Mamarika v Rourke [2015] NTSC 42

PARTIES:	MAMARIKA, Clarence v ROURKE, Josette Lisa
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 14 of 2015 (21512361)
DELIVERED:	23 July 2015
HEARING DATE:	22 July 2015
JUDGMENT OF:	BARR J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW – Appeal – sentence for aggravated assault – magistrate applied principle of totality by reducing sentence for fresh offending rather than ordering concurrency with restored sentence – appellant contends magistrate failed to give effect to principle of totality – no error established – appeal dismissed.

CRIMINAL LAW – Appeal – sentence for aggravated assault – appellant had one recent and several other previous convictions for male-on-female aggravated assault – fresh offending constituted by assault on pregnant wife – harm not alleged as an aggravating circumstance – sentence of 10 months cumulative on restored sentence – manifest excess not established – appeal dismissed.

Criminal Code, s 188(2).

Mill v The Queen (1988) 166 CLR 59; *Postiglione v The Queen* (1997) 189 CLR 295; *Pearce v R* (1998) 194 CLR 610, followed.

Wurrawilya v Davis & Anor [2012] NTSC 57, referred to.

REPRESENTATION:

Counsel:

Appellant:	J Ker
Respondent:	L Michalko

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Department of Public Prosecutions
Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Mamarika v Rourke [2015] NTSC 42
No. JA 14 of 2015 (21512361)

BETWEEN:

CLARENCE MAMARIKA
Appellant

AND:

JOSETTE LISA ROURKE
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 23 July 2015)

[1] On 24 March 2015 the appellant entered a plea of guilty and was found guilty of unlawfully assaulting his wife, with the admitted circumstance of aggravation that it was a male-on-female assault. The offence was committed on 9 August 2014.

[2] The offence carried a maximum penalty of imprisonment of five years.

[3] A document containing the agreed facts for sentencing was tendered, and the facts read out in open court. I reproduce the agreed facts from paragraph 2 to the end:

> 2. The victim in this matter is the defendant's wife Christine Lalara.

3. On Saturday 9 August 2014 at approximately 9.30 pm Lalara was walking across the grass area out the front of Uncle Sams takeway shop on Smith Street, Darwin.

4. The defendant was sitting in the park drinking when he approached Lalara and pushed her. The defendant punched Lalara once to the stomach with a closed fist. At the time Lalara was 28 weeks pregnant.

5. Lalara has covered her stomach with her arms to protect her unborn baby and the defendant has punched Lalara to the head three times with his closed left fist. Lalara has released her arms around her stomach and protected her face from the defendant's punches.

6. A witness David Adamson has seen the defendant punching Lalara to the head and ran over to intervene.

7. A police vehicle attended the location and the defendant has run off in the direction of Daly Street Bridge, Darwin City.

8. On Monday the 23rd March 2015 the defendant handed himself in to police at the Alyangula Police Station.

9. The defendant was arrested by Constable Scott Lewis and processed in the Alyangula Watch House.

10. The defendant participated in an electronic record of interview and made full admissions.

11. At no time did the defendant have permission to assault the victim.

12. When asked his reasons for assaulting the victim the defendant replied, "She told me to stop drinking".

[4] The appellant was convicted and sentenced to a term of imprisonment of 10 months, to be served wholly cumulatively upon a restored sentence of

seven months' imprisonment imposed for previous offending, including for an earlier assault upon the same victim committed in January 2013. That earlier assault was constituted by a course of conduct in which the appellant struck his wife with a sword, causing defensive lacerations; then, after she had fallen to the ground, he punched and kicked her a number of times.

[5] In her sentencing remarks, the learned magistrate stressed the seriousness of the aggravated assault, noting that it was not alleged that the victim had suffered harm. Her Honour nonetheless categorised the assault as in the middle to upper end (of the hypothetical range) in relation to an assault on a woman by a man.

[6] The magistrate's sentencing remarks included the following statements:[1]

> You were drunk, she asked you to stop drinking, you then punched her to the stomach with your closed fist. At that time she was 28 weeks pregnant. She had to then cover her stomach with her hands to protect her baby and you then – because her hands were down, you punched her in the head three times with your closed left fist, and then she had to let go of her stomach to protect her face from your punches. Somebody who saw it came over and intervened and you then ran off when the – and the police came. …
>
> Women of course deserve to be safe whether they are in Darwin, whether they are at home, and they do not deserve to be treated in is in this way, particularly – and it is an aggravating factor – when she was 28 weeks pregnant. As I said, no harm came to her or the baby as a result of the assault but in my view, as I said, it's extraordinary that a man whose job it is to protect his wife when she is in a vulnerable condition such as this should instead hurt her – assault her, in the way you have done.

[7] In sentencing, her Honour said:

[1] Transcript 24/03/2015, p.9.

> … I have taken into account the principle of totality and I have reduced the sentence I would otherwise have given you. I have also reduced it by a third in relation to your plea of guilty today. You are convicted, you are sentenced to 10 months imprisonment, cumulative, to the sentences reimposed on the other files.

[8] With the restored sentence, the total effective sentence was 17 months. Her Honour directed that the appellant be released after serving 12 months' imprisonment.

[9] It may be noted that the magistrate did not indicate her starting point in fixing the sentence of 10 months' imprisonment for the aggravated assault. However, it appears that her Honour allowed a discount of one third for the plea of guilty, and that she applied the principle of totality by reducing the sentence for the fresh offending, rather than by making that sentence concurrent or partially concurrent with the restored sentence. The method chosen by the magistrate is not the preferable way to accommodate the principle of totality, but is nonetheless legitimate.[2]

[10] On appeal it is argued that (1) the magistrate erred in failing to properly give effect to the principle of totality and (2) the overall sentence imposed was manifestly excessive.

[11] As to totality, the appellant's complaint is that any allowance made by the magistrate for totality did not properly reflect the exercise required by *Mill v The Queen*. Her Honour did not stand back and assess the overall sentence and consider whether any further adjustment was warranted in accordance

[2] *Mill v The Queen* (1988) 166 CLR 59 at 63.3 (Wilson, Deane, Dawson, Toohey and Gaudron JJ)

with the 'third stage' totality exercise referred to in *Mill v The Queen* and *Postiglione v The Queen*.[3] A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, and also questions of totality.[4]

[12] I propose to first examine the asserted ground of manifest excess.

[13] At the time of offending, the appellant was three months short of turning 30 years old. In addition to a significant number of property offences, he had been convicted five times for aggravated assault, all male-on-female, three involving the use of a weapon. Two of the assaults were committed in October 2002 (when the appellant was just short of turning 18 years old), one in March 2003, one in June 2003, and most recently in January 2013.[5] He had also committed DVO contraventions in January and February 2013.

[14] The offending conduct was ugly. The appellant went up to his pregnant wife, pushed her, punched her once to the stomach and then punched her three times to the head. He did all this because she had told him to stop drinking. It was 9.30 on a Saturday evening. A bystander felt compelled to run over and intervene.

[15] Counsel for the appellant concedes that the magistrate was entitled to take into account, as an aggravating feature, that the victim was pregnant at the time of the offence. However, she contends that the magistrate's assessment

[3] (1997) 189 CLR 295 at 341 per Kirby J. See also the discussion in *Wurrawilya v Davis & Anor* [2012] NTSC 57.
[4] *Pearce v R* (1998) 194 CLR 610 at 624 [45], per McHugh, Hayne and Callinan JJ.
[5] The offending in January 2013 is described in [4] above.

of the offence as being in the mid to upper end of the range for an assault on a woman by a man was unjustified.

[16] In my view, the offending was mid-range. Although the appellant punched the victim to the victim's stomach and head, he did not use a weapon, there was no evidence of harm and it was not alleged that the victim was unable to effectually defend herself. Only one of the several possible circumstances of aggravation under s 188(2) Criminal Code was alleged. My assessment, that the offending was mid-range, does not result in any disagreement with the learned magistrate's assessment. I interpret the magistrate's comment, that "the circumstances of the assault … put it to the middle to upper end in relation to an assault on a woman by a man", as a reference to the seriousness of the assault committed by the appellant relative to other assaults in which the only aggravating circumstance was the male-on-female circumstance.

[17] Counsel for the appellant submits that the magistrate was not entitled to sentence the appellant on the basis that he maliciously assaulted the victim in full knowledge of her pregnancy. She refers to the absence in the admitted facts of any statement to the effect that the appellant knew that the victim was pregnant. In my opinion, however, it was open to the magistrate to infer beyond reasonable doubt that the appellant knew that the victim was pregnant, for two reasons established on the agreed facts: (1) the appellant was the victim's husband, and she his wife, and (2) the victim was 28 weeks pregnant. She was in her third trimester. There were no competing

inferences raised on the agreed facts or otherwise (such as long-term separation of the parties, or the obesity of the victim, or the appellant's impaired vision) which might have made drawing such an inference erroneous or unsafe.

[18] Notwithstanding the view expressed by me in [17], it is not clear that the magistrate did sentence the appellant on the basis of a malicious assault on the victim in full knowledge of her pregnancy. True, her Honour referred to the appellant's breach of his duty to protect his pregnant wife, but the aggravating factor identified by her Honour was the fact that the victim was 28 weeks pregnant, not that the appellant had acted maliciously in the full knowledge of that pregnancy.

[19] The objectives of denunciation, punishment, general deterrence and specific deterrence were all relevant to the sentencing of the appellant.

[20] Taking into account the circumstances of the offence and of the offender, I consider that the appropriate starting point in sentencing for this offending was 18 months, or close to it. Although I believe that a discount of 25 per cent was appropriate for the guilty plea in the court below,[6] there may have been circumstances entitling the magistrate in the exercise of her discretion to allow a greater discount, and I will proceed on the basis that a discount of one third was justified. After such discount, the resulting sentence would be 12 months. The magistrate's sentence was ten months.

[6] See, for example, the observations of the Court in *R v Wilson* [2011] NTCCA 9 at [37], [39].

[21] On ordinary principles of concurrency and cumulation,[7] there was no basis for ordering concurrency of the 12-month sentence with the fully restored balance of suspended sentence of seven months. However, there was probably some basis for concurrency on application of the principle of totality. In my view, concurrency of three months would have been appropriate.

[22] The hypothetical sentencing exercise undertaken by me would result in a total effective sentence of 16 months.[8] In that context, and given my observations in [20] and [21], the appellant's argument that the sentence of 10 months imprisonment was manifestly excessive, both in its own right and when fully accumulated with the restored sentence of seven months imprisonment, cannot be made out. The appellant has not established manifest excess.

[23] I turn to consider the ground of appeal relating to totality. It is regrettable that, as mentioned earlier, the learned magistrate did not indicate her starting point before she discounted the sentence for the plea of guilty and application of the totality principle. Things would have been clearer. However, when I consider and compare the total effective sentence imposed by the magistrate with my own view as to an appropriate sentence, it appears that the magistrate has imposed a sentence only one month greater than the total effective sentence of 16 months arrived at by me. Her Honour clearly

[7] See, for example, *Miles v The Queen* [2001] NTCA 9 at [35] – [40]; *Hampton v The Queen* [2008] NTCCA 5 at [35] – [36]; *R v Nadich* [2012] NTCCA 4 at [39].
[8] Arrived at as follows: to 12 months, add 7 months restored, but reduce the total of 19 months by 3 months for concurrency allowed for the totality principle, resulting in 16 months total effective.

stated that she had applied the totality principle, and, as explained in [9], her method was appropriate. I bear in mind also that her Honour allowed an arguably generous discount of one third, which I have adopted. But for that, I would have imposed a higher sentence than that imposed by the magistrate.

[24] I consider that, in the facts of this case, the presumption, that there is no error, applies.[9]

[25] Accordingly, the appeal must be dismissed.

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[9] See, for example, *Midjumbani v Moore* [2009] NTSC 27 at [33]; *Carne v Wride and Carne v Nicholas* [2012] NTSC 33 at [40].