15/12; [2012] WASC 145

SUPREME COURT OF WESTERN AUSTRALIA

CLOSTER v HUMPHREYS

Hall J

27 March, 27 April 2012

CRIMINAL LAW – SENTENCING – ASSAULT OCCASIONING BODILY HARM – DEFENDANT IN LICENSED PREMISES AND INTOXICATED – ASKED TO LEAVE BY CROWD CONTROLLER – DEFENDANT HOLDING A GLASS STUBBIE BOTTLE – STRUGGLE WITH CROWD CONTROLLER – DEFENDANT THREW UP HER ARMS AND BOTTLE CAME INTO CONTACT WITH CONTROLLER'S FOREHEAD – CONTROLLER SUFFERED A LACERATION TO HER FOREHEAD – BLOW WITH BOTTLE NOT DELIBERATE – PRIOR CONVICTION IN 2005 FOR COMMON ASSAULT – PERSONAL FACTORS – DEFENDANT SENTENCED TO TEN MONTHS' IMPRISONMENT – WHETHER SUCH SENTENCE MANIFESTLY EXCESSIVE

HELD: Appeal allowed. Sentence imposed by Magistrate set aside. Appellant resentenced to a 12-month Intensive Supervision Order with a programme condition.
1. Relevant sentencing matters included that:
(a) the glass bottle had been not used deliberately by the appellant as a weapon.
(b) there was no suggestion that the defendant had deliberately targeted the head of the crowd controller.
(c) the nature and extent of the injuries caused was significantly less serious than in the other cases.
(d) whilst it was difficult to determine with exactness the degree of force which was used, the extent of the injuries tended to indicate that it could not have been great.
(e) this was an offence that occurred on the spur of the moment.

2. To describe this as an offence of 'glassing' dangerously obscured the fact that the glass bottle in this case was not deliberately used. Whilst the magistrate recognised this as being an important mitigating factor and characterised the defendant's conduct as reckless, he nevertheless imposed a sentence which was more consistent with offences involving the deliberate use of a glass as a weapon. While the Court does not detract from the seriousness of this offence, it was clearly not one which, in all of the circumstances, required the imposition of a sentence of imprisonment to be immediately served.

3. Having considered all of the relevant factors, the appropriate sentence was an Intensive Supervision Order of 12 months duration with a programme condition under s73 of the *Sentencing Act* 1995 (WA). The programme condition will ensure that the appellant continued with the counselling.

HALL J:
1. This is an appeal against sentence. On 22 December 2011 the appellant was sentenced to 10 months' imprisonment following her plea of guilty to one charge of assault occasioning bodily harm contrary to s317 of the *Criminal Code* (WA). She now seeks leave to appeal that sentence on a number of grounds. Those grounds relate to a single issue, that is whether the sentence imposed by the magistrate was manifestly excessive.

The facts
2. The admitted facts were that on or about 12.25 am on 7 October 2011 the appellant was at a licensed premises in Kalgoorlie. She was heavily intoxicated. The complainant was a female crowd controller on duty at the premises.

3. As a result of the appellant's intoxicated state she was asked to leave the premises by the complainant. As the appellant was being escorted to the door she broke away and made off in the direction of the toilets. The complainant followed the appellant and 'engaged physically' with her with a view to removing her forcibly from the premises. The appellant was holding a glass stubbie bottle, from which she had previously been drinking.

4. The appellant resisted the complainant's attempt to seize her, and there was a brief struggle. Security camera footage of the incident indicates that it lasted approximately eight seconds. During

this time the appellant threw up her arms and this resulted in the bottle that she was holding in one hand coming into contact with the forehead of the complainant. The glass bottle broke. It was accepted that the blow with the bottle was not deliberate, rather the so called 'glassing' was said to have occurred in the context of the struggle that I have described. The implication was that whilst the appellant's actions in resisting the complainant were willed acts, she did not intentionally strike the complainant with the bottle.

5. The complainant suffered a 1.5 cm laceration to her forehead, some bruising and superficial cuts to her face. There was no medical report as to the extent of the injury. However, the magistrate noted in sentencing that the laceration caused by the broken glass did not penetrate with sufficient depth as to amount to a wounding at law. A victim impact statement was submitted to the court in which the complainant referred to some scarring and psychological consequences.

6. A presentence report was obtained. That report records the appellant's account of the circumstances in which the offence occurred. She said that she was at the bar with her sister and friends celebrating her sister's birthday. Late in the evening she recalled having a verbal argument with a girlfriend in the toilet. A security guard came in and asked if everything was all right. The appellant said that she answered the guard but then continued to discuss with her girlfriend why the latter was upset with her. At this point the security guard stepped in and commenced to walk her off the premises.

7. The appellant said that she had a limited recall of the events due to her level of intoxication. However, she said that she could recall that someone pulled her by the hair and arm and that she then hit that person with her free arm. The appellant said that it was only after she heard the sound of the glass breaking that she realised that she had a stubbie in her hand. She maintained that at no time did she plan to hurt anyone.

Personal circumstances

8. As a consequence of the offence the appellant lost her fulltime employment. She was also made the subject of a 12 month prohibition order prohibiting her from attending licensed premises pursuant to the *Liquor Control Act* 1988 (WA).

9. The presentence report states that the appellant expressed remorse and has not attempted to minimise or excuse her conduct. She had written letters of apology to both the complainant and the owners of the licensed premises.

10. The appellant accepts that she had issues in regard to excessive alcohol use and anger management. Her solicitor told the magistrate that she was seeking to address these issues by attending counselling. There was evidence before the magistrate that she had attended a number of counselling sessions prior to appearing for sentence on 22 December 2011.

11. At the time of sentencing the appellant was 25 years old. She was in a stable and supportive relationship. Following the offence she stopped drinking alcohol and had the support of her partner and friends in this regard.

12. The appellant is the second oldest of five siblings. Her parents separated when she was 8 years old while the family was living in Victoria. She moved to Western Australia with her mother and her mother formed a new relationship in Kalgoorlie which produced her two younger siblings. The presentence report indicated that she had a good relationship with all of her siblings and a close relationship with her mother.

13. The appellant's mother had been diagnosed with a brain tumour prior to the offence and was undergoing treatment. The treatment required the appellant's mother to attend medical appointments in Perth. On these occasions the appellant provided daily care for her two youngest siblings. She also cared for her mother during periods when her mother was bedridden.

14. The appellant has a limited prior record. However, it did include a previous conviction for aggravated common assault in 2005. That offence had occurred in the context of a confrontation with a former partner after being advised of his infidelity. She had been sentenced to an intensive supervision order in respect of that earlier offence, and had successfully completed it.

Magistrate's sentencing remarks

15. The magistrate recounted the facts, particularly noting that the hitting with the bottle could not be 'described as a deliberate blow but it was a blow that occurred in the context of a particularly violent struggle by [the appellant] that wasn't simply instantaneous, although relatively brief'. His Honour stated that whilst the offence was serious, it was not as serious as it would have been had the appellant struck a deliberate blow with the bottle. Nonetheless, his Honour considered that there was a degree of recklessness in the appellant's behaviour. He said in that regard that:

> The recklessness with which you behaved while struggling with a bottle in your hand does fall towards the upper end of such recklessness, albeit significantly short of a deliberate blow, as I have already acknowledged and noted.

16. The magistrate noted the matters favourable to the appellant, including her early plea of guilty, her expressions of remorse and her personal circumstances. His Honour accepted that the appellant was 'very contrite' and that she had made commitments to bring about changes in her lifestyle in an endeavour to ensure that such an event would not happen again.

17. The magistrate noted a number of favourable character references. He also noted the prior conviction, which whilst not being an aggravating factor, he said, did indicate a history of violence.

18. The magistrate stated that the present offence was serious because it involved the use of a bottle in circumstances which included the complainant being struck to the forehead. He considered that it was also relevant that the complainant at the time was attempting to carry out her duty as a crowd controller by ejecting the appellant from the premises.

19. The magistrate then turned to the question of general deterrence and said:

> Also of relevance in respect to determining sentence is the issue of general deterrence and in that respect I note that within this community violence fuelled by largely alcohol and an inability for people to manage their emotions and their anger occurs frequently in this community within and around licensed premises.
> Therefore there needs to be a penalty that makes it clear such behaviour will not be tolerated in this community and makes it clear that such behaviour, violence fuelled by alcohol and anger will be met with significant penalty. I note that that violence occurs regularly both between patrons of licensed premises and between patrons and crowd controllers seeking to maintain order within licensed premises. Such violence against crowd controllers occurs all too frequently within the community.
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> Having regard to my consideration of all those matters, it's my view that even with your prospects for rehabilitation, the very serious nature of this offence, the need for there to be particularly a general deterrence and, to a lesser extent, although to some extent because of the steps you are already taking, the need for personal deterrence and also the need for a penalty that not only reflects the seriousness of this offence but also properly reflects the condemnation and abhorrence of the community towards this kind of violence within and around licenses premises, it is my view that the only appropriate penalty is one of a term of imprisonment.
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> I reach that decision considering all other sentencing options available to me quite carefully. Turning my mind to whether or not that sentence should be suspended and in doing so, considering all the matters I took into account and to which I referred to in reaching the decision that imprisonment is the only appropriate penalty, I am not persuaded that the term should be suspended.
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> The reasons for that are the serious nature of the offence and the need for there to be a penalty particularly of general deterrence. Now I accept in reaching that decision that a suspended sentence can operate as a general deterrence (sic) but in these circumstances I am not of the view that suspending the sentence in all the circumstances would be appropriate.

20. Finally, the magistrate referred to the personal circumstances of the appellant as regards her mother and the care of her siblings. His Honour noted that it is only in exceptional circumstances that an offence otherwise calling for a term of imprisonment could justify a lesser penalty due to the impact on family members of the offender. The magistrate concluded that the situation in the present case was not of such an exceptional nature.

The merits of the appeal – Was the sentence manifestly excessive?

21. The relevant principles applying to an appeal against sentence are well known. They are conveniently summarised in *Wilson v The State of Western Australia* [2010] WASCA 82. That case related to an appeal to the Court of Appeal under pt 3 of the *Criminal Appeals Act* 2004 (WA) but the principles are materially the same for appeals from magistrates under pt 2 of the Act.

22. A ground of appeal which alleges that a sentence is manifestly excessive asserts the existence of an implicit error: *Royer v The State of Western Australia* [2009] WASCA 139; (2009) 197 A Crim R 319 [126] (Buss JA); *Dinsdale v R* [2000] HCA 54; (2000) 202 CLR 321 [6]; (2000) 175 ALR 315; (2000) 74 ALJR 1538; (2000) 115 A Crim R 558 (Gleeson CJ, Hayne J). A claim of manifest excess depends on establishing implied error in the type or length of the sentence imposed. The implied error that must be established is that a sentence of the nature or length imposed could not have been reached in the exercise of proper sentencing discretion.

23. It is not enough that an appellate court considers that it would have imposed a different sentence; it must be established that there has been some error in the exercise of the sentencing discretion: *House v R* [1936] HCA 40; (1936) 55 CLR 499, 504, 505; 9 ABC 117; (1936) 10 ALJR 202 (Dixon, Evatt and McTiernan JJ). The discretion that the law invests in sentencing judges is of vital importance in the administration of criminal justice: *Lowndes v R* [1999] HCA 29; (1999) 195 CLR 665 [15]; (1999) 163 ALR 483; (1999) 73 ALJR 1007; (1999) 12 Leg Rep C1.

24. In order to determine if a sentence is manifestly excessive it is necessary to view it in light of the maximum penalty prescribed by law for the offence, the standard of sentencing customarily observed for that type of offence, the level of seriousness of the circumstances of the offending and the personal circumstances of the offender: *Chan v R* (1989) 38 A Crim R 337, 342 (Malcolm CJ); *McDougall v The State of Western Australia* [2009] WASCA 232 [12] [13] (McLure P).

25. The maximum penalty for an offence of assault occasioning bodily harm (when not committed in circumstances of aggravation) is 5 years' imprisonment, with a summary conviction penalty of a maximum of 2 years' imprisonment and a fine of up to $24,000: s317 *Criminal Code*. The summary conviction penalty provides a jurisdictional limit only and it remains relevant to consider the maximum penalty even where the offence is dealt with summarily: *Wiltshire v Mafi* [2010] WASCA 111.

26. During submissions the offence in this case was referred to as a 'glassing'. There is, of course, no offence strictly so described. There have been a number of cases involving assaults in which glasses or bottles have been used as a weapon. In many of these cases the charge preferred was one of unlawful wounding. That is a result of the nature and extent of the injuries inflicted. However, some of the principles may be applicable in cases of assault where the facts are similar.

27. A summary of the sentences imposed in such cases was provided by Martin CJ in *Scolaro v Shephard (No 2)* [2010] WASC 271 [202]. In that case his Honour accepted that serious offences of unlawful wounding committed by the use of a glass or bottle will ordinarily result in the imposition of a significant term of imprisonment to be immediately served. However, his Honour went on to say:

> I do not mean to suggest that such a sentence will be inevitable in each and every case of this character. On the contrary, the cases to which I referred reveal that it would be in error in principle to adopt such a hard and fast rule, and that established principle, and the provisions of the *Sentencing Act* require detailed consideration to be given to all the relevant circumstances in each case. Much will depend upon the circumstances of the offence, the degree of force used, and the extent of the injury caused. However, the seriousness of offending of this kind, and its prevalence, lead me to conclude that the cases in which a significant term of imprisonment to be served immediately is not imposed following a conviction for unlawful wounding using a glass or bottle will be exceptional.

28. It is important to read the statement of the Chief Justice in context. In referring to offences of 'this kind' it must be understood that the conduct in *Scolaro* involved deliberate and forceful use of a glass to strike the face of another, thereby causing significant injuries. It was also an offence of unlawful wounding and not, as here, one of assault.

29. In *Powell v Tickner* [2010] WASCA 224 Buss JA said at [125] that whilst each case would

depend on its particular facts, a term of immediate imprisonment would ordinarily be required for offences of unlawful wounding where:

a. a glass has been intentionally used as a weapon and has been used intentionally to harm the victim (even where the degree of harm was not intended);

b. the offender has not reacted instinctively to a serious provocation; and

c. seriously disfiguring injuries (or other injuries) had been caused.

30. Factors that may be relevant in sentencing for this type of offence include whether a glass has been used as a weapon, whether that use was intentional, whether the glass was used deliberately against a vulnerable part of the body, the nature and extent of the injuries, the force that was used, whether the offence occurred on the spur of the moment, whether there was any element of provocation and the importance of general deterrence: *Plant v Harrington* [2010] WASC 364 [23].

31. In *Scolaro v Shephard (No 2)* it was accepted that the crime of unlawful wounding can occur in such a wide variety of circumstances that it is not possible to discern a range within which sentences for those offences usually fall: see also *Duggan v Coelho* [2009] WASC 372. The same conclusion is applicable to an offence of assault occasioning bodily harm.

32. In *Holden v The State of Western Australia* [2009] WASCA 50 the Court of Appeal considered sentences imposed for offences of assault occasioning bodily harm. Wheeler JA said that it was difficult to discern a range because of the great variation in circumstances in such cases. However, her Honour noted that sentences of between 6 months' suspended imprisonment to 2 years' immediate imprisonment had been imposed in cases where there had been a plea of guilty. These comments have also been referred to in the context of a sentence imposed by a magistrate: *Wiltshire v Mafi* [2010] WASCA 111 [42].

33. In many of the cases where a sentence of immediate imprisonment has been held to be appropriate the use of a glass or bottle has been deliberate. The circumstances of such cases have commonly included a heated argument in licensed premises during which the offender has deliberately picked up or used a glass or bottle as a weapon to attack their opponent. Such cases have also commonly involved a deliberate attack to the face and the incurring of significant injuries by the victim. Those cases include *Powell v Tickner*, *Plant v Harrington* and *Scolaro v Shephard (No 2)*. The deliberate use of a glass implement in this way enhances the need for general deterrence to be reflected in the sentence.

34. The circumstances of each of the three cases referred to should be mentioned. In each of them the offence was unlawful wounding, not assault occasioning bodily harm. Whilst the maximum penalty is the same, the difference is explained by the nature of the injuries inflicted.

35. In *Powell v Tickner* the complainant and the offender had a verbal altercation at a hotel. Shortly afterwards the complainant left the hotel. The offender told a friend what had occurred and identified the complainant. The friend ran up and smashed a glass to the left side of the complainant's face as he was about to get into his car. The offender then ran up and smashed a glass into the right side of the complainant's face. Both the offender and his friend fled the scene. The complainant suffered major injuries that required sutures and extensive plastic surgery. A sentence of 15 months' imprisonment was imposed on appeal.

36. In *Scolaro v Shephard (No 2)* the offender engaged in a verbal altercation with the complainant in a nightclub. The offender struck the complainant with a heavy glass to the face. The glass broke causing significant lacerations. The complainant was treated in hospital and required between 32 and 36 sutures from a plastic surgeon. It was accepted on appeal that there had been a degree of provocation and the original sentence of 18 months' immediate imprisonment was reduced to one of 12 months' imprisonment.

37. In *Plant v Harrington* the offender deliberately struck the complainant to the head with a glass. The blow was sufficiently forceful that the glass broke. The offender and the complainant had previously had a falling-out. The offender claimed that the complainant had spoken sarcastically

to her before the blow was struck. The complainant received three lacerations, one of 3 cm behind her left ear and two of 1 cm each on her collarbone area. A sentence of 8 months' immediate imprisonment was not disturbed on appeal.

38. The present case is distinguishable from the cases I have referred to in a number of important respects. First, it was not contended that the glass bottle had been used deliberately by the appellant as a weapon. There was no suggestion that the appellant had picked up the bottle in order to use it in such a fashion. Nor was there any suggestion that she had intended to strike the complainant with the bottle. Secondly, there was no suggestion that the appellant had deliberately targeted the head of the complainant. The admitted facts were that whilst she had violently struggled against the crowd controller, that struggle had occurred in circumstances where her movements were unfocused. Thirdly, the nature and extent of the injuries caused was significantly less serious than in the other cases. The statement of material facts indicated that the laceration was 1.5 cm long and did not penetrate the full thickness of the skin. This is to be contrasted with other cases which involved multiple injuries requiring medical treatment and, in some cases, surgery. Fourthly, whilst it is difficult to determine with exactness the degree of force which was used, the extent of the injuries tends to indicate that it cannot have been great. Fifthly, this was an offence that occurred on the spur of the moment. The incident took place in a matter of seconds and this is to be contrasted with those cases in which there has been an escalating argument which provided opportunities for the offender to desist in their conduct.

39. As against the mitigating factors I accept that it was relevant for the magistrate to take into account that the complainant in this case was a crowd controller carrying out her lawful duties in respect of the premises. I also accept that offences involving the use of violence on licensed premises by persons who are intoxicated are unacceptable and deserving of condemnation. But it is also important to ensure that each offence is dealt with in a way that reflects the particular circumstances in which it occurred.

40. There can be no doubt that general deterrence is an important factor, but its significance can be affected by the circumstances of the offence. It is certainly important to impose sentences that will deter the deliberate use of glass or bottles in drunken fights on licensed premises, but this was not an offence of that character.

41. It also appears that the magistrate, by referring to the prevalence of 'this kind of violence within and around licensed premises', was putting the present offence into a very broad category which included other conduct of a much more serious type. Not all offences of assault occasioning bodily harm will attract the same degree of approbation.

42. To describe this as an offence of 'glassing' dangerously obscures the fact that the glass bottle in this case was not deliberately used. Whilst the magistrate recognised this as being an important mitigating factor and characterised the appellant's conduct as reckless, he nevertheless imposed a sentence which was more consistent with offences involving the deliberate use of a glass as a weapon. While I do not detract from the seriousness of this offence, it was clearly not one which, in all of the circumstances, required the imposition of a sentence of imprisonment to be immediately served.

Conclusion

43. For the above reasons the sentence of 10 months' immediate imprisonment was manifestly excessive. Accordingly, the appeal must be allowed and the appellant resentenced.

44. In resentencing it is relevant to take into account the circumstances that have occurred since the appellant was first sentenced. Following her sentence the appellant filed an appeal and made an application for bail. Bail was granted by Commissioner Sleight on 27 January 2012. Accordingly, the appellant served approximately four weeks in prison before being released on bail.

45. Since being released on bail the appellant has continued to attend counselling sessions both in regard to alcohol use and anger management. The appellant's mother continues to be treated for cancer and this has required the mother to attend Perth for treatment every three months. The appellant's mother has indicated that her condition requires an operation with three weeks

in hospital and ten weeks recovery during which time she will need the support of the appellant in caring for her younger siblings.

46. I agree with the magistrate that the personal circumstances of the appellant as regards the care of her siblings would not necessarily justify the conclusion that she should not by imprisoned if the offence otherwise called for it. However, as I have reached a conclusion that a sentence of imprisonment to be immediately served was not the appropriate penalty in this case, it is possible for me to take these circumstances into account in a general way in determining the appropriate sentence.

47. Having considered all of the relevant factors, it is my view that the appropriate sentence is an intensive supervision order of 12 months duration with a programme condition under s 73 of the *Sentencing Act* 1995 (WA). The programme condition will ensure that the appellant continues with the counselling.

48. The orders of the court will therefore be that:

1. leave to appeal be granted in respect of the grounds contained in the notice of appeal;

2. the appeal be allowed;

3. the sentence imposed by the magistrate be set aside;

4. in lieu thereof the appellant be sentenced to a 12 month ISO with a programme condition.

APPEARANCES: For the appellant Closter: Ms CA McKenzie, counsel. McKenzie & McKenzie, solicitors. For the respondent Humphreys: Ms GM Cleary, counsel. Director of Public prosecutions (WA).
