

By Mark Hunter

This appeal was in respect of the severity of a sentence imposed by Mr McGregor SM. The appellant pleaded guilty to one charge of aggravated unlawful assault, contrary to section 188(2) of the *Criminal Code*. The victim was a woman who suffered a fractured skull after being struck with a stick by her brother.

The Magistrate sentenced the appellant to 18 months imprisonment and specified a non-parole period of 9 months. The appellant had five convictions prior to 1992 for assault.

The only ground of appeal argued was the alleged failure of the Magistrate to give due weight to the "cultural context" of the offence. The appellant had assaulted his sister because her husband swore at her in his presence. The victim had not provoked the assault in any way.

The victim's husband told the Magistrate that the Aboriginal customary law which allowed for the punishment of the

victim in these circumstances was almost obsolete, the practice sometimes being followed when the aggressor was intoxicated.

The Magistrate accepted that the appellant had acted in accordance with "his notion" of customary law but found this fact not to be a mitigating factor "except perhaps in the most minor way".

The Supreme Court was referred to previous decisions of the Court dealing with customary and the wishes of the community in relation to the resolution of criminal activity.

HELD

1. The sentence imposed was not manifestly excessive and the appeal was dismissed.
2. The Magistrate did not fail to give due weight to the cultural context in which the offence was committed.

His Honour noted that the practice of punishing a woman in the circumstances

outlined did not appear to be obligatory in its application and there was no evidence as to consequences for a failure to comply with it. Bailey J stated that in these circumstances it would make a mockery of the principle that all people stand equal before the law to elevate a "morally indefensible practice" to the status of a customary law to which courts should have regard.

APPEARANCES

Appellant

Counsel: Gibson
Solicitors: KRALAS

Respondent

Counsel: Fraser
Solicitors: DPP

COMMENTARY

Public policy considerations may be relevant where courts are asked to give recognition to "laws" of the type considered in this case.

High Court of Australia – 1998 Sittings

It is ordered as follows:-

1. Sittings of the Court for the transaction of all such business as may be brought before it shall be held during the year 1998 at the places and commencing on the days hereunder mentioned, that is to say:

Canberra	Tuesday 3 February
Canberra	Tuesday 3 March
*Hobart	Monday 30 March at 2.15pm
Canberra	Tuesday 21 April
Canberra	Wednesday 20 May
Canberra	Tuesday 16 June
*Brisbane	Monday 22 June at 2.15pm
Canberra	Tuesday 4 August
*Adelaide	Monday 10 August at 2.15pm
Canberra	Tuesday 1 September
Canberra	Tuesday 29 September
*Perth	Monday 19 October
Canberra	Tuesday 10 November
Canberra	Tuesday 1 December

2. Sittings to hear applications for special leave to appeal will also be held at the places and on the days hereunder mentioned, that is to say:

Sydney	Friday 13 February
Melbourne	Friday 13 February
Sydney	Friday 13 March
Sydney	Friday 1 May
Sydney	Tuesday 19 May
Melbourne	Tuesday 19 May
Sydney	Friday 19 June
Sydney	Friday 7 August
Sydney	Friday 11 September
Sydney	Friday 11 September
Melbourne	Friday 11 September
Sydney	Friday 9 October
Sydney	Friday 20 November
Sydney	Friday 11 December
Melbourne	Friday 11 December

3. If there is insufficient business at a place at which applications for special leave are listed to be heard the sittings may be moved to another capital city.

4. The winter vacation shall begin on Saturday 27 June 1998. The summer vacation shall commence on Saturday 12 December 1998.

