COURT: SUPREME COURT OF TASMANIA

CITATION: *Garcie v Lusted* [2014] TASSC 27

PARTIES: GARCIE, Jordan Charles
v
LUSTED, Gary

FILE NO: 126/2014

DELIVERED ON: 7 May 2014

DELIVERED AT: Launceston

HEARING DATE: 28 April 2014

JUDGMENT OF: Pearce J

CATCHWORDS:

Criminal Law – Sentence – Relevant factors – Nature and circumstances of offender – Age of offender – Young offender.
Jones v Fleming [1957] Tas SR 1; *Lahey v Sanderson* [1959] Tas SR 17; *Gray v Strickland* A44/1978; *Williscroft v Hibble* [2002] TASSC 88; *Mannie v Hibble* [2006] TASSC 55, referred to.
Aust Dig Criminal Law [3260]

Criminal Law – Sentence – Sentencing orders – Non-custodial orders – Suspended sentence of imprisonment – General principles – Assault – Whether sentence manifestly excessive – Whether rehabilitation prospects outweigh considerations of deterrence, punishment and denunciation.
Director of Public Prosecutions v Broadby, Cockshutt and Woolley (2010) 20 Tas R 399, referred to.
Aust Dig Criminal Law [3387]

REPRESENTATION:

***Counsel*:**
Applicant: F Cangelosi
Respondent: S Nicholson
Solicitors:
Applicant: Rae & Partners Lawyers
Respondent: Director of Public Prosecutions

Judgment Number: [2014] TASSC 27
Number of paragraphs: 20

Serial No 27/2014
File No 126/2014

JORDAN CHARLES GARCIE v SERGEANT GARY LUSTED

REASONS FOR JUDGMENT **PEARCE J**
7 May 2014

1 On 12 February 2014, the applicant, Jordan Charles Garcie, was convicted on his plea of guilty to one count of common assault. He was sentenced by Magistrate Brown, who ordered that he serve a term of imprisonment of four months, two months of which was suspended for two years. The applicant moves this Court to review the sentence. There are two grounds of review. The first is that the learned magistrate erred by placing too much weight on general deterrence, given the applicant's youth and lack of prior convictions. The second ground is that the sentence was manifestly excessive.

2 The circumstances of the offence were explained to the learned magistrate and he was shown a CCTV recording of the incident. At 4.15am on 6 July 2013, the applicant, then aged 19, was standing with one other young man on the footpath outside a licensed premises in Launceston. One other male was present. The applicant had been drinking but was not intoxicated. He and his friend were skylarking, engaging in boisterous but harmless mock fighting. The complainant, Mr Hanigan, then aged 62, emerged from inside the building. The learned magistrate described the complainant as overweight, smaller than the applicant, and "the worse for wear for alcohol". It can be seen on the CCTV film that he was somewhat unsteady on his feet. The applicant's friend then urinated against the building wall not far away from the group. The complainant said something about this to the companion. The applicant became involved in the discussion which then proceeded primarily between the applicant and the complainant. The two men were standing 1 – 2 metres apart, facing each other. The complainant took a step towards the applicant. In response, the applicant advanced toward the complainant, spinning rapidly in a full clockwise rotation, and raising his right arm as he did so in such a way as to enable him to strike the right of the complainant's face or head with the back of his cocked left elbow. The learned magistrate accepted that the force of the blow, coupled as it was with the momentum of the spin, immediately rendered the complainant unconscious. Unable to protect himself from the fall, the complainant fell heavily backwards against the wall of the hotel and onto the footpath where he lay motionless. The applicant removed himself from the immediate vicinity of the assault but did not leave. Others provided assistance to the complainant, who was taken to hospital by ambulance. He remained unconscious for several hours. He remembers waking up in hospital about 10 hours after the assault. He received eight stitches to a laceration on his head. It is not clear whether the laceration was caused by the blow inflicted by the applicant or by the complainant striking his head as he fell. The learned magistrate seemed to accept that it was the former. After the assault the complainant suffered headaches and lethargy, but the learned magistrate sentenced the applicant on the basis that he suffered no lasting injury or incapacity.

3 The applicant was, at the time of sentencing, 19 years old. He had no record for violence and no other relevant prior convictions. He had completed year 13 at a secondary college. For three years while a full-time student he had held part-time employment in which he worked 16 – 20 hours per week. Although he had ambitions to become a personal trainer, he was about to commence an apprenticeship in Victoria as a roof plumber. The learned magistrate received what he described as "careful and considered submissions" from the applicant's counsel who submitted that the applicant did not take drugs and only consumed alcohol socially. His counsel described the applicant as intelligent, industrious and articulate. None of that was challenged. No pre-sentence report was sought. In mitigation it was submitted that the applicant, although engaging in boisterous behaviour before the complainant arrived, was not looking for a fight. However, as the discussion with the complainant continued, the applicant perceived that the complainant, by stepping towards him, posed some threat and he struck the blow as a "pre-emptive strike". The learned magistrate dealt with that submission as follows:

> "It has been put in mitigation on your behalf that you believed that the complainant had something of a rough reputation, and that when he moved towards you, you saw that threat through the prism of that belief. Now to be fair to the complainant and to be fair to your counsel the court makes no such finding and it is indeed contrary to what I have been told, but I suppose what's important was that I am told and I must accept on your behalf that that was at least part of your subjective situation at the time this all occurred. By pleading guilty as you have, you have of course accepted what you did was an assault. Your counsel has very correctly conceded that it is a very bad common assault. Whilst you may well have felt threatened, both by the step that the man took towards you and your mistaken, but subjectively held view that he had something of a reputation, even putting those matters together, and even taking into account that you no doubt yourself were affected to some degree by alcohol, your response to that step towards you was wildly excessive. The complainant had not even raised his hands. There was no suggestion that he offered you or anyone else anything by way of threat of harm."

4 The learned magistrate went on to point out the physical mismatch between an older, smaller but overweight and intoxicated complainant and the applicant.

5 The first ground of appeal asserts that the learned magistrate gave too much weight to general deterrence given the applicant's youth and lack of prior convictions. The ground can only be concluded in the applicant's favour if I am also satisfied that the sentencing order was manifestly excessive. If it was not manifestly excessive, it cannot be said that the magistrate placed too much weight on general deterrence.

6 The remaining ground asserts that the sentence was manifestly excessive. A ground contending that the sentence was manifestly excessive can only succeed if it is established that the sentencing order is so manifestly wrong that it could only be the result of some undefinable error in the exercise of the judicial discretion: *Bresnehan v R* (1992) 1 Tas R 234 at [13]; *Lusted v Kenway* [2008] TASSC 47 at [38]; *Visser v Smart* [1998] TASSC 151. This Court must be persuaded of error of the second type referred to in *House v R* (1936) 55 CLR 499 at 505, that is that the sentence imposed by the sentencing judge is "unreasonable or plainly unjust". An appeal court may not substitute its own opinion for that of the sentencing magistrate merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing magistrate exercised his or her discretion: *Whittle v McIntyre* [1967] Tas SR (NC 6) 263; *Lowndes v R* (1999) 195 CLR 665 at [15], and the other cases referred to by this Court in *Director of Public Prosecutions v CSS* [2013] TASCCA 10. The applicant must show that the sentence is so obviously excessive that the sentencing discretion must have miscarried; or to put it another way, the sentence is plainly outside the proper limits of the wide discretion vested in the magistrate: *Allen v Kerr* (2009) 19 Tas R 132; (2009) 193 A Crim R 262. A sentencing court has a wide measure of latitude that is to be viewed with respect and restraint by appeal courts: *Postiglioni v R* (1997) 189 CLR 295 per Kirby J at 336 – 337. However an appeal court can intervene in the case of clear error. In *Visser v Smart* (above) Crawford J (as he then was) summarised the function of an appeal court in dealing with an appeal on the grounds of manifest inadequacy of sentence. The comments apply equally to an appeal on the ground of manifest excess:

> "An appellate court must not interfere with the exercise of the sentencing discretion except in a clear case of error. A magistrate is vested with a very wide discretion. *Whittle v McIntyre* [1967] Tas SR 263 (NC6). It is not sufficient to set aside a sentencing order just because a more severe sentence would have been imposed by the appellate court. In the circumstances of this case, the motion must fail unless the Court is satisfied that the sentence was manifestly wrong in its inadequacy, as to amount to a clear error in the sentencing process. Such principles have been stated by courts of this State on a great many occasions and come from the High Court in cases such as *House v R* [1936] HCA 40; (1936) 55 CLR 499, *Cranssen v R* [1936] HCA 42; (1936) 55 CLR 509 and *Harris v R* [1954] HCA 51; (1954) 90 CLR 652. Notwithstanding the

> wide sentencing discretion in the court below, it is the duty of the appellate court to interfere where it is necessary to do so to avoid such manifest inadequacy in sentence or inconsistency in sentencing standards that the error is of such gravity that it is essential in the administration of justice that the error be corrected. It is not necessary to identify any particular error of law made. The error can be implicit in the excessive leniency in the sentence imposed."

7 The expression of manifest excess or manifest inadequacy is a conclusion formed by giving regard to all the matters that are relevant to determining the sentence: *Hili v R* (2010) 242 CLR 520 at 539.

8 The learned magistrate concluded that, taking into account the nature and severity of the assault, a sentence of imprisonment for four months was appropriate. I find no error in that conclusion. It was within the range of sentences commonly imposed for serious assaults and within the proper exercise of his discretion. The penalty specified in the *Police Offences Act* 1935, s35, for common assault is a fine not exceeding $2,600 or imprisonment for a term not exceeding 12 months. A fine or community service, without more, would have been an inadequate response to this offence. A sentence of imprisonment was appropriate to mark the seriousness of the offence. No-one contended it was not a serious assault. It occurred in a public place outside a licensed establishment. The blow struck by the applicant imparted such force as to render the complainant immediately unconscious. The complainant was a much older and less agile man, affected by alcohol, posing no serious threat and who had no effective opportunity to protect himself. The applicant had been drinking, but that is no excuse, and the manoeuvre he performed was of a young, fit and strong man exercising physical dexterity and skill and substantially in control of his faculties.

9 The critical issue is whether the learned magistrate was wrong to not wholly suspend the sentence. To borrow from the words used by Underwood J (as he then was) in *Spaulding v Lowe* [1985] TASSC 4 this aspect of the appeal forcefully illustrates the complex nature of the sentencing process. Sentencing requires the balancing of several diverse and often conflicting objectives, including deterrence of the individual offender, deterrence of others who might be minded to commit similar crimes, retribution or denunciation of criminal conduct, the safety and security of the public and the rehabilitation of the offender. The sentencing process is an exercise of judicial discretion in which the force of each of those sentencing objectives is weighed against the other. That process is undertaken in light of the circumstances surrounding the commission of the crime and the personal circumstances of the offender. Subject to the individual circumstances of each case, the sentence should not be outside the range of sentences imposed in similar circumstances and should strike an appropriate balance between the competing objectives. The learned magistrate was aware of that balancing exercise. He undertook a careful examination of the facts relevant to sentencing and gave detailed reasons for the sentence he imposed. Nevertheless, after earnest consideration, I have concluded that the sentencing discretion miscarried. This case required, because of the applicant's youth and lack of prior convictions, that considerations of general deterrence, punishment and denunciation were subordinated to the applicant's prospects of rehabilitation.

10 The learned magistrate correctly recognised that the applicant's youth and lack of prior convictions were very important sentencing considerations. Both were significant factors to be taken into account when assessing whether all or part of the sentence of imprisonment should be immediately effective. Youth takes a prominent place during the sentencing process. There is a high public interest that young offenders be rehabilitated. It does not necessarily dominate all other relevant matters and does not of itself provide immunity from custodial sentences: *Spaulding v Lowe* (above). It is not a principle of universal application that imprisonment is always inappropriate for young first offenders: *Goold v McKenna* A4/1980. However, the importance of youth as a sentencing consideration has been emphasised by this Court for more than 50 years. The Courts have long recognised that, generally speaking, the youthfulness of an offender is always a ground for extending leniency. Imposition of an actual prison sentence on a young offender is likely to expose him to the

influence of confirmed criminals and increase, rather than decrease, the chance of re-offending. In *Jones v Fleming* [1957] Tas SR 1, Burbury CJ dealt with an appeal against the severity of a sentence of three months' imprisonment imposed upon a 19 year old who stole two gallons of petrol. In allowing the appeal, his Honour said, at 4 – 5:

> "The modern approach to the juvenile offender as recognized by the courts implies the realization that a juvenile offender should be given every reasonable opportunity to reform, rather than that he should be exposed to the possible corrupting influence of other inmates of the gaol and thereby be set on a path of crime ...
>
> In the case of a young man of this age who has had no previous conviction involving dishonesty or previous conviction of a serious crime, he should not be sent to gaol unless the nature of his crime is such that it is clearly the duty of the court to give effect to the deterrent aspect of punishment as outweighing other factors."

11 In *Lahey v Sanderson* [1959] Tas SR 17 at 21, Burbury CJ said:

> "It is because the public interest is best served if an offender is induced to turn from criminal ways to an honest living that a court rarely sends a youth to gaol except in the case of crime of considerable gravity (such as a crime involving violence), or in the case of a persistent offender who has shown himself not amenable to disciplinary methods short of gaol. The courts have recognised that imprisonment is likely to expose a youth to corrupting influences and to confirm him in criminal ways, thus defeating the very purpose of the punishment imposed. There has accordingly been a universal acceptance by the courts in England, Australia, and elsewhere of the view that in the case of a youthful offender his reformation is always an important consideration and in the ordinary run of crime the dominant consideration in determining the appropriate punishment to be imposed. It has been said by Lord *Goddard*, the former Lord Chief Justice of England, that a judge or magistrate who sends a young man to prison for the first time takes upon himself a grave responsibility."

12 In *Gray v Strickland* A44/1978, Nettlefold J referred with approval to the following passage from the Court of Criminal Appeal in England in *Smith's* case [1964] Crim LR 70, a passage also later adopted in 1987 by the Court of Criminal Appeal of this State in *Harris v R* A67/1987:

> "In the case of a young offender there can hardly ever be any conflict between the public interest and that of the offender. The public have no greater interest than that he should become a good citizen. The difficult task of the court is to determine what treatment gives the best chance of realising that object. That realisation is the first and by far the most important consideration."

13 A sentence of actual imprisonment should be a sentence of last resort, particularly for a young first offender, and ought be imposed only where alternative punishment is inappropriate: *Williscroft v Hibble* [2002] TASSC 88 at [16]; *Mannie v Hibble* [2006] TASSC 55 at [6]. The learned magistrate took the view that the deterrent and denunciation aspects of punishment were so predominant that actual imprisonment was required. He took into account considerations of both general and specific deterrence, as he expressed it "the need for the court to impose a sentence which acts as a deterrent, not just to you, but generally to others". There are, undoubtedly, some crimes that are so serious that an immediate sentence of imprisonment is required despite the applicant's youth and lack of prior convictions. The critical question, therefore, was whether the nature of this offence is such that it was the duty of the court to give effect to the deterrent aspect of punishment as outweighing other factors. I have concluded that the learned magistrate fell into error in deciding this was such a case. General deterrence is an important consideration when dealing with an offence of violence. There is justifiable public disquiet about the incidence of violent assaults in public, particularly those fuelled by alcohol. Society expects courts to hand down sentences which will mark denunciation of conduct of this kind and deter others. But such public opinion must be informed by the individual circumstances of each case. Although immediate custodial sentences are appropriate for serious cases of assault, there is no

prima facie position that the offence of common assault should be punished by an immediate gaol term: *Fruin v White* [2005] TASSC 25 at [23]. And the needs of general deterrence are not such as to make a sentence of actual imprisonment inevitable, particularly in the case of a young person with no record for violence or any other form of serious offending.

14 Whilst this was an offence of violence, there were certain aspects of it that distinguished it from an assault that justified an immediately effective sentence of imprisonment for a young first offender:

- The learned magistrate described it as a brutal assault. In doing so he focused strongly on the nature of the manoeuvre performed by the applicant and the force of the blow and the effect on the complainant. However it was a single, spontaneous, unplanned and unpremeditated blow. It did not involve use of a weapon and was not a sustained attack.

- The blow was inflicted in the course of an argument between the complainant and the applicant, and after the complainant had taken a step towards the applicant. It was put in mitigation that the applicant mistakenly believed the complainant had a "rough reputation" and posed some threat. The learned magistrate concluded that the complainant took only a single step and intended no more. He commented that, viewed objectively, the complainant posed no real threat. However, in his sentencing remarks the learned magistrate said "your reaction to that [the step] was to perceive that as a threat", and later, "I must accept on your behalf that it was at least part of your subjective situation at the time this all occurred". Thus, in the absence of any evidence and finding to the contrary, the applicant was to be sentenced on the basis that he held an honest belief that the complainant posed some threat, even if that belief was not reasonable. The question of whether the applicant had an honest belief that some force was necessary in defence of himself was not clearly resolved. The learned magistrate's remarks suggest a sentence on the basis that the applicant believed some force was necessary to defend himself but the extent of the force he used was "wildly excessive". Put another way, a reasonable person would consider the amount of force used was unreasonable judged against the circumstances as the defendant believed them to be: *Hill v Richman* [2001] TASSC 148. In the circumstances it was correct to sentence the applicant on that basis.

- The complainant was not seriously injured. The immediate effects of the injury were confronting. He was rendered immediately unconscious and remained so for some hours. A single blow may cause serious and life threatening injuries and death. Fortunately, however, that did not occur in this case. The complainant recovered and suffered no serious or long term harm as a result of the assault.

- The Crown relied on the assertion that the applicant did not assist the complainant after the blow. That is relevant only to the extent it may indicate a lack of remorse. However the learned magistrate accepted that the applicant became distressed and frightened. He did not leave the scene, despite being physically confronted by others upset at what had occurred, until the ambulance arrived. He did not seek to hide his identity and some days later he presented himself to the police. He pleaded guilty, albeit not at a particularly early stage.

15 I have concluded that, in this case, a sentence involving actual imprisonment was manifestly excessive. A suspended sentence was what was necessary to meet the need for a sentence of denunciation and deterrence. Although each case is different, the approach taken by Evans J in *Mannie v Hibble* (above) provides a yardstick for the approach I think should have been adopted. That case concerned a sentence of six months' imprisonment with four months suspended imposed on a 19 year old man for common assault. The applicant had no prior convictions for violence. The complainant in that case suffered much more serious injuries than were suffered by the complainant in this case. Nevertheless his Honour found the learned magistrate was in error in failing to wholly suspend the sentence, and referred to many of the same sentencing principles that I have referred to.

Since then, the maximum penalty for common assault has increased, indicating a legislative intention that offences should attract greater sentences, but the fundamental sentencing principles remain the same.

16 As to the contention that a wholly suspended sentence is no deterrent or punishment at all, I refer to the decision of the Court of Criminal Appeal in *Director of Public Prosecutions v Broadby, Cockshutt and Woolley* (2010) 20 Tas R 399. The principal judgment was written by Evans J with whom Porter and Wood JJ agreed. In the course of his reasons Evans J, at [16], remarked on the imposition of a suspended sentence on a young offender in the following terms:

> "Whilst I appreciate the reality of and the significance to the sentencing process of the community's perception that an offender who receives a suspended sentence 'walks free', I am in no doubt whatsoever that when such a sentence is appropriate it is the community that benefits. As explained by Crawford J (as he then was) and Slicer J in *Attorney-General (Tas) v Blackler* (2001) 121 A Crim R 465, at 470 par[15]:
>
> > 'If leaving out of prison a young person who has not previously appeared in a court for offences results in the offender not re-offending, then the public will have been well served by the sentence which was selected. If, in breach of a sentence of imprisonment suspended on a condition of good behaviour, the offender re-offends within the period of suspension ..., then the offender is likely to serve the imprisonment which was suspended, in addition to suffering punishment for the subsequent offence or offences. In such a case, what the public may regard as a "real" punishment, has not been avoided'."

17 There was also scope in this case to couple the suspension of the sentence with community service or a fine. There is nothing in the *Police Offences Act*, s35, permitting both a fine and imprisonment. However the learned magistrate had power to order both a fine and imprisonment because the difficulty identified in *Rosevear v Bonde* (2005) 15 Tas R 133 and *Mannie v Hibble* (above) at [7] is overcome by amendment to the *Acts Interpretation Act* 1931, s37(5A), on 1 January 2008. Subject to the problems of statutory interpretation referred to by Crawford J in *Rosevear v Bonde* (above), which I need not deal with in this appeal, the learned magistrate also had power to make a community service order or to impose conditions on a suspended sentence requiring performance of community service or supervision of a probation officer.

18 Counsel for the respondent correctly cautioned the Court against "tinkering" with the learned magistrate's sentence. I do not regard the conclusion that it was an error to sentence a young first offender to actual imprisonment as tinkering.

19 The second ground of appeal is made out. The motion is allowed. The sentence imposed by the learned magistrate is quashed. I will re-sentence the applicant after hearing further submissions.

Postscript

20 These reasons were published on 7 May 2014. On 8 May 2014, the appellant was convicted, sentenced to a term of imprisonment of four months, wholly suspended for two years and fined $1500.