Ryan v Malogorski & Ors [2013] NTSC 17

PARTIES:	RYAN, Christopher Nicholas v MALOGORSKI, Mark Anthony and GANLEY, Carney and EATON, Donald John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 78 of 2012 (21227106), JA 79 of 2012 (21237376) & JA 80 of 2012 (21217750)
DELIVERED:	8 APRIL 2013
HEARING DATES:	14 MARCH 2013
JUDGMENT OF:	KELLY J
APPEAL FROM:	E MORRIS SM

REPRESENTATION:

Counsel:

Appellant:	I Rowbottam
Respondents:	S Ledek

Solicitors:

Appellant:	NT Legal Aid Commission
Respondents:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ryan v Malogorski & Ors [2013] NTSC 17
No. JA 78 of 2012 (21227106), JA 79 of 2012 (21237376) &
JA 80 of 2012 (21217750)

BETWEEN:

CHRISTOPHER NICHOLAS RYAN
Appellant

AND:

MARK ANTHONY MALOGORSKI
First Respondent

AND:

CARNEY GANLEY
Second Respondent

AND:

DONALD JOHN EATON
Third Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 8 April 2013)

[1] On 25 October 2012 the appellant pleaded guilty in the Court of Summary Jurisdiction to the following charges:

(a) aggravated assault of a woman on 9 May 2012 causing the victim harm;

(b) indecent assault of a different woman on 21 July 2012;

(c) aggravated assault of a third woman on 8 October 2012 again causing the victim harm; and

(d) resisting arrest also on 8 October 2012. This last charge arose out of the victim's behaviour after his arrest on the third charge.

[2] The admitted facts in relation to the first offence (in summary) are these. On 9 May 2012 the victim was the appellant's then girlfriend. The appellant had been drinking at the Heavy Tree Gap Store. The victim picked him up in her car. While they were in the car the appellant became angry and aggressive. He yelled, "Who have you been fucking today?" and then punched the victim in the face with the back of his right hand.

[3] The victim stopped the car. The appellant kept yelling at her, "Who have you been fucking today?" and grabbed her to stop her from getting out of the car. She struggled and managed to get out and then told him to get out of her car. While they were out of the car he grabbed her again and she pushed him away. He fell down and couldn't get up because he was too drunk. She then drove away.

[4] The agreed facts in relation to the second charge (in summary) are as follows. On 21 July 2012, the appellant was again drunk. He went to the Darwin Bus Terminal on Harry Chan Avenue and saw the second victim sitting on a bench at the bus stop. He said to her, "Hey bro," and sat down next to her. He put his hand on the victim's right upper thigh where she had a tattoo visible. He rubbed the palm of his hand over her upper thigh for

about five seconds and said, “Nice tat.” She shuffled further down the bench away from him. He grabbed her hand and held onto her hands tightly until she managed to pull away from him. He said to her, “I have seen you at Palmerston before but you were on the phone outside the butchers a while ago. I wanted to come up to you in Palmerston but I knew a gorgeous girl like you would have a boyfriend.” He asked her if she had a boyfriend and she said she did. He asked her for her phone number and she declined to give it to him. He tried to put some head phones into her ears and said, “Have you heard this song?” She pulled her head back and tried to get away from him. He took some items from his back pack and put them on the victim’s lap asking her to hold them for him. Then he sat back down next to her on the bench with his left leg touching her right leg and the left side of his body pressed up against the right side of her body. She shuffled down the bench to get away from him and he followed her. She got out her mobile phone, put her bag on her lap to try to cover her legs and then tried to phone her boyfriend for help. The appellant said to her, “Get off your fucking phone.” The victim walked towards a bus that had pulled up and the appellant said, “No, no, don’t go.” She told him she would be back as she was worried he would follow her.

[5] He eventually stumbled towards the victim saying, “Don’t go,” and then lunged at her wrapping both of his arms around her body tightly. He held onto her for about eight seconds before she managed to shuffle loose from

his grip. He then grabbed hold of her right arm as she attempted to leave. He also grabbed her left hand before she managed to break free.

[6] In summary, the agreed facts in relation to the third offence are as follows. On 8 October 2012 the appellant and the third victim had been in a relationship for about a month and living together in a unit in Katherine. The appellant became intoxicated. At about 4:00 o'clock in the afternoon that day he returned home, went into the main bedroom, slammed the door, and started punching the walls. As he was punching the walls he shouted at the victim, "Fuck you, fuck this, fuck Katherine."

[7] He left the bedroom and came back a little while later. The victim was on the phone, and he shouted at her, "You're on the phone to the cops, aren't you, dog?" He grabbed the victim by the arm and pushed her to the ground. This caused her to hit her head on the floor. She tried to get up twice but each time he pushed her to the floor and both times she hit her head on the floor. Then he hit her with an open hand to her face causing her immediate pain, then put his hand on her throat and squeezed, his thumb placing pressure on her airway. While he was holding her throat he used his other hand to hit her on the neck and chest. Then he grabbed her by the hair and pulled with enough force to pull out a small amount of hair from her scalp. The victim ran away from the unit calling for police.

[8] When police arrested the appellant he tried to wrestle free while he was being taken to the police van. He had to be physically subdued by the police. That was the subject of the fourth charge.

[9] On the first charge the learned magistrate sentenced the appellant to a term of eight months imprisonment. On the second charge he was sentenced to 10 months imprisonment concurrent with the sentence in relation to the first charge. On the third charge he was sentenced to 16 months imprisonment. On the fourth charge he was sentenced to one month imprisonment. The sentences on the third and fourth charges were to be served concurrently with each other but cumulatively upon the sentences on the first two charges. The total sentence was 26 months imprisonment. He was given a 16 months non-parole period.

[10] The appellant has appealed to this Court on the following grounds:

(1) that the learned magistrate erred in finding beyond a reasonable doubt that the circumstance of aggravation that the assault was indecent had been made out in relation to the second charge;

(2) that the learned sentencing magistrate erred in not giving sufficient weight to the principle of totality in determining the total sentence; and

(3) that the overall sentence was manifestly excessive.

[11] On 14 March 2013 I dismissed the appeal and indicated that I would give reasons at a later date. These are those reasons.

Ground 1

[12] Counsel for the appellant attempted to analyse the appellant's conduct in relation to charge two into a number of distinct separate actions. He said that the closest act that could be said to comprise indecency was the act of rubbing the palm of his hand over the victim's upper thigh for about five seconds, and submitted that that was not sufficient to comprise an indecent assault. In doing so he referred to *Drago v R*[1] and *R v P*[2] and *R v Eldridge*.[3] *R v P* and *R v Eldridge* simply establish that mere words without more do not amount to indecent dealing. They are of no assistance to the appellant. *Drago* is authority for the proposition that to amount to an indecent dealing the accused's actions must be sexual in nature. The word indecent is not defined in the *Criminal Code*. It is an ordinary English word. It means unseemly, unbecoming or offensive to common proprietary, something that would offend the modesty of the average person, and it must have a sexual connotation.

[13] There is no doubt whatsoever that the actions set out in the agreed facts in relation to the second charge were indecent. Coming up to a strange woman in a bus stop, pressing up against her, rubbing his hand on the upper part of her thigh and asking her if she had a boyfriend is unseemly, unbecoming, offensive to common proprietary, would clearly offend the modesty of the average person, and has a clear sexual connotation. No doubt this is why

[1] (1992) 8 WAR 488

[2] [2000] 2 Qd R 401

[3] (2005) 16 NTLR 112

the appellant pleaded guilty to the charge, including the circumstance of aggravation that the victim had been indecently assaulted, after receiving legal advice. This ground of appeal has not been made out.

Grounds 2 and 3

[14] In sentencing the appellant, the learned magistrate took into account that he had been in a car accident in 2001 and that his lawyer submitted there had been some frontal lobe damage which had some effect on his impulsiveness or aggression. She also took into account that he had a substance abuse problem, perhaps multiple substance abuse problems. She noted that he had had a violent upbringing suffering at the hands of both his father and then his mother's second partner. She noted that the appellant had an extensive criminal history including many violent offences and a history of many breaches of court orders.

[15] She noted that all of the offences were disturbing and serious. In relation to the indecent assault the learned magistrate said:

> "I do regard the indecent assault at the bus stop as a serious matter. Whilst there is no physical harm alleged in relation to it, one does not have to have much imagination to know how frightening this matter would have been in relation to that particular witness and victim."

I completely agree.

[16] Her Honour allowed a full 30% discount on account of the pleas of guilty. She said, "I do accept he doesn't remember these offenses and so with that plea of guilty comes that indication that he is willing to accept the

prosecution case as it stands." She did not mention that there had been any expression of remorse.

[17] In those circumstances a 30% discount can only be regarded as extremely generous. In *JKL v The Queen*[4] the Court of Criminal Appeal held that although the value of the reduction to be given for any plea of guilty is a matter of discretion dependent on the circumstances of the particular case, a reduction of 25 per cent will normally be given in circumstances where there has been an early guilty plea which is indicative of true remorse and resipiscence.[5]

[18] The appellant complains in Ground 2 that the learned sentencing magistrate did not give sufficient weight to the principle of totality in determining the total effect of sentence. This ground cannot be made out. The learned magistrate specifically said:

> "In my sentencing I also take into account the totality of the sentences I am going to give him. The incidents are similar in nature but are separate. In some of the sentences to take into account totality will be cumulative and some will be concurrent."

[19] In putting these words into effect the learned magistrate made the 10 month sentence for the second charge totally concurrent with the eight month sentence for the first charge. Again that can only be regarded as extremely generous to the appellant. These two assaults were completely separate offences, committed on completely separate occasions against two different

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4 [2011] NTCCA 7

5 per Martin (BR) CJ at para [28]

women. One would have thought that, in normal circumstances, at least some degree of accumulation was warranted.

[20] In Ground 3 the appellant complains that the total sentence was manifestly excessive.

[21] The principles to be applied in appeals of this nature are well known. The trial judge's exercise of the sentencing discretion is not to be disturbed on appeal unless error has been shown in the exercise of the discretion. The presumption is that there is no error. The appeal court will interfere only if it is shown that the sentencing judge acted on a wrong principle. The error may appear in what the sentencing judge has said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error.[6]

[22] The appellant has not demonstrated that the learned magistrate acted on any wrong principle, failed to take into account any relevant considerations or took into account any irrelevant considerations. In my view, the sentence was not manifestly excessive and this ground of appeal too must fail.

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[6] *R v Tait and Bartley* (1979) 24 ALR 473 at 476 and *Salmon v Chute* (1994) 94 NTR 1 at 24.