CITATION: *Justin Anthony Firth v Stephen Frederick Reid* [2017] NTLC 022

PARTIES:	Justin Anthony FIRTH v Stephen Frederick REID
TITLE OF COURT:	Local Court
JURISDICTION:	Criminal
FILE NO(s):	21632628
DELIVERED ON:	29 August & 26 September 2017
DELIVERED AT:	Darwin
HEARING DATE(s):	10, 11, 16 and 29 August 2017
JUDGMENT OF:	Greg Macdonald

CATCHWORDS:

Assault – Part 3 Division 6A *Sentencing Act* - ss.78C and 78DI - Mandatory imprisonment for violent offence - "substantially corresponding" - "exceptional circumstances".

REPRESENTATION:

Counsel:

Plaintiff:	Mr G. O'Brien-Hartcher
Defendant:	Mr H. Riley

Solicitors:

Plaintiff:	NTLAC
Defendant:	DPP

Judgment category classification:	B
Judgment ID number:	[2017] NTLC 022
Number of paragraphs:	20

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

No. 21632628

BETWEEN:

Justin Anthony FIRTH

Complainant

AND:

Stephen Frederick REID

Defendant

REASONS FOR JUDGMENT

(Delivered 29 August & 26 September 2017)

Judge Macdonald:

1. The defendant Steven Frederick Reid ("Defendant") was charged by Information that on 16 February 2016 he unlawfully assaulted Scott Olive, who suffered harm, contrary to s 188 of the Criminal Code (NT) ("Code").

2. On 10 August 2017 the Defendant pleaded not guilty to the charge, with the Crown then adducing evidence from Mr Olive, two other witnesses being Messrs. Michael Pearce and Scott Barlow, and investigating members of NT Police.

3. On the basis of the evidence placed before the court, on 11 August 2017 I found the offence proven, so recorded a conviction. Submissions on legal issues which then arose were heard on 16 August 2017.

4. The issues are, first, whether a conviction in January 2007 of "*Stalking or intimidation with intent to cause fear of physical or mental harm*" contrary to s 562AB of the then *Crimes Act 1900* (NSW) is an offence "*substantially corresponding*" with s 189 of the Code, being "*Unlawful stalking*". Section 78C read with Scheduled 2 of the *Sentencing Act* prescribes an offence against s 189 to be a "*violent offence*", with the definition then proceeding to also include certain offences from other jurisdictions, on the basis of that descriptor.

5. Secondly, whether "*exceptional circumstances*" within the meaning of Division 6A of Part 3 of the *Sentencing Act* exist, so as to exempt the Defendant from the mandatory sentence Parliament has prescribed for the offence convicted of.

6. In relation to the Crown's submission that the NSW offence is a substantially corresponding offence, the Defendant submitted a material difference between the then s 562AB and the current s 189 was determinative against such a finding. Namely, that s 562AB(4) makes clear that actual fear of "*physical or mental harm*" on the part of an alleged victim was not an element of that offence. Conversely, s 189 requires that a defendant's conduct "*actually did have that result*".

7. The then s 562AB is in simpler terms than s 189, but the gravamen of each offence is intention to cause "*fear* [of] *physical or mental harm*". Although proof of actual fear of harm is not an element of s 562AB, a minimum objective element in respect of the defendant's intention is also required for each offence. Contravention of s 562AB at least requires proof that the defendant "*knows that the conduct is likely to cause fear*" in the other person of the relevant harm.

8. Due to the distinction identified by the Defendant, s 189 of the Code may be seen as a narrower and, in some respects, more specific offence than s 562AB. However, I do not consider the further requirement of s 189 of

proof of at least actual apprehension or fear in the victim produces the result that the Territory provision does not substantially correspond with s 562AB.

9. The meaning of "*corresponding provisions*" and "*correspond*" were comprehensively considered by the Supreme Court in *Samarkos v Commissioner for Corporate Affairs* (1988) 52 NTR 1 at 9 to 10 and the High Court in *New South Wales v Corbett & Anor* (2007) 237 ALR 39 at [11] and [12]. That consideration did not include the broadening effect of "*substantially*" contained in s 78C.

10. Having regard to the respective elements of s 562AB and s 189, together with the character and nature of the offence which each Parliament clearly intended to create by enactment of those sections, I consider contravention of s 562AB is of a "*substantially corresponding*" offence. The mandatory sentence prescribed by Division 6A of Part 3 of the *Sentencing Act* therefore applies to the Defendant unless "*the court is satisfied that the circumstances of the case are exceptional*" as provided by s 78DI.

11. Eyewitness Mr Scott Barlow gave oral evidence to the court at hearing. Although he could not say he saw the first blow struck, Mr Barlow's evidence was detailed and particularly credible, and is fully accepted. Mr Barlow's evidence included what he heard following the Defendant assaulting Mr Olive, after the Defendant had been restrained with cable ties in the office of the Litchfield Tavern. That evidence was corroborated by a report of medical practitioner Dr Candice Elizabeth Norris, which became Exhibit D3.

12. I find on the balance of probability that, once restrained, the Defendant was struck on more than one occasion in circumstances where he was unable to defend himself. Also, that the application of force to the Defendant constituted something in the nature of extra-curial punishment, as considered and discussed in *Fernando v Balchin* [2011] NTSC 10. In my view the punishment received by the Defendant alone constitutes

exceptional circumstances, including having regard to the principles laid down by the Court of Criminal Appeal in *R v Duncan* (2015) 34 NTLR 201.

13. Although not finally determined, the evidence before the court also indicated that a trespass notice binding the Defendant in respect of the Litchfield Tavern had expired. It is noted that a licensee has power under s 121 of the *Liquor Act* to exclude or remove a person from licensed premises under their control. However, that is generally only upon one or more prerequisites being met.

14. Lastly, the court also notes that the CCTV system which the licensee is obliged to maintain failed to record the incident the subject of the charge, and events following. It was also suggested that this was not the first occasion on which the CCTV was ineffective. Although I do not finally determine the cause(s), the fact of the malfunction is also a factor which may constitute an exceptional circumstance.

15. The circumstances of the case are exceptional.

16. On 29 August the court imposed a sentence of a bond of good behaviour on security of $1000, together with a prohibition on attending or being present at the Litchfield Tavern (which premises subsequently had a change of name to Darwin River Tavern) and environs under the control of the licensee, for a period of 12 months.

17. Following delivery of decision and sentence on 29 August 2017, the matter was further called on by the parties on 15 September 2017. At that time all counsel submitted that the offence for which the Defendant had been convicted was a level 3 offence and that the sentence of 29 August 2017 was not consistent with s 78DG so fell within one of the criteria prescribed by s 112 of the *Sentencing Act*, such that the proceeding should be reopened.

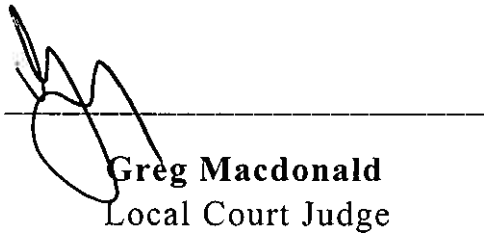
18. I agreed with those submissions. Section 78DD of the *Sentencing Act* applies to the offence for which the Defendant was convicted on 29 August 2017,

generally attracting a "*minimum sentence of a specified period*" of three months actual imprisonment through s 78DH. However, s 78DI is activated due to the exceptional circumstances which attend the case, requiring s 78DG to be applied instead.

19. Section 78DI only applies to situations where the court is required to impose "*a minimum sentence of a specified period of actual imprisonment*" and does not expressly include the simpler alternative requirement of Division 6A of "*a term of actual imprisonment*". That is presumably because disposition under s 40 or 44 is expressly available under s 78DG and perhaps also because a sentence to 'the rising of the court' constitutes a sentence of imprisonment.

20. The Defendant is sentenced to the rising of the court, together with a bond of good behaviour on security of $1000, including a prohibition on attending or being present at the Darwin River Tavern and environs under the control of the licensee, for a period of 12 months from 29 August 2017.

Dated this 26th day of September 2017.



Greg Macdonald
Local Court Judge