

(tho94011)

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

(9309053)  
N° JA6 1994

BETWEEN:

JEAN LOUIS KENNETH JOYCE  
Appellant

AND:

GOTTLIEB THOMAS SVIKART  
Respondent

**CORAM: THOMAS J**

REASONS FOR DECISION

(Delivered 2 June 1994)

This is an appeal pursuant to s163 of the *Justices Act* in respect of a sentence imposed by the Chief Stipendiary Magistrate on 11 February 1994.

On 1 February 1994 this matter came before the Court of Summary Jurisdiction. The appellant entered a plea of not guilty to a charge that:

On 15 April 1993 at Darwin in the Northern Territory of Australia:

- (1) Did unlawfully assault Kevin Connor.  
Section 188 Criminal Code.

The hearing proceeded, the Crown called four witnesses. The appellant did not give evidence at the summary hearing.

No challenge is made to the finding of guilt. The facts as found by the Chief Stipendiary Magistrate can be briefly stated. The whole incident took place in the vicinity of the Post Office shopping arcade in Cavenagh Street, Darwin. The finding was that on 15 April 1993 the appellant struck Mr Connor to the left hand side of the face, not less than three times, deliberately with a closed fist. As a result he caused some bleeding to Mr Connor's left ear which appears not to have produced any serious or lasting injury. The explanation by the appellant put to the Crown witness in cross examination, that the victim bumped into the appellant, said some smart words to him and thereby provoked him, was rejected by the Magistrate. Instead, there was a clear finding to the effect that the appellant committed the assault after waiting in the passage for some minutes and not as a simple spontaneous event which occurred when he simply came across Mr Connor in the passageway.

There is no challenge to any of those findings by the learned Chief Stipendiary Magistrate. Counsel for the appellant made submissions on the question of sentence. The following exchange then took place between counsel for Mr Joyce and the learned Chief Stipendiary Magistrate commencing at p3a and concluding on p5a transcript of evidence:

MS MORRIS: Your Worship, I would submit this is a matter - well, it is assault, but perhaps a pecuniary penalty would be an appropriate one in relation to this. If Your Worship is considering some form of bond or - - -

HIS WORSHIP: I think I'll assist you, Ms Morris. To be fair to you I think I should indicate what I am thinking. I think it's nowhere near the top of the scale, true, but nonetheless it's not an insignificant assault, in my view.

MS MORRIS: Yes.

HIS WORSHIP: On a person who, on my finding, has not provoked Mr Joyce at all, and I reiterate that finding. It's not an insignificant assault and it's one that must attract at least a consideration of a deterrent sentence, on general deterrent grounds. This is an extremely prevalent kind of event in Darwin.

MS MORRIS: Yes.

HIS WORSHIP: The environment in terms of prevalence and the influence that must have on sentence is - it couldn't be worse for your client on the prevalence side of things.

- - - - -

HIS WORSHIP: I indicate that I'm simply duty bound to consider a general deterrence. This is a very prevalent kind of event in Darwin; assaults on people, both at night and during the day, by people who are drunk, by people who are sober. It's a matter of the utmost community concern which the courts are simply duty bound to recognise and, within the appropriate limits, deal with.

MS MORRIS: Yes, Your Worship.

HIS WORSHIP: It really does place it fairly and squarely in that category. I don't rule out other dispositions at all, but that has to be seriously considered as a starting point, I would've thought."

The matter was adjourned to 11 February 1994 to enable counsel for the appellant to put further material before the court, in particular, medical evidence in relation to the diagnosis of the appellant's schizophrenia. On 11 February 1994, counsel for the appellant made further submissions, tendered a medical report from Dr Welch dated 5 February 1994. A copy of this report is annexure "B" to the affidavit of Elizabeth Morris sworn 6 May 1994 (Exhibit D1). This report states as follows:

" Mr Joyce has consulted my surgery since April 1992. He suffers schizophrenia in that at times he hears voices, suffers paranoia, has thought disorder and thought-blocking, and can at times be out of touch with reality.

At the time of April 1993 he consulted me three times. On the 5th April, he presented with increased stress because he was hearing voices, but he did not wish to be on the appropriate medication for this. Instead, he requested a sedative for his anxieties.

On 8th April, he stated that his girlfriend had left him and that he felt under more stress. He requested a medical certificate for the department of social security because he was unable to work due to his mental state. I repeated to him the fact that he should have been taking the appropriate medication to control his thought disorder (schizophrenia), and on this occasion he agreed to commence "Melleril" 25mg, at

a dose determined by himself, between one and three tablets per day.

On the 15th April 1993, Jean-Louis reported that the Melleril had stopped the voices at a dose of only one tablet per day. Subsequently, Jean-Louis stayed on two Melleril tablets per day through the remainder of 1993, as well as taking "Valium" to control the secondary anxieties that he has.

When last seen on 4th January 1994, Mr Joyce was quite stable and well, and spoke clearly."

The learned Chief Stipendiary Magistrate convicted the appellant and sentenced the appellant to three months imprisonment. To be released after one month on entering into a recognisance in the sum of \$1000 for 12 months, the first six months of the one year bond to be supervised. The subsequent appeal was limited to an appeal against sentence. The grounds of the appeal being:

1. That the sentence imposed was manifestly excessive.

2. The learned Chief Stipendiary Magistrate erred by failing to give sufficient weight to the appellant's mental illness when determining questions of general deterrence.

At the hearing of the appeal counsel for the appellant sought to tender two affidavits being the affidavit of Elizabeth Morris sworn 6 May 1994 and the affidavit of Suzan Jane Cox sworn 6 May 1994. These affidavits were tendered with the consent of counsel for the Crown pursuant to s176 of the *Justices Act*. The affidavit of Suzan Jane Cox sworn 6 May 1994 (Exhibit D2) includes annexure "D" which is a report from Dr Lester Walton dated 22 March 1994. This report was not before the learned Chief Stipendiary Magistrate. Also tendered before the Supreme Court was a record of prior convictions of the appellant (Exhibit P1). The court was informed that this was the record of prior convictions that had been put before the learned Chief Stipendiary Magistrate at the time when the appellant was sentenced.

I will deal with each of the grounds of appeal:

1. That the sentence imposed was manifestly excessive

The learned Chief Stipendiary Magistrate found that he did not believe the appellant's explanation to police and as put to the Crown witnesses as to how the incident occurred. The Chief Stipendiary Magistrate did not accept the appellant was provoked to assault Mr Connor. That finding is not challenged on appeal. The learned Chief Stipendiary Magistrate stated in his reasons for decision (p24 transcript)

"... You pleaded not guilty which, of course, was your right, but it indicates that there is no remorse or serious regret or sorrow for what occurred and there is nothing mitigating the seriousness of it."

The finding was entirely justified on the material before the Chief Stipendiary Magistrate. However, the report of Dr Walton does give more detailed information concerning the mental illness termed "schizophrenia" and its effect upon this particular appellant. The appellant stated to Dr Walton that he did feel remorse and that he shouldn't have taken justice into his own hands. The explanation given by the appellant to Dr Walton is at odds with the explanation he apparently gave to police. Dr Walton is aware of this and states (p3 of his report dated 22 March 1994):

"I appreciate that that flies in the face of the information that Mr Joyce seems to have supplied to police but such inconsistency is certainly not uncommon in persons suffering from schizophrenia."

Had the learned Chief Stipendiary Magistrate had the benefit of this report then he may well have taken a different view of the appellant's apparent lack of remorse.

The learned Chief Stipendiary Magistrate accepted that the injuries to the victim were not serious. I refer to this exchange between counsel for the appellant and the Magistrate as set out on p23 of the transcript of evidence:

"MS MORRIS: However, I would submit that this is not the kind of assault which demands an immediate period of imprisonment. The injuries to the victim were not serious injuries.

HIS WORSHIP: They weren't particularly serious, they were temporary. They were temporary.

MS MORRIS: Well, it was not a prolonged assault.

HIS WORSHIP: That is true."

The Magistrate went on to make the following findings at p23 transcript of evidence:

". . . But the findings I made on the last occasion were, of course, that you were engaged in what was, in fact, on my finding, an unprovoked and entirely unjustified assault which was nasty.

It was unprovoked and it was on a man much smaller than yourself, and it caused him at least some temporary discomfort; more than discomfort, I suspect. I would infer that it caused him some immediate fear and it caused him a bleeding ear. . . ."

The learned Chief Stipendiary Magistrate was entitled to make such findings on the evidence. A record of prior convictions was tendered before the court. This record indicates a total of seven occasions between 11 May 1983 and 24 August 1990 on which the appellant had been convicted for offences. However, each of the offences were related to breaches of the traffic law. The appellant is entitled to some credit for his prior good character in that he has not previously been convicted for any offence of violence. He has never previously served a period of imprisonment or been placed on a bond following a suspended period of imprisonment. In his remarks on sentence the learned Chief Stipendiary Magistrate does make reference to the aspect of general deterrence. I will deal with that in more detail under the second ground of appeal. However, I consider it relevant to again note that the learned Chief Stipendiary Magistrate did not have before him the report of Dr Walton dated 22 March 1994, and had he had the benefit of such report this may well have affected his attitude to the principle of general deterrence as applied to this particular appellant.

In summary, the assault was not prolonged but occurred over a short period. An assault is a serious offence, however, in this matter the resultant injuries were not in the more serious category. The appellant has never previously been found guilty of any offence of violence. The aspect of general deterrence should have been given very little weight in this particular matter. For those reasons I am satisfied the part of the order that required the appellant to serve an actual term of imprisonment is manifestly excessive and I would allow the appeal.

2. The second ground of appeal is:

"The learned Magistrate erred by failing to give sufficient weight to the appellant's mental illness when determining questions of general deterrence."

Most of the submissions made by counsel for the appellant were directed to this ground and I will deal with this ground of appeal in detail although I have made reference to it in respect of ground 1 of the appeal.

I accept the principle of law in dealing with persons suffering mental illness is:

General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or abnormality because such an offender is not an appropriate medium for making an example to others. *R v Anderson* 1981 VR 155, 160. See also *R v Scognamiglio* 56 A Crim R 81, *R v Champion* 64 A Crim R 244.

I do not accept the submission of counsel for the Crown that the report of Dr Walton dated 22 March 1994, does not take the matter any further than the information before the sentencing Magistrate. I consider the more detailed report prepared by Dr Walton gives a full explanation of the effects of schizophrenia and the effect of that illness upon the appellant. The sentencing Magistrate was in a difficult position because the medical report before him from Dr Welch dated 5 February 1994 was to the effect that the appellant had been suffering from schizophrenia over a period of time, and had

apparently consulted Dr Welch earlier on the same day as the offence. I quote the final two paragraphs from the report of Dr Welch dated 5 February 1994:

" On the 15th April 1993, Jean-Louis reported that the Melleril had stopped the voices at a dose of only the one tablet per day. Subsequently, Jean-Louis stayed on two Melleril tablets per day through the remainder of 1993, as well as taking "Valium" to control the secondary anxieties that he has. When last seen on 4th January 1994, Mr Joyce was quite stable and well, and spoke clearly."

However, this does not give the complete picture of the effect of schizophrenia as disclosed by Dr Walton in his report (p2) dated 22 March 1994:

"OPINION

1. I concur with this man's treating doctors that he is suffering from schizophrenia and related anxiety problems which are part and parcel of that illness.
2. I agree with the sentencing Magistrate's proposition that Mr Joyce was not actively psychotic at the material time, for example, there was an absence of command hallucinations and the like which may have made a very direct contribution to the aggressive incident and which may have given rise to questions of insanity. However, it is well recognised that persons suffering from schizophrenia suffer from more subtle generalised erosion of the ability to exercise proper social judgment and responsibility and I believe those factors were relevant." (emphasis mine)

Dr Walton also states in that report at page 3 paragraph 3:

"It is my opinion that while this man's mental illness does not provide a basis for his being excused in law, the condition is relevant and has likely made a fairly direct contribution to his out of character behaviour."

The appellant suffered schizophrenia for a period prior to 15 April 1993 and continues to suffer such affliction. Dr Walton's report makes it clear that, although the appellant was not actively

psychotic at the time of the offence, he was nevertheless suffering schizophrenia and it is likely that this contributed to "his out of character behaviour" in assaulting Mr Connor.

The learned Chief Stipendiary Magistrate was not addressed or provided with any authorities in respect of the effect of the appellant's mental disorder on the principles of sentencing, in particular, with regard to the aspect of general deterrence.

It is clear from the learned Chief Stipendiary Magistrate's remarks on sentence that the aspect of general deterrence was a factor of some significance. I quote the following extracts from the reasons for sentence (transcript p23):

"... It was a nasty, unprovoked, unjustified assault, and I think that that means that I have to look at the question of general deterrence. That means that I have got to look at a sentence which would at least try to deter you and others from doing the same sort of thing in the future.

One other factor I have to consider, which you would probably be aware of, is that this kind of behaviour is relatively prevalent in Darwin, is regarded as totally unacceptable in Darwin by the community and by the courts, and the courts have a duty to sentence appropriately in each case, but also to take that into account and to endeavour to reduce it - that is, that kind of behaviour. ....

.....

This is an assault which is not at the top end of the range, it is not the most serious assault in the world, but any assault of that nature on somebody who is (a) much smaller and (b) not provoking is serious and calls for the courts to look at the question of general deterrence. I must do that and, in my view, I must impose a sentence of imprisonment."

The learned Chief Stipendiary Magistrate clearly considered the aspect of general deterrence as a significant factor in sentencing the appellant.

I am aware the learned Chief Stipendiary Magistrate was proceeding on the basis that the appellant had his condition under control and was not suffering serious schizophrenia at the time of the offence. The report of Dr Walton dated 22 March 1994, provides

further information with respect to the condition of schizophrenia as it affects the appellant.

This court has had the benefit of further evidence and also submissions from counsel supported by authorities on the manner in which courts should approach the task of sentencing persons with mental abnormalities.

I am of the opinion that the aspect of general deterrence should, in respect of this particular appellant, be given little weight and for that reason the appeal should be allowed.

I note the report of Dr Welch indicates the appellant's condition is stabilised and the report of Dr Walton states that the appellant requires ongoing psychiatric treatment to reduce the likelihood of his re-offending, although Dr Walton does not consider the appellant is at high risk in that regard.

I confirm that for the reasons stated I consider the order that the appellant serve an actual term of imprisonment is manifestly excessive and to that extent I allow the appeal. In all other respects I confirm the decision of the sentencing Magistrate. I consider a 3 month sentence, provided it is totally suspended, although at the upper end of the sentencing range, is not manifestly excessive.

Pursuant to s177 of the *Justices Act* I affirm the conviction imposed by the learned Magistrate and vary the order to a sentence of 3 months imprisonment to be released forthwith upon entering a recognisance himself in the sum of \$1,000 O/R to be of good behaviour for a period of 12 months. For the first 6 months of the 12 month period of the bond to be supervised by the Director of Correctional Services or his delegate.