CITATION:	*Smiler v The Queen* [2018] NTCCA 2
PARTIES:	SMILER, Robert Kevin v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL from the SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	CA 8 of 2017 (21628678)
DELIVERED:	2 March 2018
HEARING DATES:	2 March 2018
JUDGMENT OF:	Grant CJ, Southwood J and Mildren AJ

CATCHWORDS:

CRIMINAL LAW – APPEAL AGAINST SENTENCE – SERIOUS HARM

Whether sentence manifestly excessive – serious harm – no intention to cause serious harm – assault with a weapon – sentence of nine years' imprisonment – regard must be had to the objective seriousness of the offence and where it sits in the range of seriousness, whether there are any aggravating factors, and whether there were any mitigating features – offence committed by the appellant fell into upper mid-range of seriousness for unlawfully causing serious harm – sentence clearly and not just arguably excessive – appeal allowed.

AB v The Queen (1999) 198 CLR 111, *Cranssen v The King* (1936) 55 CLR 509, *Forrest v The Queen* [2017] NTCCA 5, *House v The King* (1936) 55 CLR 499, referred to.

D Mildren, *The Appellate Jurisdiction of the Australian Courts* (2015 Federation Press).

REPRESENTATION:

Counsel:

Appellant:	M Aust and P Coleridge
Respondent:	S Robson

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	12

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Smiler v The Queen [2018] NTCCA 2
No. CA 8 of 2017 (21628678)

BETWEEN:

ROBERT KEVIN SMILER
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, SOUTHWOOD J and MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 2 March 2018)

THE COURT:

[1] On 28 April 2017, following a trial by jury, the appellant was sentenced to nine years' imprisonment for committing the crime of unlawfully causing serious harm, and three years' imprisonment for committing the crime of assault with circumstances of aggravation. One year and six months of the sentence of imprisonment imposed for the crime of assault was ordered to be served cumulatively on the sentence of nine years' imprisonment for the offence of unlawfully causing serious harm. That gave a total sentence of ten years and six months. A non-parole period of five years and six months was fixed.

[2] The maximum penalty for the crime of unlawfully causing serious harm is imprisonment for 14 years. The maximum penalty for assault with these circumstances of aggravation is imprisonment for five years.

[3] By orders made on 26 July 2017, an extension of time within which to lodge an application for leave and leave to appeal were granted.

[4] The two grounds of appeal are:-

(a) The sentence of imprisonment for nine years for the crime of unlawfully causing serious harm is manifestly excessive.

(b) The total sentence of imprisonment for ten years and six months is manifestly excessive.

Manifestly excessive

[5] The principles applying to an appeal for manifest excess have been well settled since the High Court's decision in *House v The King*[1]. The principles were recently restated by this court in *Forrest v The Queen*[2]. They are (footnotes omitted):

> [63] The exercise of the sentencing discretion is not to be disturbed on appeal unless error is shown. The presumption is that there is no error. Appellate intervention is not justified simply because the result arrived at below is markedly different from other sentences that have been imposed in other cases. Intervention is warranted only where the difference is such that in all the circumstances the appellate court concludes there must have been some

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1 [1936] HCA 40; 55 CLR 499 at 504-505. See also *Cranssen v The King* [1936] HCA 42; 55 CLR 509.

2 [2017] NTCCA 5.

misapplication of principle, even though where and how is not apparent from the statement of reasons.

[64] Manifest excess is a conclusion which does not depend upon attribution of specific error in the reasoning of the sentencing judge. The relevant test is whether the sentence is unreasonable or plainly unjust. It must be shown that the sentence was clearly and not just arguably excessive. In approaching the task of determining whether a sentence is unreasonable or plainly unjust, the appeal court does so within the context that there is no one single correct sentence. The process of sentencing comprehends that there may have been compliance with the appropriate sentencing principles at first instance notwithstanding that there may also be differences of judicial opinion concerning the result.

[6] As Hayne J stated in *AB v The Queen:*[3]

> The difference between cases of specific error and manifest excess is not merely a matter of convenient classification. It reflects a fundamental difference in what the appellate court does. In the former case, once an appellate court identifies an error, the sentence imposed below must be set aside and the appellate court is then required to exercise the sentencing discretion afresh. The offender must be re-sentenced unless, of course, in the separate and independent exercise of its discretion the appellate court concludes that no different sentence should be passed. By contrast, in the case of manifest excess, the error in reasoning of the sentencing judge is not discernible; all that can be seen is that the sentence imposed is too heavy and thus lies outside the permissible range of dispositions. Only then may the appellate court intervene and, in the exercise of its discretion, consider what sentence is to be imposed.

[7] In order to determine whether a sentence is manifestly excessive, regard must be had to all of the relevant circumstances, including the objective seriousness of the offence and where it sits in the range of seriousness,

3 [1999] HCA 46; 198 CLR 111 at [130]

whether there are any aggravating factors, and whether there were any mitigating features.[4]

The facts

[8] The facts of the offending are as follows.

[9] On 11 April 2016 the appellant and his partner were drinking alcohol. At about 7:45 pm they caught a taxi to Malabar Lodge, which is a boarding house occupied by people of generally diminished circumstances. The appellant's partner got out of the taxi and went up the stairs. Peter Doucas and Marie Griesebner were sitting at the top of the staircase.

[10] The appellant got out of the taxi a little after his partner had gone past those two people. He ran up the staircase because he was angry with Mr Doucas. The appellant believed that Mr Doucas had inappropriately touched his partner. Mr Doucas was a skinny man in his late fifties. He was not in good health. The appellant was a lot younger, fitter and stronger than Mr Doucas. They did not know each other.

[11] When the appellant reached the top of the staircase he picked a fight with Mr Doucas. He accused him of inappropriately touching his partner. Mr Doucas denied doing so, and the appellant threw him down the staircase. The appellant followed him and assaulted him again at the bottom of the

4 D Mildren, *The Appellate Jurisdiction of the Australian Courts* (2015 Federation Press) at [10.16].

staircase. Mr Doucas ended up on the ground and was unable to defend himself. The appellant kicked him and hit him with a plastic chair.

[12] While the appellant was assaulting Mr Doucas at the bottom of the stairs, the appellant's partner was shouting at him, "He didn't touch me!", and people from inside the Malabar Lodge came outside to see what was happening. At least two people – Eunice Bonson and Eddie Aden – told the appellant to stop assaulting Mr Doucas, but he would not. As a result of the assault, Mr Doucas suffered a laceration to the top of his head.

[13] Because the appellant would not stop hitting Mr Doucas, Mr Aden went to his room in the Malabar Lodge and brought out a big stick. It was approximately one metre long and 50 millimetres in diameter. He swung the stick at the appellant about five times. It is unclear how many times he actually struck the appellant with the stick.

[14] At first, being struck with the stick did not deter the appellant and he kept assaulting Mr Doucas. He then turned on Mr Aden, who ended up on the ground. While Mr Aden was on the ground and defenceless, the appellant kicked him twice – once in the ribs and once in the face. The appellant was wearing work boots when he kicked Mr Aden and he kicked him with considerable force. The kick to the ribs broke three ribs and caused a cut to Mr Aden's liver.

[15] The appellant then picked up a weapon. It was probably Mr Aden's stick, but it could have been a chair. Nothing turns on that matter for these

purposes. In any event, the appellant picked up a weapon and delivered two or three blows to Mr Aden's face.

[16] For the purposes of the trial various facts were agreed pursuant to s 191 of the *Evidence (National Uniform Legislation) Act* (NT). Those facts included the following description of Mr Aden's head injuries:

- bilateral LeFortill fractures (fractures to the bone structures across both sides of the middle of the face)
- bilateral zygomatic arch fractures (fractures to both cheekbones)
- bilateral naso-orbital ethmoidal fractures (fractures to the bone structures of the nose and eye sockets)
- dentoalveolar fractures (broken teeth and broken bone surrounding the teeth) involving teeth 44, 43, 42, 41, 31, 32, 33, 34 (8 lower teeth) and 12 and 21 (2 upper teeth)
- dislodged teeth
- full thickness laceration to the upper lip
- lacerations to the right and left side of the scalp

[17] Those facts went on to describe the injuries to Mr Aden's liver and ribs, and two admissions to the Royal Darwin hospital for treatment to those injuries. It was further agreed that the head injuries suffered by Mr Aden constituted "serious harm" as defined in the *Criminal Code*.

[18] A victim impact statement made by Mr Aden was tendered in evidence during the sentencing proceedings. In it Mr Aden describes the physical effects of the assault on him. He stated:

> I got a lot of broken bones across the middle of my face, both cheekbones, broken nose, right eye socket, lots of broken teeth and bones around my teeth. I think I swallowed some of them plus some

> teeth got knocked out and the doctors had to take all the broken teeth out.

[19] He then went on to describe the physical sequelae of his injuries. As to the emotional effects of the assault upon him, Mr Aden stated:

> I didn't think he was going to finish. He stopped for a bit once, but he started again. I felt like he was going to kill me. All I wanted was for him to stop. I feel angry now because I have all these problems and I can't get them all fixed. Every day I am in pain and I want it fixed. He did this to me and he's not sorry. He should be sorry.

The objective seriousness of the assault on Mr Doucas

[20] While the appellant has not appealed against the sentence imposed on him for assaulting Mr Doucas, it is nonetheless important to note the level of seriousness of that assault because it provides the context in which the appellant committed the crime of unlawfully causing serious harm. It was by reason of that attack that Mr Aden sought to intervene in defence of Mr Doucas, and it was by reason of that intervention that the appellant turned his violent attentions to Mr Aden.

[21] The assault upon Mr Doucas was a serious assault. The sentencing judge's assessment was that it was somewhere in or above the middle range of seriousness for such offences. That is, with respect, an accurate assessment.

[22] As already described, Mr Doucas was a much smaller and frailer man than the appellant. The assault was unprovoked. The appellant ignored Mr Doucas's denial of any wrongdoing. The attack persisted for a significant period of time. It persisted even after the appellant's partner yelled out to

him that Mr Doucas did not touch her, and after other people had called on him to stop. The appellant threw Mr Doucas down the stairs and continued to attack him when he was on the ground and unable to defend himself. The assault involved the use of a weapon and Mr Doucas suffered physical harm.

The objective seriousness of the crime of causing serious harm

[23] The subsequent assault upon Mr Aden was very serious in nature. The appellant's moral culpability for that conduct is high. As already described, Mr Aden came to the assistance of Mr Doucas who was being savagely beaten by the appellant. Mr Aden acted lawfully in doing so. A person may come to the defence of another person and the defence will be lawful provided the response involves reasonable force. The appellant's attack upon Mr Aden was a sustained attack. It continued even after he became disarmed and fell to the ground. The appellant kicked Mr Aden to the head and chest while wearing work boots. He then picked up a weapon and struck Mr Aden to the head with it two or three times.

[24] It was a matter of agreement that Mr Aden suffered extensive and serious injuries as a result of the assault. Those injuries have been described above. In order to surgically repair the injuries to Mr Aden's head and face it was necessary to peel Mr Aden's face forward and then staple it back. Following his surgery Mr Aden continued to suffer from very bad headaches and could not eat solid food. At the time Mr Aden made his victim impact statement he had been told that it would be necessary for him to undergo further surgery to complete the treatment of his broken jaw and eye socket.

Subjective circumstances

[25] The appellant's moral culpability is qualified by his deprived and dysfunctional upbringing and his loss of attachment to his parents.

[26] The appellant was born on 25 September 1979 at Mt Isa in Queensland. He is now 38 years of age. He comes from a dysfunctional family which was marked by heavy drinking and domestic violence. His mother died when he was 10 years of age. After his mother died, his father left him abruptly without making any arrangements for his care and upbringing. He was cared for by his maternal grandparents and then his older sister.

[27] The appellant completed year 10 of high school and then started an apprenticeship as a diesel fitter. At the age of 21 he obtained employment with Bell and Moir Mechanics. In 2004, he moved to the Northern Territory and obtained work on cattle stations.

[28] The appellant married at the age of 17 years. The marriage lasted for five years, during which the appellant and his first wife had two children. He met his partner at the time of this offending in 2014.

[29] The appellant has a lengthy criminal history. He has one prior conviction for aggravated assault in the Northern Territory and twelve prior convictions for assault in Queensland. Many of those were minor assaults, but two were quite serious. In 2004, he hit an older woman with a large stick and broke her arm. In 2009, he hit his then partner in the head, face and body with a tree branch giving her numerous cuts and bruises and concussion. Both of

those offences were the product of rage precipitated and exacerbated by the consumption of alcohol.

[30] There is very little by way of mitigation. The appellant did not plead guilty but went to trial. He is not entitled to the usual discount for a plea of guilty, and as a result of his criminal history he has lost the right to any significant leniency. He is not remorseful and his prospects of rehabilitation are very largely dependent on successfully undertaking an appropriate alcohol rehabilitation program and a violent offender treatment program. He has previously participated in an alcohol rehabilitation program, but the offending with which this appeal is concerned is a tragic demonstration of his lack of success in that program.

Consideration

[31] The appellant has committed two very serious crimes and there is little by way of mitigation. The sentencing judge was no doubt correct to draw those conclusions. Those matters notwithstanding, in our opinion the sentence to imprisonment for nine years imposed for count 2 is clearly and not just arguably excessive. It is important to note that the appellant was not charged with intentionally causing serious harm, which carries a maximum sentence of life imprisonment. It may also be noted that a sentence of imprisonment for nine years is comparable with some sentences that are imposed for the crimes of manslaughter contrary to s 160 of the *Criminal Code*, or attempting unlawfully to kill another person contrary to s 165(a) of the *Criminal Code*.

[32] The maximum penalty for the crime of unlawfully causing serious harm is imprisonment for 14 years. The offence committed by the appellant falls in the upper mid-range of seriousness for such offences. The crime committed by the appellant did not fall within the most serious category of such offences, which typically involve heinously gratuitous violence, marked degradation, a prolonged course of conduct and/or a male assailant and a female victim. Sentences of imprisonment for nine years should ordinarily be reserved for offences in the upper range of seriousness of such offences.

Disposition

[33] The following orders are made:-

1. The appeal is allowed, and the original sentence imposed in respect of the offence of unlawfully causing serious harm charged in count 2 on the indictment dated 2 February 2017 is set aside.

2. The appellant is resentenced to imprisonment for six years and six months for that offence.

3. Eighteen months of the original sentence of imprisonment for three years imposed in respect of the offence charged in count 1 on the indictment dated 2 February 2017 is to be served cumulatively on the sentence imposed for count 2.

4. The total effective period of imprisonment is eight years.

5. A non-parole period of four years is fixed.

6. Both the total effective period of imprisonment and the non-parole period are to commence on 20 June 2016.
