kea95014.J

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

No. JA3 of 1995

IN THE MATTER OF the Justices Act

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

BETWEEN:

WILLIAM JOHN HAYES
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 13 March 1995)

This is an appeal against severity of sentence.

On 13 December 1994 the appellant pleaded guilty before the Court of Summary Jurisdiction at Darwin to a charge that on 20 May 1994 he assaulted a member of the Police force who was then in the execution of his duty. That is an offence under s158 of the Police Administration Act; it carries a maximum punishment of 6 months imprisonment or a fine of $1000, or both.

The appellant was sentenced to 14 days imprisonment. He appeals against the severity of that sentence, pursuant to s163(1) of the Justices Act. He relies on 5 grounds, viz:-

1. The sentence was manifestly excessive.
2. The learned Magistrate erred in fact and in law by failing to give any weight, or any proper weight, to the age and circumstances of the appellant, his previous good character and the circumstances surrounding his commission of the offence.
3. The learned Magistrate erred in fact and in law in determining that the conduct of the appellant in all the circumstances required the imposition of an actual period of imprisonment.
4. The learned Magistrate erred in fact and in law by giving undue weight to the need for general deterrence.
5. The learned Magistrate erred in law in holding that *Jackaboy v O'Brien* (unreported, Supreme Court (Martin J), 9 December 1992) was authority for the proposition that 14 days imprisonment "was about the correct sentence for the offence of spitting on a Police officer" whereas in that judgment it was said:

> "two weeks would be about the upper end of the scale that one might impose for an offence of this sort."

The case before the Court of Summary Jurisdiction

The facts and circumstances of the offence, as admitted by the appellant, were as follows:-

> At about 9pm on Friday 20 May 1994 he was apprehended under s128 of the Police Administration Act, which provides for the apprehension of persons intoxicated with alcohol in a public place. He was taken into protective custody. He was conveyed to the Berrimah Watchhouse due to his aggressive state. On being searched at the watchhouse, he became aggressive and refused to co-operate with Watchhouse staff in the search.
>
> He was escorted to the cells and as he was being escorted there he commenced to shout at Watchhouse staff, saying "Fuck off you, you cunt. Let me go and I'll have you." On reaching the cells he commenced to struggle and had to be restrained. He was then placed inside the cell.
>
> As the door to the cell was being closed, he reared his head back and spat fully in the face of Watchhouse Member, Auxiliary Gregory, the spittle striking Mr Gregory in the face and eyes. He continued swearing at Police and struck out at the bars of his cell with his feet, challenging the Police to fight him.
>
> He was subsequently released at 6am the next morning, 21 May.

The officer was clearly still in the execution of his duty at the time; see *Thomson v C* (1989) 67 NTR 11 at p13. In mitigation, the appellant's then counsel Ms Dikstein relied on the following matters:-

(1) That the appellant's state of intoxication at the time of his offence was such that he could not recall the incident;

(2) he had pleaded guilty at the first opportunity, thus displaying contrition;

(3) he was a young man, 23 years of age;

(4) he had no prior criminal history;

(5) he was employed as a counsellor for the Family Domestic Violence Education Program, and had good "career and educational prospects." Clearly he was "a productive member of the community and should be - - - on this occasion - - - given the opportunity to continue in that way";

(6) he lived in a de facto relationship and his partner was then expecting their child; and

(7) his offence was out of character for him, a "one-off" incident.

Ms Dikstein stressed factors (1), (3) and (5) above as being particularly important to the appropriate disposition to be made by the court.

The remarks on sentence

The learned Magistrate then proceeded to sentence the defendant immediately, in the following terms:-

> "We're dealing with a young man who hasn't been in any trouble before, of good character, [who] has pleaded guilty to a charge of assaulting an auxiliary police officer. He has no priors. He's committed what I would call an abhorrent offence. It's not an abhorrent offence in the sense that he's caused serious injury from the point of view of broken bones, or engaged in a repeated bashing. It's just that when somebody spits at somebody, there's just something that's offensive about the use of bodily fluids when an assault is effected.
>
> It is degrading to the person spat upon and it promotes a concern in the person spat upon about the possibility of infection due to the spittle being on their person. I'm of the view, in this case, that despite the fact he's a young man, he's pleaded guilty, a person of good character contributing to the community, there should be a gaol term.

> There has to be a gaol term for a couple of reasons. One, to reflect general deterrence, to show people in the community that when they drink alcohol they can't take it upon themselves to think that they can assault, and assault by spitting, with impunity. Secondly, I feel that because of the nature of the offence, the degrading aspect, that there needs to be a measure of retribution.
>
> There is a Justices Appeal decision - I'm not sure when, it might've been in 1992 - involving the Chief Justice who heard an appeal from a sentence of mine at Katherine involving spitting on a police officer. [This was clearly a reference to *Jackaboy v O'Brien* (supra)]. In that appeal the Chief Justice said that 14 days was about the correct sentence for the offence of spitting on a police officer. That's the sentence that - - - I propose to impose in this case.
>
> I have to consider whether or not the sentence should be suspended. The rationale for suspending a sentence is to give a person one last chance. In this case, I'm of the view the person, the defendant, is not entitled to one last chance. He has to be imprisoned to show the community that assaults by spitting will not be tolerated.
>
> He's convicted. He's sentenced to imprisonment for 14 days with hard labour." (emphasis mine)

The submissions on appeal

Ms Gibson of counsel for the appellant stressed ground of appeal no.5 (see p2). In *Jackaboy v O'Brien* (supra) the appellant was sentenced to 6 weeks imprisonment for an aggravated assault, the maximum punishment being 2 years. This offence entailed spitting in a Police officer's face when being arrested and placed in a Police van. He was also sentenced to 14 days imprisonment for separately resisting arrest at the time. On appeal, the respondent conceded that the sentence of 6 weeks imprisonment was manifestly excessive. The appellant

had already served 9 days imprisonment by the time his appeal was heard. The respondent conceded that the intoxicated appellant could have spat at the officer after his foot was injured when he was being placed in the Police van. For the purpose of re-sentencing the respondent submitted that it was "not outside the range [of sentencing], for some short term of imprisonment [to be imposed]"; he conceded that the 9 days imprisonment already served was sufficient punishment for both the aggravated assault and the resisting of arrest.

Martin J (as he then was) was referred to *Halsey v Haymon* (unreported, Supreme Court (Mildren J), 10 June 1992). In that case the appellant had been convicted of various offences, including assaulting a Police officer by spitting at him. He received 2 months imprisonment for unlawfully damaging property, a fine for disorderly behaviour, and one month's imprisonment for the assault on the Police officer; the service of the sentences of imprisonment was suspended upon the appellant entering into a bond to be of good behaviour for 12 months. He appealed on the basis that suspended sentences of imprisonment were manifestly excessive. He had spat on the back of the Police officer who was walking away after placing the appellant in a cell. The appellant had handicaps stemming from brain damage at birth. The respondent did not seek to uphold the sentence for assaulting the Police officer, conceding that it "was a very minor offence, warranting only a fine". Mildren J referred to observations by Walters J in *Wood*

v Samuels (1974) 8 SASR 465 at p468 on the nature of suspended sentences of imprisonment. His Honour concluded that a suspended sentence was not warranted; the appellant was "young, with no serious prior convictions, and - - - intellectually handicapped." The appeal was allowed and the appellant was fined $200 plus $20 levy for the assault, in default 5 days imprisonment, and allowed 10 weeks to pay.

In *Jackaboy v O'Brien* (supra) the appellant had several priors, including assaults. Martin J noted the offensive nature of spitting in the face; his Honour considered that it would be more offensive if the spitting was in the eye or if the spittle reached the victim's mouth; he noted that these "more serious aspects of spitting" were not involved in that case which "must be regarded as being towards the lower end of the scale [for spitting cases]." In the present case the appellant spat in the officer's eyes (see p3). His Honour continued at pp12-13:-

> "The usual course in these things is for the person to be given a fine. And, depending upon the way one looks at it, bearing in mind that the assault and the resist are all part of the one course of criminal conduct, one might look to a solution which would tend to marry the two things together and come up with a fair but proper penalty taking into account the whole circumstances.
>
> It may well have attracted a fine of some hundreds of dollars. From what I am told, the accused has been in custody for nine days as a result of these offences, and the sentence imposed upon him which, at the usual rate at which these things are cut out in the Magistrates Court - - - would itself amount to some hundreds of dollars.

> It would also amount, with the usual remissions one gets if in prison of a third off, would have been a total penalty of some 12 or 13 days - let us say a fortnight, with time off for remission would bring him back to nine days. And it seems to me that a sentence to the order of 14 days would have been effective and appropriate in this case.
>
> In any event, nothing further should be imposed on this appellant." (emphasis mine)

Later there was the following exchange:-

> "MR ADAMS: That is an appropriate sentence, Your Honour, with respect. I am just concerned about the message that might be sent back to the magistrate. Your Honour is not quashing the sentence in a sense that it is a totally inappropriate sentence but - - -
>
> HIS HONOUR: No.
>
> MR ADAMS: - - - simply saying that he has served enough.
>
> HIS HONOUR: What I am saying is two weeks would be about the upper end of the scale that one might impose for an offence of this sort, taking into account the circumstances of the appellant at the time."

I accept that his Worship mis-quoted the effect of what Martin J said in *Jackaboy v O'Brien* (supra), and misled himself as a result. However, in terms of what was said in that case the present case was a more serious case of spitting, because the victim's eyes were involved.

As to the "manifestly excessive" ground, Ms Gibson relied on what was said in *Jackaboy v O'Brien* (supra); she did not seek to adduce any statistical material relating to sentences for spitting at Police officers in the execution of their duty.

Ms Gibson made 3 submissions in relation to grounds 2 and 4 (see p2).

First, his Worship failed to distinguish the factual situation in the present case from the common (and more serious) case where Police are spat on in a public place while trying to maintain public order; she referred to cases such as *Miller v Huffa* (1980) 24 SASR 595, *Bull v Tuckey* (1986) 40 SASR 321 at pp324-5 and *Bowditch v Pryce* (unreported, Supreme Court (Kearney J), 29 April 1986) at pp3-4. See also *Faehrnamm v Edwards* (1986) 44 SASR 94. I accept that cases in the latter category are intrinsically more serious, in that they carry a potential for inciting group violence, and thus expose Police to further attack. I accept what Wells J said in *Pye v Samuels* (1972) 4 SASR 12 at p17 that there is no "average assault on Police", although assaults on Police are always treated seriously by the Courts. See also *Berry v Samuels* (1975) 10 SASR 376 at p377, per Zelling J. Persons who attack Police officers in the execution of their duty cannot ordinarily expect leniency; see *Miller v Huffa* (supra) at p598, per Walters J. An immediate custodial sentence may be expected by those who deliberately assault Police in order to impede them in performing their work. I accept, however, that the present assault does not fall into that more serious category.

Second, she submitted, the sentence itself, or his Worship's remarks, showed that he had failed to give sufficient weight to mitigating factors in sentencing, and had

given too much weight to the need for general deterrence. I accept this submission.

Third, the magistrate had given too much weight to the nature of the assault as such, when determining the punishment. I accept this submission; see the observations on the offence of assault by spitting by Martin J in *Jackaboy v O'Brien* (supra) and by Murphy J in *Neal v The Queen* (1982) 42 ALR 609 at p615; and, generally as to assaults, see *Yardley v Betts* (1979) 22 SASR 108 at pp112-3, per King CJ. Cases of assault require individual assessment and treatment, for sentencing purposes.

As to ground no.3 Ms Gibson submitted that his Worship had erred in stating (see p5) that the rationale for suspending a sentence was "to give a person one last chance." I agree that that is not the only reason for suspending a sentence; the possibility of rehabilitation is the primary factor - see *Wood v Samuels* (supra) at pp468-9 per Walters J, *Yardley v Betts* (supra) and *R v Percy* [1975] Tas. S.R. 62 at pp72-4, per Neasey J. I accept that account had to be taken of the appellant's age, employment prospects and family relationships when deciding whether service of the sentence should be suspended.

Conclusions

It is clear that the appellant must show that the sentence is manifestly excessive, and not just arguably so, to establish ground no.1; see *Cranssen v The King* (1936) 55 CLR

509 at pp519-520, and the authorities cited in *R v Raggett and ors* (1990) 50 A Crim R 41 at pp44-7. I consider that the sentence imposed, in light of the factual circumstances, itself constitutes convincing evidence that the exercise of the sentencing discretion miscarried. The sentence imposed was such that it was not fixed in the due and proper exercise of the sentencing power. In saying that, I bear in mind that a Magistrate has a wide discretion when sentencing, and the exercise of that discretion can only be set aside on establishing matters such as those set out in *Bowditch v Pryce* (supra) at p9. Here the sentence, in all the circumstances of the offence and the offender, is manifestly excessive. I also uphold the other grounds of appeal, as earlier indicated.

It was not sought to be argued that in the event the grounds of appeal were upheld the appeal should nevertheless be dismissed under s177(2)(f) of the Justices Act, on the ground that no substantial miscarriage of justice had occurred. Accordingly, I allow the appeal and quash and set aside the sentence of 14 days imprisonment imposed on 13 December 1994. It is common ground that should the appeal be allowed I should re-sentence, rather than remitting the case to the Court of Summary Jurisdiction. I proceed to do so.

On the basis of all of the materials placed before the magistrate, I consider that a substantial fine is the appropriate punishment in this case. In light of the appellant's circumstances, I impose a fine of $400; pursuant to

s25B(4)(b) of the Crimes (Victims Assistance) Act, there will be a victim levy of $20.00; in default of payment, 10 days imprisonment pursuant to s85(1) of the Justices Act. I will hear the parties on the question of time to pay.
