Fernando v Balchin [2011] NTSC 10

PARTIES:	FERNANDO, Peter Robin v BALCHIN, Vivien Lynette
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 50 of 2010 (21009638)
DELIVERED:	10 February 2011
HEARING DATES:	14, 17 December 2010
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Court of Summary Jurisdiction

CATCHWORDS:

CRIMINAL LAW – APPEAL FROM SENTENCE – appellant punished in addition to Court imposed punishment – regard to extra-curial punishment – exacting retribution or revenge for the commission of the offence – weight to matters of mitigation – Court to take into account all material facts – sentencing discretion – Appeal allowed.

Criminal Code (NT) s 189A
Justices Act (NT) ss 176, 176A
Police Administration Act (NT) ss 127A, 129, 158
Sentencing Act (NT) ss 5(1)(a), s 5(2)(f)

Jadurin v The Queen (1982) 7 A Crim R 182; *Mamarika v The Queen* (1982) 5 A Crim R 354; *Neal v The Queen* (1982) 149 CLR 305*; R v Allpass* (1994) 72 A Crim R 561; *R v Barci* (1994) 76 A Crim R 103*; R v Cooney* (unreported, Court of Appeal, Queensland No 386 of 1997, 6 March 1998); *R v Gentz* [1999] NSW CCA 285; *R v Haddara* (1997) 95 A Crim R 108; *R v Minor* (1992) 59 A Crim R 227; *R v Noble* [1996] 1 QD R 329; referred to.

R v Daetz (2003) 139 A Crim R; applied.

Bellis v Burgoyne [2003] NTSC 193; relied on.

REPRESENTATION:

Counsel:

Appellant:	Mr Brock
Respondent:	Mr Sharafeldin

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

Fernando v Balchin [2011] NTSC 10
No. JA 50 of 2010 (21009638)

BETWEEN:

PETER ROBIN FERNANDO
Appellant

AND

VIVIEN LYNETTE BALCHIN
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 10 February 2011)

Introduction

[1] This appeal against sentence primarily concerns the question of the regard to be had to extra-curial punishment inflicted on a defendant. Although other grounds of appeal were argued in these proceedings, shortly after hearing the appeal and viewing the relevant closed circuit television ("CCTV") footage, I formed the view that the ground of appeal relevant to this issue had been made out. On 17 December 2010 I made orders allowing the appeal and reducing the sentence from four months imprisonment to two months imprisonment. These are the reasons for that decision.

Proceedings Before the Court of Summary Jurisdiction

[2] On 22 October 2010 the Appellant pleaded guilty to one count of unlawful assault of a police officer in the execution of his duty contrary to s 189A *Criminal Code*. The assault was constituted by the spittle from three spits in close succession striking the police officer. The offence occurred in the context of the Appellant being spoken to and apprehended for protective custody due to his level of intoxication. The assault occurred after the Appellant was placed into the rear of the police van and the cage door was closed.

[3] The victim was Aboriginal Community Police Officer RW. The spittle landed on ACPO RW's face and chest area and a small amount sprayed out and landed on his mouth, neck and chest areas.

[4] The Appellant had previous convictions, a number of those are directly relevant to this charge although they are from some time ago. For example, the Appellant received a 14 day sentence of imprisonment suspended for 12 months in 1999 for assault police and aggravated assault. In 2001 he was dealt with for aggravated assault. In 2002 he was dealt with for two counts of aggravated assault. In 2005 he was dealt with for liquor and cannabis related offences and a charge of being armed with an offensive weapon. He received fines and bonds for that offending.

[5] In sentencing the Appellant for the assault police charge[1] part of the learned Magistrate remarks were as follows:

> The assault matter is far more serious, I view assaults involving spitting in peoples faces as right at the top of the range when it comes to assaults. It puts an awful stress on the victims. They do not know for several months whether they are going to be cleared of any disease, and that is not to suggest you have got one. It is just the fear in the victim for those matters.

Primary Arguments on Appeal

[6] Initially, on behalf of the Appellant, it was indicated there would be an application under s 176A *Justices Act* to tender fresh evidence in the form of the CCTV footage of the dealings of certain police officers with the Appellant after he was taken to the police station. The CCTV footage was not played to the learned Magistrate in the Court of Summary Jurisdiction. On behalf of the Respondent consent was given to tender the CCTV footage under s 176 *Justices Act.* Section 176 *Justices Act* relieves a party of the stricter requirements under s 176A *Justices Act* when it is sought to tender evidence that was not before the Court of Summary Jurisdiction.

[7] The Appellant argued the CCTV footage was relevant for two reasons. First as relevant to extra curial punishment. The Appeal proceeded on the basis this issue was substantially within the ambit of Appeal Ground 4: "The learned Magistrate gave insufficient weight to matters of mitigation presented by counsel for the Appellant". The second area of relevance was

[1] The Appellant was also sentenced for one count of possess cannabis in a public place committed on 8 July 2010. He was sentenced to one month imprisonment to be served concurrently with the sentence on the assault police count.

said to be that the CCTV footage illustrated the sense of power imbalance a person such as the Appellant may feel during protective custody procedures and certain other interactions with police. In acknowledging the repulsive nature of the act of spitting on a person, counsel for the Appellant urged the Court to recognise that spitting can be reflective of a power imbalance and sense of helplessness. In support of this submission counsel cited Murphy J in *Neal v The Queen*:[2]

> Spitting is humiliating and degrading. It is a typical response of children and others without power, attempting to humiliate and degrade those seen as oppressors.[3]

[8] Although it can be helpful to be reminded of these dynamics as it assists to contextualise the conduct, in my view this factor is not of such significance that by itself would result in allowing this particular appeal. This case involves the difficult mix of problems inherent in the management by police of persons who are seriously intoxicated.[4] The direct relevance of the footage is in my view for the first reason submitted, namely informing the Court with some clarity and accuracy of the alleged extra curial punishment.

[9] Before the learned Magistrate, counsel referred to this issue in a rather oblique way by stating:[5]

> What's happened subsequent to that Your Honour is the subject of a current civil proceeding, where offers have been made from the

[2] (1982) 149 CLR 305 at 319.
[3] Murphy J citing Seligman, "Helplessness – On Depression, Development and Death", San Francisco, 1975.
[4] *Police Administrations Act*, ss 127A-129.
[5] T 22/10/2010 at 4.

> police to settle the matter. It is relevant what happened in terms of the fact that there has been some summary justice that was meted out at the police station and assaults have occurred, which left him with some injuries. Your Honour, he spent that night in protective custody, and he was released the following day and he spent no further time in custody.
>
> Your Honour I won't go into the details about what happened that night at the police station but I do say that it is relevant in sentencing in these matters.

[10] On appeal I have had the advantage of seeing the relevant police footage and have readily come to the conclusion that the sentencing discretion has miscarried for the reason of failing to take into account conduct that amounted to extra curial punishment. It would have been difficult however for the learned Magistrate to have taken this matter into account appropriately as the relevant evidential material was not directly before him.

[11] In the CCTV footage of the Appellant's arrival at the police station, (with many other persons to be detained for protection), there are some disturbing images. I say that in the knowledge that processing of intoxicated persons is a difficult and no doubt thankless task for police. I will summarize the CCTV footage played at the hearing of the Appeal.

[12] Prior to the appellant being taken from the rear of the police caged vehicle, a police officer appears to make a rude gesture with his middle finger directly towards the rear of the vehicle containing the Appellant and others. He does this for a number of seconds. The occupants are then escorted to and placed in a holding cell. Shortly after, a police watch house officer

enters the holding cell housing the appellant and places another person in the same holding cell. It appears the appellant engages in a verbal altercation with that officer.

[13] The appellant is then pushed by the officer and there is some brief interaction between the appellant and the officer, ending with the appellant being dragged from the holding cell and tossed into an area that is out of the view of the CCTV camera for one to two seconds. Upon reappearing in view of the camera the appellant is dragged to the ground by an officer and ground stabilized with a knee in the back area. The appellant is then held and escorted into the 'charge counter' area of the watch house by two officers, one of them holding the appellant in the area at the back of the neck, the other holding the appellant's arm in an 'arm lock' behind his back. The appellant is then shoved hard into the charge counter, his chest region heavily impacting against the counter.

[14] The officer holding the appellant's neck moves his grip from that area to the top of the appellant's head and grabs him by the hair. The appellant is asked his name. He responds with "Peter Fernando". The officer holding him by the hair says "shut the fuck up Fernando" and proceeds to push the appellant's head down with some force into the charge counter.

[15] The appellant's head is then held down against the charge counter whilst two other officers search the appellant and remove belongings from his person. Throughout this process the appellant's head is repeatedly pushed

into the counter. At one stage what appears to be a towel or a blanket is placed over the appellant's head.

[16] Shortly after the appellant's head is covered, there is an exchange between the appellant and some officers. The appellant says "you are breaking my arm". The officer holding his head against the counter states "good, you assaulted a police officer". The appellant says "no" to which another officer states "you spat at Ray".

[17] When the appellant's search is completed he is lifted off of the ground by four officers and carried away to a cell.

[18] The treatment of the Appellant at the charge counter is particularly disturbing. By virtue of the actions and words of some of the police officers this episode has all the appearances of the Appellant being punished by them for the earlier offending.

Relevant Law

[19] It is important not to lose sight of the fact that spitting at anyone, let alone a police officer performing difficult duties is a serious offence, however given the Appellant's treatment after his apprehension as observed at the hearing of the Appeal, that treatment should be reflected in the sentence. The authorities indicate some allowance should be made in these circumstances.

[20] Although in the context of commenting on the leniency of a sentence, in *Allpass*[6] the New South Wales Court of Criminal Appeal noted this principle where there was evidence of a campaign of abuse and harassment involving threats of serious injury to the person and property of the prisoner and his elderly wife after allegations of serious sexual assault emerged. Although the consequences of the threats and harassment were severe, in terms of the relevant principle, the Court stated:[7]

> We also take into account, as the Crown concedes we are entitled to do, the extra-curial punishment that has already been meted out to the respondent by others, both before and after the sentencing proceedings.

[21] In *R v Daetz,*[8] after reviewing relevant authorities from a number of jurisdictions the New South Wales Court of Criminal Appeal held[9] that while it is the function of the court to punish persons who have committed crimes, a sentencing court, in determining what sentence it should impose on an offender, can properly take into account that the offender has already suffered some serious loss or detriment as a result of having committed the offence. This was held to be so, even where the detriment the offender has suffered has taken the form of extra-curial punishment by private persons exacting retribution or revenge for the commission of the offence.[10] It was held the reason the Court takes these matters into account was because:

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[6] (1994) 72 A Crim R 561.
[7] At 566-67.
[8] (2003) 139 A Crim R.
[9] James J. with whom Tobias JA and Hulme J agreed.
[10] *R v Daetz* at 410-411.

> [t]he Court is required to take into account all material facts and is required to ensure that the punishment that the offender receives is what in all the circumstances is an appropriate punishment and not an excessive punishment. How much weight a sentencing Judge should give any extra-curial punishment will, of course, depend on all the circumstances of the case. Indeed, there may well be many cases where extra-judicial punishment attracts little or no significant weight.

[22] In coming to this conclusion the New South Wales Court of Criminal Appeal drew heavily on not only previous decisions in New South Wales,[11] Queensland[12] and Victoria,[13] but importantly compared the underlying rational in Northern Territory jurisprudence concerning community punishment of Aboriginal offenders.[14] Although acknowledging the difficulties of applying these cases generally, the New South Wales Court of Criminal Appeal concluded that extra judicial punishment is a matter that a sentencing court can and should take into account as part of its duty to take into account all material facts and to ensure that an offender is punished appropriately.[15]

[23] Although not dealt with specifically in the *Sentencing Act* (NT), a sentencing Court as a matter of statute is obliged to punish or sentence in a way that is "just in all the circumstances"[16] and consider the presence of any "aggravating or mitigating factor concerning the offender".[17] The

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[11] *R v Allpass* (1994) 72 A Crim R 561; *R v Gentz* [1999] NSW CCA 285.
[12] *R v Cooney* (unreported, Court of Appeal, Queensland No 386 of 1997, 6 March 1998); *R v Noble* [1996] 1 QD R 329.
[13] *R v Barci* (1994) 76 A Crim R 103*; R v Haddara* (1997) 95 A Crim R 108.
[14] In particular, *Jadurin v The Queen* (1982) 7 A Crim R 182; *R v Minor* (1992) 59 A Crim R 227; *Mamarika v The Queen* (1982) 5 A Crim R 354.
[15] *R v Daetz* at 409.
[16] Section 5(1)(a) *Sentencing Act*.
[17] Section 5(2)(f) *Sentencing Act*.

Sentencing Act (NT) is clearly broad enough to allow a Court to consider this issue in arriving at the appropriate sentence.

[24] This Court was not informed in detail on the extent of injuries received by the Appellant. I have proceeded on the basis that although there were "some injuries" suffered by the Appellant, they were not of the significance illustrated in other cases.[18] The circumstances however give rise to the conclusion that the Appellant was being punished. Any later Court imposed punishment is additional. This is not a case where the treatment of the Appellant could be said to have been brought upon himself, such as being injured during the course of commission of the crime or during apprehension. It is in relation to the treatment at the "charge counter" that leads me to this conclusion. The previous interactions are not of the same significance. Counsel for the respondent acknowledged that the treatment could be seen as degrading and humiliating for the Appellant. Counsel for the respondent did however ask the Court to reject the Appellant's submission in reliance on *Neal v The Queen*[19]. I accept that argument concerning the context in this particular case but in my view the treatment of the Appellant at the charge counter should lead to mitigation of the penalty.

[18] Counsel before the learned Magistrate said the assaults had left the Appellant with "some injuries" T p 4..
[19] As discussed in para [8] above.

Other Grounds of Appeal.

[25] Although assault by spitting is a serious offence for the reasons that the learned Magistrate pointed out, it is an error to regard assaults by spitting as "right at the top of the range when it comes to assaults".[20] Although the learned Magistrate was no doubt trying to impress upon the Appellant and others who might offend in this way the significance of assault by spitting, I am persuaded it is an error to sentence on the basis that this was "right at the top of the range". Assaults, including assaults on police officers vary significantly and although all are serious, the "top of range" should be reserved for those that possess more serious attributes. This is a further reason why the Appeal must be upheld.

[26] Since 1994[21] the maximum penalty for assaulting a police officer in the execution of their duty has been five years imprisonment.[22] In *Bellis v Burgoyne*[23] Mildren J helpfully set out a number of guidelines distilled from the authorities relevant to sentencing offenders on pleas of guilty for assaulting police. I respectfully agree and adopt those guidelines in the re-sentencing process. They are as follows:[24]

1. Each case requires individual assessment and treatment: (*Yardley v Betts* (1979) 1 A Crim R 329 at 334: applied by Kearney J in *Golder v Pryce* (unreported, 24/12/97)).

[20] Transcript 22 October 2010.
[21] Previously s 158 *Police Administration Act* provided for a maximum penalty of $1000 fine or six months imprisonment.
[22] S 189A *Criminal Code*.
[23] [2003] NTSC 193.
[24] *Bellis v Burgoyne* at [17].

2. There is no presumption that there must be a gaol term: (*Robertson v Hood* (1992) 111 FLR 177 at 188: *Casey v Haywood* per Kearney J 12/3/97, unreported).

3. However, an immediate gaol sentence can generally be expected where:

(a) The offender deliberately assaults police in order to impede them from performing their work: *Hayes v Trenerry* (unreported, Kearney J 13/3/95, para 18).

(b) There is some other aggravating feature about the case, for example: the appellant may have a prior conviction for assault police or for violence; or the appellant may have used or threatened to use a weapon: see *Ferguson v Chute* (unreported, Mildren J 3/6/92), applied in *Casey v Hayward* (unreported, Kearney J 12/3/9). I would add to this category cases where the police officer has suffered bodily or grievous harm, or has been put in fear of his safety, or has suffered psychological trauma as a result of the attack.

(c) Where the offence took place in circumstances where the police were outnumbered, or in a remote location away from assistance: *Kumantjara v Harris* (1992) 109 FLR 400 at 409.

4. Obviously, there may be mitigating circumstances which may persuade the sentencer to suspend the sentence fully or to impose a home detention order or community service order or fine. Commonly, assaults at the lower end of the scale will not attract actual custodial sentences if the offender is a juvenile or youthful first offender who has pleaded guilty and is remorseful, for example.

[27] Further, His Honour noted that having regard to the very wide range of circumstances of this type of offence and of offenders, the views expressed by other members of the Court to the effect there is no tariff must be correct.[25]

[28] As I have found error on two clear grounds, I proceeded to re-sentence. In these circumstances it is of no value to examine the further grounds. I note there was material before the learned Magistrate concerning mental health and rehabilitation issues with this Appellant. In re-sentencing I have taken into account the plea of guilty in permitting release of the Appellant after service of two months rather than serving a further month imprisonment. The primary reason for reducing the term remains the treatment of the Appellant at or near the "charge counter". The offending still justified a term of imprisonment, (albeit reduced for the reasons given), because of the Appellant's previous convictions.

[25] *Casey v Haywood* (unreported Kearney J 12/3/99); *Lansen v Marshall* (unreported, Thomas J 25/2/03).

[29] I confirm the appeal was allowed and the Appellant was sentenced by me to two months imprisonment.