



**SUPREME COURT
OF WESTERN AUSTRALIA**

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8 October 2010

JUDGMENT SUMMARY:

Scolaro v Shephard – SJA 1037/2010

The Chief Justice, the Hon Wayne Martin, today dismissed an appeal brought by Eva Grace Scolaro against her conviction for unlawful wounding. The charge against Ms Scolaro arose from an incident in a nightclub in Northbridge around midnight on 7 March 2009, in which a glass held by Ms Scolaro was thrust into the face of the complainant. The glass broke upon impact and lacerated the complainant's face, requiring more than 30 stitches to be inserted. However, the Chief Justice upheld the appeal against sentence on the basis that the magistrate had passed sentence on a wrong factual basis, and replaced the sentence of 18 months imprisonment imposed by the magistrate with a sentence of 12 months imprisonment, with eligibility for parole.

The appeal against conviction

The first ground of the appeal against conviction asserted that there was a miscarriage of justice because the magistrate found the case proven on a different basis to the way in which the case had been put by the prosecution. During the cross-examination of Ms Scolaro, the police prosecutor stated that the case was brought on the basis that Ms Scolaro had thrown the glass into the complainant's face. The magistrate found that while the glass may have slipped from Ms Scolaro's hand just before the point of impact, Ms Scolaro had deliberately and intentionally propelled the glass into the complainant's face.

The Chief Justice held that the conduct of the trial was not unfair to Ms Scolaro. The Chief Justice also held that the magistrate was correct to take the view that the real issue in the case had always been whether the prosecution had established beyond reasonable doubt that Ms Scolaro had deliberately and intentionally propelled her glass into the face of her victim, or whether there was a reasonable doubt that the glass had slipped from her hand as she was attempting to disgorge its contents upon the victim, as Ms Scolaro alleged. In the context of that issue, the question of whether or not the glass was in Ms Scolaro's hand at the point of impact with the victim's face was immaterial, as the magistrate held.

The second ground of appeal asserted that the evidence was inadequate to sustain the conviction of Ms Scolaro. The third ground of appeal asserted that the magistrate had made factual errors based upon his misconstruction of images recorded on a DVD which was put into evidence. During the appeal, a version of the recorded images at a higher degree of

resolution was viewed using slow motion and freeze frame technology. On that basis, the Chief Justice concluded that the magistrate had erred by finding that the complainant had not initiated the incident by spilling her drink on Ms Scolaro, and by finding that Ms Scolaro had not reacted to that spilling of drink. He also found that the magistrate had erred by finding that the complainant had not splashed her drink on Ms Scolaro a second time, prior to being struck with the glass, and by finding that Ms Scolaro's actions were not a reaction to the actions of the complainant.

However, the Chief Justice concluded that these errors of fact were not critical to the line of reasoning adopted by the magistrate in order to find Ms Scolaro guilty of the offence. The critical issue was whether there was a reasonable doubt that the glass had slipped from Ms Scolaro's hand while she was attempting to throw its contents onto the face of the complainant. The magistrate found that Ms Scolaro had previously upturned her glass, with the result that she must have known that there would have been little or no liquid left within it. He also found that the throwing action depicted on the DVD was inconsistent with an attempt to only throw liquid. He also relied on the fact that Ms Scolaro's hand was cut in the course of the incident, from which it could be inferred that her hand was very close to the complainant's face at the point of impact, to conclude that there was no reasonable doubt as to Ms Scolaro's intention of causing her glass to strike the complainant.

The Chief Justice concluded that the errors of fact made by the magistrate did not affect the essential reasoning by which he concluded that Ms Scolaro was guilty. The Chief Justice also concluded that it was not necessary for there to be a retrial of the issues, and that the prosecution case against Ms Scolaro was overwhelming. Accordingly, the Chief Justice concluded that there was no miscarriage of justice and each of grounds 2 and 3 of the appeal against conviction were also dismissed.

The appeal against sentence

The first ground of the appeal against sentence complained that the magistrate had erred by taking the view that his sentencing discretion was constrained by community expectations. The Chief Justice reviewed the role of community expectations in the sentencing process and concluded that it was entirely proper and appropriate for courts to take into account legitimate and informed community expectations at the time of passing sentence, as one factor to be considered. Community expectations are particularly relevant to the Court's obligation to impose a punishment which is commensurate with the seriousness of the offence, to denounce conduct which offends community standards of behaviour, and to vindicate victims of crime. However, it would be wrong in law for a court to allow community expectations to dictate or control the outcome of the sentencing process, which is complex and multi-faceted.

In the present case, although there is one passage in the magistrate's sentencing remarks which might suggest that he felt constrained by community expectations, the Chief Justice concluded that when the magistrate's sentencing remarks are read as a whole, it was clear that the magistrate only regarded community expectations as one factor to be taken into account, and did not allow that factor to override other relevant considerations, so as to cause him to impose a sentence that he would not otherwise have imposed.

The second ground of the appeal against sentence asserted that the sentence was manifestly excessive. The third ground of appeal relied upon the errors of fact made by the magistrate that were raised in the appeal against conviction.

The Chief Justice reviewed previous sentences imposed for comparable offences and concluded that while the outcome in any particular case would depend upon its particular circumstances, the seriousness of assaults committed using glasses or bottles as weapons, the danger of those offences, and their prevalence, supported the conclusion that a significant term of imprisonment, not suspended, would be imposed in all but exceptional cases.

The Chief Justice concluded that, on the basis of the facts found by the magistrate, the sentence which he imposed could not be said to be manifestly excessive, nor could the magistrate's failure to suspend the term of imprisonment which he imposed be said to be an error justifying appellate intervention.

In his reasons, the Chief Justice emphasised that courts of appeal should give due weight and deference to the exercise of sentencing discretion by lower courts charged with administering justice in the large numbers of cases with which they deal, and only intervene where error was established - and not merely because the appellate court might have imposed a different sentence.

However, the Chief Justice found that the magistrate had imposed sentence on an erroneous factual basis - namely, that Ms Scolaro's actions were entirely unprovoked, and were perpetrated on an unsuspecting victim. As it could not be said that those facts were immaterial to the sentence imposed, the sentencing process had miscarried, and the Chief Justice re-exercised the sentencing discretion.

After reviewing all relevant factors, the Chief Justice concluded that a term of imprisonment of 12 months was appropriate, and that it would not be appropriate to suspend that term of imprisonment. He directed that Ms Scolaro be eligible for parole.

He backdated the sentence to the date upon which Ms Scolaro was returned to custody following a breach of her bail, 14 September 2010.

The effect of the decision is that the sentence imposed by the magistrate has been set aside, and instead of that sentence, a sentence of 12 months imprisonment, with eligibility for parole, dated from 14 September 2010 has been imposed. The Prisoners Review Board will be able to consider Ms Scolaro's eligibility for parole after she has served 6 months of her sentence. Whether or not she is granted parole will be entirely a matter for the Prisoners Review Board.

The Chief Justice's full judgment is available on the Supreme Court of Western Australia website at www.supremecourt.wa.gov.au