August 2011)

[1] The appellant appeals against sentences handed down by the Court of Summary Jurisdiction on 20 June 2011. The appeal was brought on for urgent hearing as the appellant was in custody and the sentence he was serving was short – a total of 3 months and 7 days imprisonment for seven charges arising out of three separate episodes of offending.

[2] The following are the facts constituting the offences, taken from the transcript of proceedings before the Court of Summary Jurisdiction.

[3] On Tuesday 29 March 2011 the appellant was heard yelling at mounted police on Railway Terrace in Alice Springs, 'Clean your fucking shit up'. Police approached and the appellant began behaving irrationally, yelling out, 'You fucking cocksuckers, you dirty fucking cocksucker. Wait till you're out of uniform. I'm going to beat the fuck out of you and burn your horse.' He then became aggressive towards police waving his arms around and yelling, 'Not Aboriginal you cocksucker, Aboriginal people don't work for the police'.

[4] The appellant was behaving increasingly irrationally and was taken into protective custody due to his demeanour and his behaviour. On being placed in the cage he began yelling abuse towards police and kicking the cage door repeatedly along Railway Terrace, Gregory Terrace and Bath Street to the Alice Springs watch house. At the watch house the appellant yelled at police and watch house staff, 'You fucking dumb cunt, if anyone comes into my cell tonight I'll punch them out and kill them, cocksuckers and you can all get fucked'.

[5] The appellant continually became confrontational and argumentative. He finally stood up to be searched but immediately upon police touching him he tried to pull his arm free and kicked out with his legs. He was physically restrained, carried into a cell and placed on a mattress where he took hold of

the police officer's wrist and watch and refused to let go. Police managed to free the constable's arm and closed the cell door and the appellant began yelling, 'You fucking dogs, you fucking dogs, you fucking dogs'.

[6] The appellant then sat up, pulled off a toenail and used his toenail to start scratching into his left wrist until blood started seeping from the wound. Police re-entered the cell and restrained the appellant and handcuffed him. The appellant yelled abuse at watch house staff, police and other persons being brought into the watch house. He also began head butting the cell door and kicking the door with his feet.

[7] At the time of the offence, Railway Terrace was a public street opened to and used by the public and there were numerous persons present within earshot, including the watch house staff and the watch house was situated in an operational police station.

[8] About a week later, during the afternoon of Wednesday 6 April 2011 the appellant consumed an unknown amount of liquor in the Todd River adjacent to Charles Creek rendering him moderately intoxicated. At about 6:00 p.m. police approached a drinking group in the river that the appellant was associated with for the purpose of seizing liquor and directing the group to leave the area due to their unlawful consumption of liquor in that area.

[9] Police observed at this time that there was an elderly Aboriginal female lying in the sand who appeared to be seriously affected by liquor. Police informed this lady that she was apprehended for protective custody before

they assisted her to her feet. At this time the appellant yelled at police, 'You cunts are racist'. This statement was repeated on numerous occasions as police assisted the elderly lady to walk to the rear of the police vehicle. The appellant continued to follow the police officers remaining within one metre from them, continuing to call them 'racist' and 'pricks' as they assisted the elderly lady.

[10] The appellant was directed to refrain from using offensive language and was warned that if he continued to use such language in public he would be arrested. After receiving this direction the appellant said, 'Fuck you, you pricks'. The appellant was then advised that he was under arrest and lodged in the cage area of the police vehicle and conveyed to the Alice Springs Police Station watch house. Whilst in transit to the police station the appellant continued to yell out, 'Fuck you, you cunts,' and, 'Northern Territory Police are racists'.

[11] On arrival at the Alice Springs watch house the appellant was removed from the vehicle and processed into police custody. Whilst in the reception area in the watch house the appellant continued to yell, calling police 'cunts'.

[12] The appellant was lodged into the male observation cell, M19, which is situated adjacent to and in the view of the watch house reception area. The appellant immediately approached the glass cell, dropped his jeans and turned facing his buttocks towards the police standing in the reception area.

He then bent over, spread his buttocks cheeks apart with his hands, exposing his anus and sprayed diarrhoea all over the glass door.

[13] The appellant was then removed from the cell to allow it to be cleaned and placed in the next cell being M18. There the appellant again sprayed diarrhoea all over the glass door directed at police in the same fashion as previously described. The appellant continued to yell at police in the watch house for approximately 10 minutes before he went to sleep.

[14] When asked why he used offensive language in a public place he said, 'Because I wanted to'. When asked why he behaved in a disorderly manner in a public place and a police station he replied, 'Because I wanted to'.

[15] At the time of the offence Todd River, in the vicinity of Charles Creek, was a public place with numerous members of the public in the area. This area is also situated immediately opposite a school. Whilst the appellant was conveyed to the Alice Springs Police Station his profanities that were yelled from the rear of the police vehicle could be clearly heard by members of the public, including children, who were in the central business district at the time as the police vehicle drove past.

[16] At the time of the offence the watch house in question was a part of the Alice Springs Police Station. There were four members of the police force within the reception area of the watch house at the time of the offence. The police officers were offended by the statements of the appellant.

[17] On 11 April 2011 the appellant was served with a domestic violence order amongst other things restraining him from approaching, contacting or remaining in the company of the protected person when consuming alcohol or under the influence of alcohol. The protected person was his de facto spouse.

[18] On 30 May 2011 the appellant breached that domestic violence order. On that occasion when he was approached by police he became aggressive and verbally abusive and then ran away. He was found and arrested on 16 June 2011.

[19] In relation to the first incident which occurred on 29 March 2011, the appellant was charged with disorderly behaviour in a public place, disorderly behaviour in a police station and resisting police in the execution of their duty.

[20] In relation to the second incident on 6 April 2011, the appellant was charged with disorderly behaviour in a public place and disorderly behaviour in a police station.

[21] In relation to the third incident on 30 May 2011, the appellant was charged with two counts of engaging in conduct that contravenes a domestic violence order.

[22] The appellant was dealt with in relation to all of the offences in the Court of Summary Jurisdiction in Alice Springs on 20 June 2011. He pleaded guilty to each of the charges.

[23] On the three charges arising out of the first incident, the appellant was sentenced to imprisonment for one month commencing on 14 June 2011. (It is not entirely clear why this was chosen as the starting date for the sentence as the agreed facts read onto the record in the Court of Summary Jurisdiction recited that the appellant had been arrested on 16 June 2011. However nothing really turns on this.)

[24] On the two charges arising out of the second incident, the appellant was sentenced to 2 months imprisonment cumulative upon the sentence imposed on the charges arising out of first incident.

[25] In relation to the two breaches of the domestic violence order, the appellant was sentenced to 7 days imprisonment on each charge. The two sentences of 7 days were concurrent with each other but cumulative upon the sentences for the charges arising out of the two earlier incidents. The total effective sentence was therefore 3 months and 7 days imprisonment from 14 June 2011.

[26] The appellant has appealed to the Supreme Court against the sentence handed down in the Court of Summary Jurisdiction on two grounds:

(1) that the sentence was in all the circumstances manifestly excessive; and

(2) that the magistrate failed to properly apply the principle of totality.

[27] On the hearing of the appeal counsel for the appellant said that no complaint was made about the sentences imposed in respect of the breaches of the domestic violence order or against the fact that those sentences were made cumulative upon the other sentences. The essence of the complaint made is that each of the two sentences imposed in relation to the two incidents of disorderly conduct was excessive in and of themselves and also that the learned magistrate was in error in failing to make those sentences at least partially concurrent.

[28] The first basis for asserting error relates to the learned magistrate's remarks about the appellant's character.

[29] Counsel for the appellant pointed to the following findings and observations by the magistrate in his sentencing remarks:

- The appellant has a significant history of disorderly behaviour offending.

- The appellant thinks it is appropriate to make a nuisance of himself when drinking.

- The appellant dislikes police.

- On 29 March 2011 the appellant was out of control.

- The appellant screams abuse at people as a reflex, without caring what his words mean or the impact they have on people who hear them.

- The appellant is a man of very poor character in relation to street offences.

- On 6 April 2011, the appellant's behaviour was foul and disgraceful.

- The appellant's offending was a reversion to infantile behaviour.

- The appellant is to be sentenced not as an infant, but as an adult.

[30] I see no error in any of these observations or findings.

[31] Counsel for the appellant submitted that the finding that the appellant was "a man of very poor character indeed when it comes to these sorts of street offences" after referring to the appellant's criminal record and chosen lifestyle, disclosed three errors.

(a) The conclusion that the appellant chooses to adopt an anti-social lifestyle when he is drinking was based on assumption rather than inference, and was not properly open on the material before the court.

(b) The characterisation of the appellant as a man of "very poor character indeed" was harsh and not supported by the material before the court.

(c) The learned magistrate appeared to impose a heavier sentence than was objectively warranted having regard to the seriousness of the offences because of his assessment that the appellant was a person of "very poor character indeed". (Counsel referred to *Freeman v Harris*[1] and *Baumer v The Queen*[2]).

[32] I do not accept that the learned magistrate made the errors complained of.

(a) The inference that the appellant chose to adopt an anti-social lifestyle when drinking was well open on the admitted facts.

(b) The learned magistrate did not describe the appellant in unqualified terms as a man of very poor character indeed. Rather he said he was "a man of very poor character indeed <u>when it comes to these sorts of street offences</u>", which is a very different proposition and one well open on the facts. The appellant's admitted prior criminal offences were helpfully summarised in the appellant's submissions as follows:

YEAR	JURISDICTION	OFFENCE	SENTENCE
1977	NSW	Rape & robbery	9 years imprisonment
2006	Queensland	**Public Nuisance**	**$100 fine**
		Defective vehicle	$75 fine

[1] [1980] VR 267 at 281 per Murphy J.
[2] (1988) 166 CLR 51 at 57-58.

		DUI	$500 fine; 3 months disqualification
2009	SA	Drive excess alcohol	$500 fine + levy; 8 months disqualification
2010		**Disorderly behaviour**	**$100 fine + fee + levy + costs**
		Disturb peace **Resist police** **Disorderly behaviour** **Disorderly behaviour**	**$400 fine + levy**
		Disorderly behaviour	**$200 fine + fee + levy + costs**

(Emphasis added to highlight offences similar to the offences the subject of this appeal)

Counsel for the appellant submitted that since committing a very serious offence in 1977, over the ensuring 34 years the appellant had been dealt with by other courts for nuisance or disorderly type street offences committed on a total of five occasions. That is one way of characterising the appellant's criminal record. Another way of looking at it is that prior to the charges for which he was dealt with by the Court of Summary Jurisdiction in this instance, the appellant had seven convictions for presumably alcohol related "street offences" since 2006[3] (nine if one counts the two convictions for driving while

[3] Counsel for the appellant submitted on his behalf in mitigation of sentence that when he is living at the dry community of Ampilatwatja, he lives soberly and peacefully but has behaved disgracefully when drunk.

under the influence). Seven of the nine convictions were in 2009 and 2010. In the circumstances, it seems to me that the characterisation of the appellant as a man of very poor character indeed when it comes to these sorts of street offences was neither harsh nor unreasonable.

Counsel submitted that an alternative explanation of the appellant's behaviour might be that he was suffering from some form of mental illness. However, no such suggestion was made to the sentencing magistrate, no evidence of any mental illness was adduced and there was no request by either counsel for a psychological report to be obtained.

(c) There is nothing in the learned magistrate's sentencing remarks to suggest that he imposed a heavier sentence than was objectively warranted having regard to the seriousness of the offences because of his assessment of the appellant's character. Counsel for the appellant submitted that the learned magistrate should have warned himself against this possibility by saying words to the effect that he was not increasing the sentence because of the appellant's poor character but that the appellant was not entitled to leniency on account of good character. The learned magistrate did not say words to this effect, but neither did he give any indication that he was impermissibly increasing the penalty on account of the appellant's poor character in relation to offences of this kind. Clearly when it came to offences of this kind the appellant was not entitled to any leniency on account of

prior good character. Moreover his prior convictions for offences of a similar nature were relevant to the learned magistrate's assessment of the weight to be given to personal deterrence, and his prospects of rehabilitation.

[33] Counsel for the appellant further complained that the learned magistrate did not advert to any of the mitigating circumstances which were before the court including the appellant's guilty pleas; his attempt to deal with his admitted alcoholism by moving to Ampilatwatja (a dry community); his need to visit Alice Springs for medical treatment for himself and his partner; his inability to return to Ampilatwatja because of a lack of transport; and his vulnerability to alcohol abuse in Alice Springs where he was living in a town camp with a high level of drinking. The submission was that the failure to advert to these mitigating circumstances suggests that the learned magistrate erred by failing to properly take into account all of the relevant circumstances of the offender.

[34] I do not think that this inference can be drawn. These matters were drawn to the learned magistrate's attention by counsel for the appellant. Counsel for the appellant reminded the learned magistrate of the circumstances of the early guilty plea right at the end of his submissions and just before the magistrate began sentencing. I see no reason to assume that the magistrate did not take it and the other matters referred to by counsel for the appellant into account.

[35] In sentencing the appellant for breaches of the domestic violence order the learned magistrate did refer to mitigating circumstances and in particular to the fact that it was difficult when living the drinking lifestyle in Alice Springs for the appellant and his wife to keep away from each other when they wanted to drink and spend time in each other's company. Counsel for the appellant submitted that the same mitigating circumstances should have been explicitly considered and referred to when dealing with the disorderly conduct offences. I do not agree: that particular mitigating circumstance was particularly relevant to the breach of the domestic violence order since the actual breach consisted simply of being in the company of his wife while drinking. The same cannot be said of the disorderly conduct offences.

[36] Counsel for the appellant took particular exception to the following passage in the learned magistrate's sentencing remarks:

> "On file 21111120, that's the offending on 6 April 2011, and just so you remember clearly what we're talking about, that's the offending when you behaved in that particular foul and disgraceful manner in the police station. I don't need to go into detail as to why that's particularly offensive. The fact that an adult man decides deliberately to lash out at people he sees as being more powerful than he is by shitting at them, probably says it's all."

Counsel characterised these remarks, and particularly the phrase, "shitting at them", as intemperate and submitted that the learned magistrate's revulsion at the appellant's conduct had distracted him and indicated that he had put too much weight on the disgusting and revolting nature of the conduct.

[37] I cannot agree with this submission. The recording of that part of the learned magistrate's sentencing remarks was played in Court. In my view the tone of the remarks was measured and appropriate. Nor do I think there is any substance to the complaint about the use of the phrase "shitting at them". If that phrase had been used in a metaphorical sense to describe behaviour other than defecating, then one might have characterised the language as intemperate – or at the very least, inappropriate. However in these circumstances that phrase was simply descriptive of the appellant's conduct. Nor do I think the learned magistrate can be criticised for using the simpler word "shitting" rather than "defecating" when addressing his remarks to the appellant, a man whom the magistrate presumably inferred had a limited education and limited grasp of English.

[38] The second ground of appeal was that the learned magistrate had failed to consider the totality principle. It was submitted that before passing sentence the learned magistrate should have stood back and looked at the overall picture to decide whether the total of what would otherwise be the appropriate sentence was a fair and reasonable sentence to impose. While the learned magistrate did not explicitly state that he was considering the totality principles, I see no reason to suppose that he did not in fact do so. The principle was drawn to his attention and counsel for the appellant specifically submitted that there should be some measure of concurrency between the two disorderly conduct sentences. I see no reason to suppose that the learned magistrate did not consider whether there should be some

concurrency between the two sentences, and whether the total sentence imposed was a fair and reasonable sentence to impose in all of the circumstances.

[39] The learned magistrate evidently rejected the submission by counsel for the appellant that the two sentences should be at least partly concurrent, and counsel for the appellant submits that he was in error to do so. I do not agree.

[40] The two incidents of disorderly conduct occurred on completely separate occasions. They were in no sense part of any continuing episode of offending. Nor do I think that the application of the totality principle required any measure of concurrency. In my view the total sentence was not out of proportion to the totality of the offending.

[41] Counsel who appeared for the appellant and for the respondent on the appeal had between them approximately 50 years experience in the practice of criminal law. Counsel for the appellant submitted that the sentences for each of the episodes of disorderly conduct were manifestly excessive; counsel for the respondent submitted that they were in the appropriate range. Neither counsel could refer me to any comparable sentences as these are not published. Both relied on their admittedly extensive experience in the area.

[42] In *Rory*[4], Kearney J in the Supreme Court of the Northern Territory said:

[4] (1992) 64 A Crim R 134 at 138.

> "It is desirable that detailed sentencing statistical material be made available to this Court when it sits on appeal from sentences imposed by courts of summary jurisdiction. That is because it is frequently difficult for this Court to assess what is appropriate by way of the exercise of the sentencing discretion, unless it knows the sentences currently imposed for similar offences by those courts: see the observations of Adam and Crockett JJ in *Williscroft*[5]. There are at least two other reasons why such material should be routinely produced. First, counsel cannot intelligently advise whether a sentence should be appealed on the basis that it is manifestly excessive, unless he is aware of the sentences imposed in other cases similar in character. Excessiveness of sentence is a relative concept, and knowledge of other sentences is essential to determine whether the sentence in question is significantly different. Secondly, such statistical information is also essential for sentencing magistrates to prevent, as far as may be, unjustified disparity of sentencing. The existence of such information is an essential first step towards attaining a desirable uniformity of approach: see the observations of Lord Lane CJ in *Bibi*[6]. Regrettably, suitable official sentencing statistics are not as yet available in this jurisdiction, despite the highly computerised systems used by the courts. The use of computer power should enable such statistical material to be readily produced."

[43] Unfortunately, nearly 20 years later, sentences and sentencing remarks from the Court of Summary Jurisdiction are still not published in a form which is accessible to this Court and to practitioners.

[44] Through the good offices of the Courts Liaison & Education Officer I was able to obtain from the Data Warehouse Programme a list of the aggregate sentences given to offenders on files which included a charge of disorderly conduct. However it was not possible to obtain a breakdown of those sentences showing what proportion of the sentence was referrable to a charge of disorderly conduct. Nor, even more importantly, was it possible

[5] [1975] VR 292 at 301.
[6] (1980) 2 Cr App R (S) 177 at 179.

to ascertain the facts so as to assess whether the disorderly conduct for which the sentences were imposed were more or less serious examples of those offences.

[45] The Court should not uphold an appeal unless the magistrate has erred in the exercise of his sentencing discretion. On appeal the assumption is that the sentence was correct; the onus is on the appellant to demonstrate error. In the absence of data showing an established range, the appellant has not satisfied the onus of establishing error.

[46] In my view a sentence of one month imprisonment for the first episode of disorderly conduct and a sentence for 2 months for the second episode of disorderly conduct were both within the range of the learned magistrate's sentencing discretion. Both episodes of offending are serious examples of this kind of offending, the second obviously more so than the first.

[47] I would view the second episode of disorderly conduct as towards the most serious end of the scale of offending of this nature, and the maximum penalty prescribed by the legislature for a charge of disorderly conduct is imprisonment for 6 months. Assuming that the learned magistrate gave an approximately 20% reduction in penalty for the early guilty plea - there being no apology or any sign of remorse apart from the guilty plea – his starting point was around 2 ½ months, less than half the maximum penalty. I do not think that a sentence of 2 months imprisonment can be said to be manifestly excessive.

[48] Similarly, I do not think the sentence of one month imprisonment for the first episode of disorderly conduct can be said to be manifestly excessive, given that it was a serious example of offending of that type and given the maximum penalty prescribed. Nor do I think that in all of the circumstances the application of the totality principle would necessitate partial concurrency of the two sentences. In my view, therefore, the sentence was not manifestly excessive. Indeed it seems to me that, taking into account the matters set out in s 5 of the *Sentencing Act*, the total sentence imposed by the learned magistrate was appropriate in the circumstances. The appeal should be dismissed.

[49] Mr Goldflam, an able and experienced counsel appearing for the appellant, said from the bar table that the maximum sentence he had seen imposed for a case of disorderly conduct in 15 years practice was imprisonment for one month. He could not recall the circumstances of the offending but characterised it as a serious case of disorderly conduct. As I said above, the absence of appropriate published material from the Court of Summary Jurisdiction means that I am unable to ascertain what, if anything, is the sentencing range for offences of this nature customarily handed down in the Court of Summary Jurisdiction. However, if there were indeed a practice in the Court of Summary Jurisdiction to hand down sentences of no more than imprisonment for only one month for even the most serious examples of disorderly conduct, then it seems to me that this might be an indication that that Court was not giving appropriate weight to the maximum sentence for

this offence prescribed by the legislature. In the absence of published sentencing data, it is impossible to know if this is the case.

ORDERS:

[50] The appeal is dismissed.