DISTRICT COURT

APPELLATE JURISDICTION

JUDGE DURWARD SC

No 83 of 2010

JOSHUA THOMAS EARL — Appellant

and

CONSTABLE L G HERON — Respondent

MACKAY

..DATE 01/02/2011

JUDGMENT

HIS HONOUR: The appellant was convicted on a plea of guilty of an offence of assault occasioning bodily harm in the Magistrates Court at Mackay on 28th of July 2010 and sentenced to 12 months' imprisonment with a parole release date fixed for the 27th of September 2010, that is after two months' of actual custody.

He was granted bail pending the appeal on 30th July 2010. He has appealed against the sentence on the ground that the sentence was manifestly excessive. The appellant is required to satisfy the Court that the Magistrate erred in exercising his sentencing discretion: House v The King [1936] 55 CLR 499.

The factual circumstances are as follows: Shortly before midnight on Saturday the 20th of February 2010, the complainant was awaiting for a taxi with a number of friends outside a hotel in Moranbah. The size of the group prevented the first taxi from conveying the whole group away. So, the taxi took a number of persons and arranged to return and collect the complainant and the remaining number of his friends. The appellant did not know of that arrangement and his group came and lined up to wait for a taxi at the same position.

When the taxi returned, one of the complainant's friends was a little distant from the rank and the complainant and his friends got into the taxi and were confronted by the appellant's girlfriend. The taxi driver informed the group

that the complainant's group had already arranged for the taxi.

The appellant is said to have said to the complainant, "What are you looking at?" He then punched the complainant in the face and side of the head for a short time. A number of persons from both groups ended up in what has been described as a heap on the ground.

The appellant and his group then left the scene and the police subsequently attended and took the complainant to the hospital. The same taxi later collected him from the hospital and took him home.

It is clear on the material before the Magistrate that the complainant was punched several times. He did not suffer any fractures. He later complained of a splitting headache and that his face, jaw and nose were extremely swollen. He used ice during the following day to reduce the swelling and pain. No victim impact statement was provided to the Court.

The appellant is aged 26 years. His date of birth is the 28th of February 1984. He was 25 years of age at the time of the commission of the offence and he had a criminal history. He was sentenced in the District Court at Rockhampton on 30 May 2007 of two offences, an assault occasioning bodily harm and a grievous bodily harm, both committed on the 3rd of December 2005, that is, some 18 months earlier. He was sentenced to 12 months' imprisonment to be served by way of an intensive

correction order on the assault occasioning bodily harm and 18 months' imprisonment wholly suspended with an operational period of two years on the grievous bodily harm offence.

He is employed full time as a trainer and assessor for work personnel and as a machinery operator.

The appellant's counsel submitted that the Magistrate erred in three respects. Firstly, in concluding that the appellant had every opportunity to rehabilitate himself but had not done so. Secondly, that the effluxion of time between the commission of the prior offences of violence and the subject offence, whilst a relevant matter, was not explicitly referred to. And thirdly, that insufficient weight was given to the appellant's cooperation, remorse and self rehabilitation.

There was no independent evidence supporting rehabilitative measures taken by the appellant. This matter was addressed by submission from the Bar table by the appellant's lawyer. It was open for the Court to infer that the intensive correction order was completed satisfactorily. However, the specific requirements of the intensive correction order were and are not known.

An intensive correction order is a sentence of imprisonment to be served in the community. On the scale of sentences of imprisonment, it sits between wholly suspended imprisonment and actual imprisonment. Alcohol consumption was apparently a factor in the commission of the prior offences. The

appellant's lawyer in submissions to the Magistrate referred to the appellant's problem with alcohol as a binge drinker. He was affected by alcohol when he committed the subject offence. He instigated the violence at the taxi rank. The catalyst for his violent behaviour was apparently his belief that the complainant and others were queue jumping. However, there had been no provocation by the complainant prior to the offence.

It was submitted that after the offence but before the sentence the appellant had consulted a psychologist. However, there was no report available to tender to the Magistrate. Apparently, he was advised to avoid alcohol. He was apparently prepared to accept the imposition of a condition in any order of a non custodial nature that banned his consumption of alcohol. He was said to have avoided hotels and social functions between committing the offence and the sentence.

A suitability assessment for community based orders was given to the Magistrate by the appellant's lawyer, although apparently not formally received or recorded as an exhibit. I nevertheless have read the document. It was prepared by a probation and parole officer on the 28th of July 2010. It refers to a number of matters. His partner had started the altercation, he was not easily angered, he felt the need to control alcohol and would benefit from counselling, and if he had not been under the influence of alcohol, the offence would not have happened.

It is readily apparent that there was no information that referred to any specific rehabilitative measures taken by the appellant to address his alcohol problem or any anger management or impulsive behavioural issues prior to the commission of the offence.

His rehabilitation prior to sentence seems to have been prospective rather than performed, other than the submission that he had avoided alcohol and attendance at social functions.

The prior offences were committed on 3rd December 2005, where the appellant was aged 21 years. The subject offence was committed on 20th of February 2010, about four years and three months later.

The sentences imposed in 2007 no doubt reflected, amongst other things, the appellant's youth and lack of prior criminal convictions. The making of a wholly suspended sentence of imprisonment for an offence of doing grievous bodily harm, which occurred on that occasion, is unusual. The appellant has not committed any breach of the suspended sentence, and had completed the intensive correction order and had not committed offences in that intervening period, until the offence which is the subject of this appeal.

It was open to the Magistrate to make findings consistent with what I have just referred to in respect of rehabilitation

measures. The Magistrate accepted the plea of guilty as timely and as an indication of remorse and cooperation. Further, so far as cooperation is concerned, the appellant left the scene after the melee during which the offence occurred, when it had ended. He was known to the taxi driver. She told the police that he was the offender.

The appellant attended the police station on 5th May 2010, some 10 weeks or so later. He exercised his right not to participate in an interview. He was issued with a notice to appear. His plea of guilty was a timely plea.

The Magistrate took into account the appellant's criminal history as he was obliged to do. It was a very relevant matter. He described the appellant's conduct as a "gratuitous display of violence". It was in my view an apt description.

Specific complaint was made in this appeal of some statements made by the Magistrate to which I will now refer. "His Honour said, 'For those matters you were given every chance of rehabilitation.'" That was a reference to the previous offences.

"You were sentenced to imprisonment for 12 months for the assault occasioning bodily harm and - but that was to be served by way of intensive correctional order in which you have received the assistance of the probation office plus some community service to be performed and you were also given the benefit of imprisonment for 18 months, I assume on the

grievous bodily harm, which was wholly suspended for a period of two years. So, you have been given every opportunity by the Court to rehabilitate yourself and you haven't done so. You tell me that you have difficulty with drink and that when you drink that these things happen."

In so far as the submission that the Magistrate's discretion miscarried by reason of error is concerned, I do not consider that there has been any error.

Firstly, the Magistrate was entitled to conclude that even though the intensive correction order and the wholly suspended sentence had been completed, the appellant had nevertheless not taken any specific steps to rehabilitate himself between the sentence in 2007 and the commission of the subject offence. There was ample information upon which that view could properly be formed. Indeed, it would have been open for the Magistrate to have concluded that there was only anecdotal evidence of rehabilitative measures having been taken prior to the sentence and that such other evidence as was submitted was prospective, rather than reflective.

Secondly, the Magistrate was alert to the relevant dates and effluxion of time to which I have referred. There had been a period of over four years of non offending. However, the commission of the subject offence demonstrated perhaps that nothing had changed in the appellant's behavioural issues, when influenced by alcohol.

I do not consider that any omission to refer to the four year period by the Magistrate amounts to an error.

Thirdly, it was submitted that the Magistrate had not properly taken into account the factors referred to in section 9 subsection 4 of the Penalties and Sentences Act. The Magistrate said he took into account the provisions of the Penalties and Sentences Act and the submissions made on the appellant's behalf by his lawyer. He specifically referred to and accepted remorse and cooperation.

It is not necessary for a judicial officer to refer specifically to the factors referred to in section 9(4) of the Penalties and Sentences Act, provided the content of the decision reflects the general thrust of those factors. The Magistrate's decision in this case did so.

Accordingly, there was no error in the Magistrate's exercise of the sentencing discretion. The head sentence imposed was open to the Magistrate to impose.

It was submitted on behalf of the appellant that the two months of actual custody was out-of-step with the head sentence and that there is little value in short sentences of actual imprisonment.

I was referred to the R v Taylor (2000) QCA/311. The statements of principle referred by the Court of Appeal in that case are unremarkable. The offender in that case was

aged 23 years. The offence occurred in the context of what was described as a tumultuous relationship. He had one minor prior offence of assault. He was sentenced to nine months imprisonment suspended after three months. He served some of that time prior to the appeal. The head sentence was upheld but the unserved balance of the sentence was immediately suspended after the appeal.

This case, in my view, does not assist the appellant so far as factual circumstances are concerned and needs to be considered in light of its own facts and circumstances.

There is no doubt that a wholly suspended sentence was open to be imposed by the Magistrate. The comparative cases referred to in Taylor demonstrate that to be so.

I was also referred to, and I have considered the decisions in R v Jones (2003) QCA/474, R v Eastwell (2007) QCA/272 and R v Anlezarka, CA207 of 1999.

The respondent conceded that the sentence of 12 months imprisonment was at the higher end of the range but open to the Magistrate to impose. I agree that the sentence of 12 months imprisonment was open to be imposed. I do not necessarily agree with the concession, given the appellant's criminal history.

The suspension of a sentence after two months seems to me, can properly be viewed as an act of grace extended to the

appellant. Ordinarily, he would have been entitled to release after one-third of the head sentence had been served, that is, after four months.

While short terms of actual imprisonment may be less than optimal in achieving the purposes of sentencing as described in the Penalties and Sentences Act, the authorities have focused on sentencing of youth and persons with no criminal history so far as short terms of actual imprisonment are concerned.

I do not consider that a period of actual custody of two months in the circumstances of this case offends the principles relevant to the short terms of imprisonment.

It follows that I do not consider that the two months means that the head sentence was excessive. In my view, it is more likely to have reflected a generous view of the appellant's antecedents despite his criminal history.

The fixing of a parole release date was appropriate in the context of the appellant's mainly prospective intentions for rehabilitation. It follows that the appeal is dismissed. And Mr Campbell-----

MR CAMPBELL: Yes, your Honour?

HIS HONOUR: The appellant of course, is in Court-----

MR CAMPBELL: Yes, he is, your Honour.

HIS HONOUR: I think in the circumstances, I should order that he surrender himself into custody. However, I think also I should fix a new parole release date and also make a declaration. Do you have anything to say about that?

MR CAMPBELL: Yes, your Honour. He has in fact served three days-----

HIS HONOUR: Yes, I thought it was two days that was submitted to me by the respondent's counsel.

MR CAMPBELL: I had in mind that it was three, but I don't-----

HIS HONOUR: Well, the 28th of July 2010 was the date of sentence. The 30th of July 2010 was the date that bail was granted-----

MR CAMPBELL: Yes, I think-----

HIS HONOUR: Generally, one of those days is not counted because the 28th would have been a day in custody and the 29th, and he was bailed on the 30th but you can discuss that with counsel if you wish. It's correct, isn't it, you did submit two days of presentence custody?

MS FRANKLIN: Your Honour, I didn't make any submission as to the-----

HIS HONOUR: I thought I made a note that it was two days.

Perhaps it was - perhaps that was my calculation, in that case.

MR CAMPBELL: I always thought they counted each day as one day, whether it be part or whole.

HIS HONOUR: Yes.

MS FRANKLIN: Your Honour, I understand my client-----

MR MORTERS: That was my understanding. Sorry, your Honour, given that I've officially appeared in this matter-----

HIS HONOUR: Yes?

MR MORTERS: -----I suppose I should continue, but my understanding is that each partial day counts as a full day.

HIS HONOUR: All right. So it's three days. I mean I'm quite happy to declare three days.

MR CAMPBELL: Is your Honour suggesting that you're going to fix a date for him to surrender himself-----

HIS HONOUR: No-----

MR CAMPBELL: -----at a later date or-----

HIS HONOUR: Well, no, I wasn't suggesting that. I was going to make it immediately, but I'll hear you about that if you wish. Do you want to take some instructions in the matter?

MR CAMPBELL: No, he doesn't wish me to make any submissions on that, your Honour.

HIS HONOUR: Yes. All right, well I'll make it three days which is to the 30th of July. Well, the new parole release

date will be the - today's the first of February. It would be the 28th of March 2010. Does anyone want to take issue with that?

MR MORTERS: No, your Honour.

HIS HONOUR: Thank you.

MR CAMPBELL: 2011?

HIS HONOUR: 2011, yes.

MR CAMPBELL: I'm happy for it to be 2010, your Honour.

HIS HONOUR: Yes, 2011. Yes, well I order that the appellant forthwith surrender himself into the custody of the Queensland Police to be conveyed to the Correctional Centre to serve a balance of the suspended part of the term of imprisonment that was ordered by the Magistrate.

Mr Earl, I fix a parole release date of the 28th of March 2011. Upon your release from prison, you are required to report to the parole authorities within 24 hours of your release. If you fail to do so, you will be unlawfully at large. Mr Campbell will explain that further to you.

The significance of parole is that you are required to stay out of trouble for the balance of the term of imprisonment. The parole authorities have the power to take you into custody

for up to 30 days at a time if you breach the conditions of your parole. They also have the power to order you to take drug and alcohol testing and you are required to comply with their directions.

I declare that three days from the 28th of July 2010 to the 30th of July 2010 inclusive, spent in custody solely in relation to this offence, as to be imprisonment already served under the sentence.

I direct the Registrar to inform the Commissioner of this declaration. Thank you.

MR CAMPBELL: Thank you, your Honour.
