kea94040J

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

No. 51 of 1994

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 Alice Springs

BETWEEN:

ROBINSON GEORGE WALIT
Appellant

AND:

JOHN HENRY CHUTE
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 28 November 1994)

The appeal

By amended Notice of Appeal dated 22 September 1994 the appellant appeals, pursuant to s163 of the Justices Act, against a sentence of 9 months imprisonment imposed on him by the Court of Summary Jurisdiction at Alice Springs on 6 September 1994, after he was summarily convicted of aggravated assault contrary to ss188(2)(a) and (m) of the Criminal Code.

There are 3 grounds of appeal set out in the amended Notice of Appeal, expressed as follows:-

"(a) That the said sentence is manifestly excessive;

(b) that the learned Stipendiary Magistrate failed to give due weight to the sentencing principle of rehabilitation;

(c) that the learned Stipendiary Magistrate erred in placing too much emphasis on the sentencing principle of public deterrence.

PARTICULARS

(i) That the learned Stipendiary Magistrate when considering whether the sentence should be suspended, did not [give] due consideration to the fact that the appellant:

(a) has undergone alcohol rehabilitation;

(b) has undergone counselling for psychological problems;

(c) was consuming alcohol excessively when he previously breached a bond to be of good behaviour;

(d) cannot obtain in prison the ongoing rehabilitation treatment he requires."

Mr Howden of counsel for the appellant abandoned ground of appeal (a) at the commencement of the proceedings.

The judgment under appeal

When sentencing the appellant her Worship said:-

" - - - Very briefly, the facts were that you struck Mr Bensley to the head with a nulla-nulla after you had been involved in an argument with him. [The offence occurred on 10 March 1993].

I accepted at the time of giving judgment that Mr Bensley had at one stage referred to you as a "black bastard", but I also accepted that you had also referred to him as a "white cunt" and that the argument had been very heated. I accept that you were under the influence of alcohol at the time and

that in particular was attested to by your wife, Connie.

You come before the court with a number of previous offences for violence. They commence back in 1979. You appeared before the court for assault occasioning bodily harm in January 1979; May 1980; May 1981; March 1982; September 1982, three counts. Then there was a gap until March 1991 when you appeared in court for aggravated assault and then in September 1991 on a charge of assaulting a police officer.

I note that in March 1991 you were given a suspended prison sentence for the charge of aggravated assault. That sentence was later carried into effect in September 1991 when you were convicted of the "assault police" and other charges. It has been submitted to me that the number of offences involving violence in your past has been largely as a result of your consumption of alcohol, and that the gap between 1982 and 1991 was at a time when you had given up drinking.

Unfortunately, as a result of a death within your family you commenced drinking again in January 1991. From then on you were drinking quite heavily. However, I am told that you have again stopped drinking in January of this year [that is, after the subject offence of 10 March 1993], after attending a CAAAPU course; that you completed that course, plus additional time as well. And you are now continuing in an alcohol awareness course. You intended, when last your counsel made submissions, to commence an alcohol counselling course [that is, a course to qualify for counselling others].

Mr Kells [of CAAAPU] gave evidence on your behalf. He stated that as a result of your undertaking the CAAAPU course he believes that you have now managed to control your anger; that your anger was very apparent when you first commenced the course. He believes that you would be able to complete the counsellor course and he believes that you have come to terms with your alcohol problem. Your case is a fairly difficult one. The offence that you committed is a very serious one.

I note that a substantial weapon was used and I note that the victim suffered some injury. I also note that this offence having been committed in March 1993 that there had been a gap of about 18 months from the previous occasion when you had appeared before the court [19 September 1991]. Nevertheless,

> as indicated, you do have a number [9 in all] of previous convictions for offences of violence. I must therefore weigh the effect of rehabilitation that the CAAAPU course has already had upon you as against the serious nature of the offence and the fact that there must be general deterrence for other people from committing offences of this kind.
>
> Your counsel has submitted that I should suspend the operation of any sentence of imprisonment which I impose upon you. I note that the bond which was imposed in March 1991 was subsequently breached and that you ended up serving that period of imprisonment. Given the number of occasions on which you have appeared before the court previously for offences of violence, I do not consider it would be appropriate to suspend the operation of the sentence, despite the fact that you have successfully undertaken the CAAAPU course.
>
> You will be convicted and sentenced to a period of imprisonment of 9 months. I order that that sentence be served as from today."

The appellant's approach

As noted earlier, Mr Howden abandoned the first ground of appeal that the 9-month sentence was manifestly excessive. He conceded that "a term of imprisonment is an appropriate disposition - - - and - - - that a term of 9 months [imprisonment] is within the realm of the sentencing discretion for offences of this type."

Mr Howden argued the second and third grounds of appeal, (b) and (c) at p2, together; he concentrated primarily on the principle of rehabilitation, and in particular on particular (d) (p2). Mr Roberts of counsel for the respondent also approached the argument in this "rolled-up" way. I deal with the grounds of appeal in the same manner.

Grounds of appeal (b) & (c): insufficient weight on rehabilitation, too much weight on general deterrence

Mr Howden submitted in essence that the nature of the sentence, that is, an immediate as opposed to a suspended term of imprisonment, in the circumstances of the case, and in light of the Magistrate's sentencing remarks at pp3-4, showed that her Worship erred when exercising her sentencing discretion in that she must have acted on a wrong sentencing principle or misunderstood or wrongly assessed some salient feature of the evidence.

Mr Howden rightly conceded that her Worship did not have to spell out in her remarks all the matters that had been put in the sentencing submissions. Nevertheless, he maintained that the exercise of the sentencing discretion had miscarried, because her Worship either did not give sufficient weight to "the principle of rehabilitation and the matters put before her Worship in relation to that principle", or did not address some of the matters in respect of the principle of rehabilitation that were put before her which were "salient matters of great importance", in particular the need for "ongoing rehabilitation"; and had given too much weight to the principle of general deterrence. Mr Howden submitted that in particular her Worship had erred in failing to give due weight and/or expressly take into account the facts (3) to (7) below.

It was submitted that there was ample evidence before her Worship to establish the following facts, namely:-

(1) the appellant was an alcoholic;

(2) the appellant's behavioural problems stemmed from his alcohol abuse, and accordingly from an inability to control his anger;

(3) the appellant had undergone self rehabilitation subsequent to the offence by undertaking alcohol abuse programs with CAAAPU (Central Australian Aboriginal Alcohol Planning Unit) and Alcoholics Anonymous;

(4) the appellant was in the early stages of this rehabilitative treatment;

(5) the appellant required "ongoing counselling and treatment" for his alcohol problem;

(6) the type of counselling and treatment required by the appellant was not available to him in prison; and

(7) the appellant was specifically benefiting the community by his work with Tangentyere Night Patrol, where he worked with people who have alcohol problems.

In the light of these facts, particularly (5), and bearing in mind the sentencing principle of rehabilitation, Mr Howden submitted that the circumstances of this case did not warrant an immediate term of imprisonment of the length her Worship had imposed. He submitted that if the above facts (1)-(7), in particular the appellant's need "to continue the counselling and therapy that he is receiving firstly at CAAAPU, secondly

at Alcoholics Anonymous - - -, and thirdly in the work he was doing at Tangentyere Council - - -", had been properly taken into account and given their proper weight, the appropriate sentence "to enable that ongoing self-rehabilitation to continue", in light of the fact that this rehabilitative "treatment for [the appellant] is required outside prison", would have involved suspension of the service of part or all of the 9-months sentence imposed, upon a bond containing a condition requiring the appellant to continue with this rehabilitative treatment.

In support, Mr Howden relied on *Vartzokas v Zanker* (1989) 44 A Crim R 243, *The Queen v Hogon* (1987) 30 A Crim R 399, *The Queen v Duncan* (1983) 47 ALR 746, and *R v Davey* (1980) 2 A Crim R 254.

In *Vartzokas* (supra) King J said at p245:-

> "[The passage] implies that rehabilitation or reform, as an object of sentencing, is confined to those who are "in need of" rehabilitation by reason of factors such as illness or being "predisposed to such behaviour by his environment or his experiences of life", that is to say, to persons subject to some personal or social disadvantage. That involves a misconception of the meaning of rehabilitation and its place in the sentencing process.
>
> Rehabilitation as an object of sentencing is aimed at the renunciation by the offender of his wrongdoing and his establishment or re-establishment as an honourable law-abiding citizen. It is not confined to those who fall into wrongdoing by reason of physical or mental infirmity or a disadvantaged background. It applies equally to those who, while not suffering such disadvantages, nevertheless lapse into wrongdoing. The object of the courts is to fashion sentencing measures designed to reclaim such individuals wherever such measures are consistent with the primary object of the criminal law which is the protection of the community. Very often a person who is not disadvantaged and whose character

has been formed by a good upbringing, but who has lapsed into criminal behaviour, will be a good subject for rehabilitative measures precisely because he possesses the physical and mental qualities and, by reason of his upbringing, the potential moral fibre to provide a sound basis for rehabilitation. It would be a great mistake to put considerations of rehabilitation aside in fashioning a sentence for such a person". (emphasis mine)

I respectfully agree, noting the qualifications in the passage emphasized. In *Hogon* (supra) Nader J said at p403:-

"In the last analysis the function of the court in administering justice according to the criminal law is to serve the public interest. It is the public interest that requires that criminals be punished, that weight be given to the deterrence of the offender and of others. It is the public interest that requires a sentence to be appropriately proportional to the offence. In the end there is no other interest that can prevail over the true public interest. It is in the public interest that a sentence be a just one. I cite no authority for these propositions because they seem to me to be axiomatic.

- - - the public interest is not simple but complex. The public has an interest in the promotion of certain traditionally accepted ideals which frequently cannot be fully realised simultaneously in the same subject-matter. Strict justice will usually be inconsistent with a full measure of mercy in a given case: a prudent judge will seek a mean that avoids excessive violence to either ideal. A sentence providing an effective measure of deterrence may extinguish a newly kindled fire of reform in an offender. Where should the prudent judgment settle? The question often arises in one's mind whether a sentence, designed to provide an ample measure of deterrence, is so sure to have that effect that a different sentence, that would provide a real chance for the rehabilitation of the offender, should be rejected merely because it would not have a deterrent effect.

The public interest is not always best served by treating general deterrence as paramount. Where, upon a fair consideration of the evidence in a case, a judge concludes that by not requiring the offender to go to gaol there is sufficient probability that he will become a useful, law-abiding member of society, the public interest may be better served by

> not sending him to gaol. If the criminal process by its proper procedures can make a real contribution towards the formation of a good member of society, it should, I believe, do so. The chance of that happy result must be a real one based on the evidence." (emphasis mine)

As to the passage emphasized, I observe that it is clear that her Worship did not reach any such conclusion. In *Duncan* (supra) there had been an unexplained delay of nearly 4 years in bringing the prisoner to trial, during which he had "striven to establish himself in a settled and regular mode of life". The Court of Criminal Appeal in Western Australia said at p749:-

> ""When it has been demonstrated by evidence that society does not need to be protected from the applicant, should the punitive and deterrent aspects of the sentencing process be allowed to prevail, and possibly destroy rehabilitation which has been shown to have taken place": see Dunn J (Wanstall CJ concurring) in *Bell v R* (1981) 5 A Crim R 347 at 351. In *Bell's* case the court decided that the learned sentencing judge unduly fettered his sentencing discretion by believing that only custodial punishment could be imposed. The case is authority for the proposition that where, prior to sentence, there has been a lengthy process of rehabilitation and the evidence does not indicate a need to protect society from the applicant, the punitive and deterrent aspects of the sentencing process should not be allowed to prevail so as to possibly destroy the results of that rehabilitation.
>
> In our opinion the circumstances of the case are exceptional". (emphasis mine)

I observe that her Worship clearly did not accept that the evidence did "not indicate a need to protect society from the [appellant]."

Davey (supra) involved a Crown appeal against the immediate suspension of a term of imprisonment. Muirhead J said at p262:-

> "In my view it is erroneous to treat the suspension of a sentence of imprisonment as merely an exercise in leniency. Such an order is made in the community interest and is generally designed to prevent re-offending - which a prison sentence, standing alone, seldom does. In the present case it is to be noted that the trial judge placed the respondent under a bond which required him to submit to supervision for the entire period of three years. A person so released has an obvious incentive not to re-offend and should have no misconception as to what will occur if he does.
>
> The [Criminal Law (Conditional Release of Offenders)] Ordinance gives the courts a complete discretion to apply its provisions to those convicted against Territory laws. The power may be exercised, be the offence great or small. It is not reserved for first offenders or for non-serious offences. The Ordinance does not set out criteria relating to the exercise of the discretion. From time to time persons charged with most serious offences may be dealt with in this manner by reason of good character, the court's view that there will be no re-offending, that treatment is required outside prison and, at times, by reason of the fact that the court believes that the particular individual will be positively damaged by immediate incarceration."

It is clear that her Worship considered, and rejected, suspending a sentence of imprisonment under this legislative provision.

The respondent's submissions

Mr Roberts submitted, in essence, that her Worship had not erred in the exercise of the sentencing discretion. Her Worship had weighed up all relevant factors, including the appellant's criminal history, the factual matrix of the offence of 10 March 1993 and the appellant's personal circumstances. She had considered the sentencing principles of rehabilitation and public deterrence, and had clearly

determined from her sentencing remarks that while rehabilitation of the prisoner was desirable, other proper sentencing considerations required the imposition of a sentence of immediate imprisonment.

Mr Roberts submitted that the evidence adduced before her Worship was restricted to evidence of alcohol rehabilitation courses already undertaken by the appellant, and that "no reference [had then been] made as to what specifically [the appellant] needs to address in the future in relation to his ongoing treatment and rehabilitation".

Further, he submitted, no evidence had been adduced to establish that the type of ongoing treatment required by the appellant was not available in the prison system.

On this basis, he submitted that as her Worship was bound to decide the case on the evidence, and only on that evidence, "her Worship was perfectly entitled to impose the disposition she did" in the circumstances of the case.

He submitted that her Worship had regard to the alcohol rehabilitation courses which the appellant had already undertaken, when weighing up the factors and considering the appropriate sentence.

As to factor (3) (p5) - the self-rehabilitation which the appellant was said to have undergone subsequent to the offence - Mr Roberts submitted that prior to 3 February 1994, the appellant had taken no real and positive steps to rehabilitate himself; rather he had made some "superficial" enquiries in "late 1993 or early 1994", as to the program

offered by CAAAPU. On 3 February 1994 the appellant was convicted of several traffic offences and as a condition of the bond imposed, the Court required that he attend and complete the CAAAPU course. On these facts, Mr Roberts submitted that it should not be accepted that any rehabilitation undergone by the appellant was the result of voluntary "self-rehabilitation", as alleged. He submitted that some 18 months had elapsed between the commission of the offence on 10 March 1993 and the sentencing on 9 September 1994, a period such that the appellant had had ample opportunity to take positive steps to undertake self-rehabilitation, but had not done so.

As to the sentencing principle of general deterrence, Mr Roberts submitted that in the circumstances of this case, involving the use by the appellant of a nulla-nulla and the infliction of bodily harm, and bearing in mind the appellant's criminal history of violence, the prevalence of this particular type of offence, and the fact that the appellant has previously breached a bond, the sentencing Magistrate was entitled to take into account, and give more weight to, consideration of general and personal deterrence as opposed to rehabilitation. I do not accept that prevalence was shown to be relevant; nor did her Worship refer to it.

In support, Mr Roberts relied on *Salmon v Chute* (1994) 94 NTR 1 at pp26-27. *Adam Kumantjarra v Wayne Morris* (unreported, Kearney J, 24 August 1992 at p15-16) and what was said by R.G. Fox and A. Freiberg in "Sentencing: State and

Federal Law in Victoria" (1985) at p446 dealing with the deterrent aspect of sentencing, p459 dealing with the significance of prevalence and p472 dealing with the significance of deterrence when persons act under the influence of alcohol. He sought to distinguish what had been said in *R v Hogon* (supra) at p8 and *R v Duncan* (supra) at p9.

The appellant's submissions, in reply

Mr Howden conceded that his submissions were essentially directed to particular (d) (p2). He submitted that there was evidence before her Worship that the appellant had made some positive steps towards "self-rehabilitation" in March or April of 1993. This evidence was said to have been adduced from Mr Kells, the senior counsellor at CAAAPU in cross-examination. However, it seems that it was in fact "the latter half [of 1993]" when the appellant first approached Mr Kells to obtain information about the CAAAPU course.

Mr Howden also submitted that there was evidence adduced before her Worship as to "the type of ongoing treatment that [the appellant was] receiving" in the CAAAPU course, and following that course. He relied on the evidence of Mr Kells, at pp154-158 of the transcript, to support this proposition.

Mr Howden summarised that evidence as follows:

> "Now, what Mr Kells is saying in my submission is that the program, the support network, the people around him is not available to my client in prison. Now he has referred in his evidence to - - - the

fact that in prison people physically are away from alcohol; but he also refers to another three aspects of treatment, that is the mental, the emotional and the spiritual which are not dealt with in prison, and those are the matters that are dealt with in the programs that are not available to my client in the prison. And it is my submission that those comments by Mr Kells do indicate the type of support and the type of programs that are on-going for my client and that Mr Kells believes are very important for him.

Also I point [to] the counselling course which my client was to do, which Mr Kells refers to at page 155 of his evidence where he talks about the people that come down from Darwin and the type of course my client would undergo. So in my submission the evidence was before her Worship of the type of ongoing treatment that my client does need. Perhaps Mr Kells could have elaborated more on certain aspects of it and it is [a] shame that did not happen, particularly with the "sober house" and type of support that my client has in that house, but my submission is, it was before her Worship and - - - it was crucial; and that it is an aspect that her Worship did not take into account when my client was sentenced."

Conclusions

The general principles applicable to appeals against sentence are those I set out in *Salmon v Chute* (1994) 94 NTR 1 at 24:-

"I venture to repeat certain comments I made in *Raggett, Douglas and Miller v R* (1990) 50 a Crim R 41 at 42:

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* (1977) 15 ALR 1; 137 CLR 293 at 308-9, per Barwick CJ. The presumption is that there is no error.

See also *R v Anzac* (1987) 50 NTR 6 at 11-12.

In *R v Tait* (1979) 24 ALR 473 at 476; 46 FLR 386 at 388, the Full Court of the Federal Court, citing from *Cranssen v R* (1936) 55 CLR 509 at 519, set out

the fundamental rule on appeals against sentence as follows:

> "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 that 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 - - - ."

See also *Steven Gorey v Leonard Pryce* (unreported, Thomas J, 18 August 1994, at pp5-6).

I have set out the appellant's submissions in detail, but applying the "recognised principles" which an appellate court must observe, I consider that none of the grounds of appeal have been established. I do not consider that there were aspects of the evidence which her Worship did not consider, including the matters going to "on-going rehabilitation" as Mr Howden put it. All of those matters were clearly present to her mind. In the end, the appellant really seeks that this Court exercise the sentencing discretion in a different way to that which the sentencing Magistrate considered appropriate. I do not consider that any error has been shown in the exercise of that discretion; her Worship neither acted on a wrong principle nor

misunderstood or wrongly assessed any salient feature of the evidence.

The appeal is dismissed and the sentence is affirmed.

_____