*Lewfatt v Thomas* [2003] NTSC 65

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| PARTIES: | JEREMY TRAVIS LEWFATT |
| | v |
| | PETER MARK THOMAS |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | JA 75 and 76 of 2003 |
| DELIVERED: | 6 June 2003 |
| HEARING DATES: | 4 June 2003 |
| JUDGMENT OF: | RILEY J |

**REPRESENTATION:**

*Counsel:*

| | |
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| Appellant: | P. Cantrill |
| Respondent: | B. Harris |

*Solicitors:*

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| Appellant: | Dalrymple & Associates |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | B |
| Judgment ID Number: | ril0319 |
| Number of pages: | 12 |

ril0319

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Lewfatt v Thomas* [2003] NTSC 65
No. JA 75 and 76 of 2003

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction in Darwin

BETWEEN:

**JEREMY TRAVIS LEWFATT**
Appellant

AND:

**PETER MARK THOMAS**
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 6 June 2003)

[1] On 11 April 2003 the appellant was sentenced to imprisonment for a period of 17 months and 25 days in relation to convictions for two offences of aggravated assault which occurred in August 2001. It was ordered that the sentence be suspended after a period of 5 months. The appellant now appeals against the severity of that sentence and does so on various grounds.

[2] There is no dispute that the offences committed by the appellant, and to which he pleaded guilty, were serious. They involved assaults on two men

on different dates and in different circumstances. The first assault occurred on 18 August 2001. On that occasion the appellant, along with a large group of people, was outside the entrance to the Waratah Sports Club where a birthday party was in progress for an 18-year old girl. The appellant and others outside of the club were not invited to the party and had been refused entry. The appellant was sitting with three other males when he heard that a friend was "getting beaten up". He got out of his car, taking with him a pair of nunchakus. He went to the front doors of the social club where the victim, Mr Short, the father of the girl celebrating her birthday, was giving directions for uninvited guests to leave. The appellant yelled out to the victim, "You old cunt in the yellow shirt", and, when the victim turned to face him, the appellant produced the nunchakus and swung them in his right hand in a downward sweeping motion. The nunchakus struck the victim on the nose and face causing him to stagger backwards. The appellant was restrained by friends and taken from the scene. He was subsequently spoken with by police, at which time he denied using the nunchakus. As a result of the assault the victim received a broken nose and bruising to his face which required medical attention.

[3] The second offence occurred early in the morning of 25 August 2001 when the appellant was outside the Palmerston Tavern in Palmerston. His friends had been in the male toilets of those premises and had begun to smash glass on the floor and to urinate on the walls. The victim of this assault, Mr Crosby, saw what was going on and alerted security. Thereafter, the

appellant and his friends waited outside the nightclub for Mr Crosby to emerge. When Mr Crosby left with his friend he had to be escorted to his car by members of the security force. As they drove from the carpark, one person from within the group that included the appellant, kicked the passenger side mirror of the vehicle causing it to snap backwards and nearly fall off.

[4] The victim departed the scene and the appellant got into his own vehicle, which was driven by another, and also left. As they were travelling to a friend's house they noticed that the victim had pulled into a service station in order to check the damage to his vehicle. The appellant told the driver of his car to stop at the service station and they did so. A co-offender walked up to the victim and punched him once in the head and pulled him out of the car. He was thrown onto the ground. The victim's friend panicked and drove off. The appellant then ran to where the victim was still on the ground and kicked him in the chest and shoulder area. There was more than one kick. A service station attendant intervened and this enabled the victim to get up and he began to run away. The appellant chased him and pushed him from behind, causing him to fall to the ground. As a result of that fall the victim lost consciousness. Just what caused the loss of consciousness was not explained. The appellant then got back into his vehicle and the party drove away.

[5] When the appellant was subsequently interviewed by police he denied causing any damage to the mirror, but he admitted having kicked the victim

in the upper chest and shoulder area and having chased the victim causing him to fall to the ground. When asked why he had stopped at the service station he said, "I suppose just to rough him up a bit".

[6] The victim of the second assault, Mr Crosby, was taken to hospital where he received stitches to his scalp and to his nose. There was bruising to his chest and face. He remained in hospital for two days for observation. He was off work for two weeks and he felt the need to leave Darwin as a result of the assault.

[7] In sentencing the appellant, the sentencing Magistrate noted the seriousness of the offending on each occasion and concluded that the penalty imposed should reflect "a measure of retribution". It also needed to "send a message to the community that this thug-like behaviour will simply not be tolerated". In relation to the first assault, his Worship determined that a starting point would be a term of imprisonment of 9 months and he then reduced that by 15 per cent to reflect the appellant's plea of guilty. The appellant was therefore sentenced to imprisonment for a period of 7 months and 19 days for that offence. In relation to the second offence his Worship identified the starting point as a period of imprisonment of 12 months and again applied a 15 per cent discount to reduce the sentence to 10 months and 6 days. He then considered the totality principle and concluded that a total of 18 months imprisonment was "about a fair sentence for your offending" and he therefore proceeded to impose the cumulative penalty of 17 months and

25 days. The period of imprisonment was to be suspended after a period of 5 months which his Worship calculated expired on 11 September 2003.

[8] During submissions made on behalf of the appellant, Mr Cantrill of counsel made it clear that he did not contend that the head sentences imposed upon the appellant were excessive. That concession was correctly made. Rather, his complaint was that his Worship failed to take into account, either adequately or at all, the prospects for rehabilitation of the appellant in imposing a period of 5 months actual imprisonment to be served before the sentence was suspended. That submission was made in light of what counsel for the appellant described as a significant shift in the life of the appellant subsequent to the offences and prior to them being the subject of proceedings or being brought before the court.

[9] The appellant committed the two offences in August 2001. He told the court that about a month after the commission of the second offence he reviewed his life and determined that he wanted to change his ways. Of his own volition he ceased contact with the friends who had been part of his life for the previous 12 months. He frankly acknowledged that those people (including himself) constituted a "gang" known as the "Palmerston Gang". He has not had anything to do with those people since that time and he has resumed relationships with former friends from his high school days. He has joined a church at Palmerston and has been attending that church regularly for many months. He is part of the youth movement within the church. Emphasis was placed upon the fact that these changes in the life of

the appellant occurred prior to proceedings being taken against him and prior to him coming before the court. The submission made on behalf of the appellant was that his Worship failed to pay appropriate attention to this dramatic change in the life of the young man.

[10] Whilst the submissions of the appellant focused upon the suggested failure of his Worship to adequately consider the appellant's prospects for rehabilitation, there were some other matters raised. The first of those was the submission that his Worship failed to properly characterise the plea as an early plea of guilty. In fact it was not an early plea of guilty. It is now agreed between the parties that the intention of the appellant to plead guilty was first indicated on 12 February 2003. That was just a week before the hearing of the matter was due to commence. At that time it was indicated that, although there would be a plea of guilty in relation to the assault of Mr Short, it would be a contested plea. The appellant had, at all times, denied that the weapon he used in the course of the assault was a pair of nunchakus. He said he had used his belt. It was not until the time the plea was actually taken that the appellant conceded that the weapon used was in fact a pair of nunchakus and the plea proceeded on that basis. In the circumstances his Worship did not err in concluding that "this is not a first-up plea, and it's clear that so far as Mr Short is concerned, that you were maintaining, to almost the end, that nunchakus were not used".

[11] His Worship went on to determine that the appropriate discount in all the circumstances for the plea of guilty was 15 per cent. There was no

complaint made as to the treatment of the plea of guilty in relation to the offence involving Mr Crosby. No submissions were made by either party in relation to that matter.

[12] A further complaint made was that the learned sentencing Magistrate failed to give proper effect to the principle of totality. In determining his final sentence, the Magistrate observed that he had considered the totality principle but determined that the sentence of 18 months was "a fair sentence for your offending and a sentence you will receive". The concession made on behalf of the appellant at the hearing that the sentence imposed in relation to each offence and the total head sentence were within the range available to his Worship means, in effect, this ground was abandoned. In any event, I see no error on the part of the learned sentencing Magistrate.

[13] The principal focus of the appeal centred upon the submission that his Worship had failed to fully take into account the remorse of the appellant and the prospects for rehabilitation of the appellant in the circumstances described above. Much of what his Worship had to say was concerned with the prospects for rehabilitation. He was aware of the availability of alternative dispositions but observed that because of the seriousness of the offences there had to be a gaol term. He then went on to say that "much of this case has been devoted to your prospects of rehabilitation." His Worship dealt with the issue of rehabilitation in various passages in his reasons for decision. He said:

> "I know you live with your parents, I know that I've received material to the effect that your parents are concerned. I know that you work with your grandfather, I know that you work within walking distance from your home to your grandfather. I know that you are in your last year of your apprenticeship, and you have some ideas, or dreams, about what you are going to do in the future so far as the business is concerned.
>
> I know that you have told me that the violence was, for want of a better expression "gang related". You were in with the wrong group and I know that you told me that you no longer associate with that group, and that you are now involved with a different group, who could be considered not to be antisocial, a church group. And I know that you started to manifest a change in yourself, according to Mr Green, about eight months before February 2003, when you appeared before me, and when I took evidence from Mr Green. So I take it that the change started to occur in about June or thereabouts, 2002.
>
> I know, because I have had the evidence from Doctor Donald Dawson, who has a Doctorate in Theology, and who is a senior pastor at the Assemblies of God Church, that he considers that you have, to him, shown repentance. I am aware of all of that, but, and there is a but, I have some concerns about your prospects of rehabilitation."

[14] The learned Magistrate also stated that:

> "I am aware that you are a young man, that you will turn 23 in 10 days time. I am aware that you are working, I am aware that I will be taking a worker out of the community, but this is a serious matter, and something has to be done to send a message to the community. To also get into your mind that what you did is wrong and also to effect a measure of retribution".

[15] It is clear that his Worship had paid close attention to the evidence that had been provided to him and the submissions that had been made regarding remorse and the prospects for rehabilitation of the appellant. However, for the reasons that he then went on to express, he concluded that he did not

think that the appellant's "prospects of rehabilitation are as great as the picture has been painted". He said:

> "There is really only one way for you to show that you can rehabilitate yourself, and that is never, ever, ever to get into trouble again, and there is only one way to work out whether or not that will happen. It is just let time run its course".

[16] The matters that caused his Worship doubt as to whether the prospects for rehabilitation of the appellant were as strong as had been submitted to him were discussed over a number of pages of transcript.

[17] His Worship expressed the view that the picture presented to him of an upbringing by a caring and concerned family was open to doubt because the appellant's father was not aware that the appellant had been suspended from school on three occasions, one of which was for a period of 2 weeks. That observation was factually correct and reflected an apparent lack of communication between the appellant and his parents during this period of his upbringing. It seems also to reflect the observation made by his friend, Nathaniel Green, who gave evidence that prior to the assaults the appellant "never got along with his parents as long as I've known him". There was an evidentiary basis for the findings of his Worship and for his expression of doubt.

[18] His Worship also expressed the view that the appellant's father was a man "who is prepared to use violence". There was no evidentiary basis for that assertion and it should not have been made. However, it does not detract

from the overall picture found by his Worship and expressed in the terms that "your upbringing may have had a problem or two". It was a remark made in passing and had little, if any, impact upon his conclusions regarding rehabilitation.

[19] Reference was made by his Worship to the suspensions from school, which included two suspensions for fighting. Those matters occurred a long time ago but were a part of the history of violence associated with the appellant. He was suspended from school for those actions and was therefore aware that such conduct was unacceptable. This also fits with the evidence of Mr Green that "as long as I've known Jeremy he's very easily angered. He's got a very short temper". Mr Green gave that evidence in the context of confirming that since the assaults occurred and the appellant had joined the church of which Mr Green was a member, he no longer suffered from a short temper.

[20] The learned sentencing Magistrate was concerned by the lie told to the father of the appellant and to the police regarding the use of the pair of nunchakus. The appellant denied that right up until the time the plea was entered. It seems he first had doubts about going on with the lie in the week leading up to the date of the contested hearing and he told Mr Green of the use of the weapon. He determined that he should face up to the truth and, to his credit, did so.

[21] Finally there was an incident during the course of a game of football. A melee occurred and the appellant entered that melee, it would seem with some vigour. As a consequence of his actions he was suspended by the relevant tribunal for a period of 3 weeks. During the course of that incident Mr Short, the victim of the first assault, was present and remarked to the appellant that he had not changed from the man who had assaulted him and he would see him in gaol. The context of that conversation was that the appellant had earlier apologised to Mr Short and Mr Short had accepted the apology. Following his viewing of the appellant on the football field, it seems Mr Short's view of the appellant changed. At that time the appellant also said to Mr Short that Mr Short could "suck his dick". All of this occurred at a time when the appellant claimed to be heavily involved with the church and to have moved on to a different life. His Worship was entitled to consider that this cast some doubt upon the appellant's prospects for rehabilitation being as strong as they had been painted.

[22] In my view, the matters referred to by his Worship were capable of raising a doubt in the mind of the learned sentencing Magistrate. Contrary to the submission made on behalf of the appellant, he did not ignore the evidence of Mr Green or Dr Dawson. He did not allow those doubts to overwhelm his view of the prospects for rehabilitation of the appellant. It would have been wrong for him to do so. On the basis of all of the information before his Worship, the appellant had reasonable prospects for rehabilitation but, as his Worship observed, there were some causes for doubt.

[23] The learned sentencing Magistrate noted that:

> "The important thing in this case is that you appear to have stayed out of trouble since 25 August 2001, that is the important thing to consider."

[24] In all the circumstances, his Worship had a basis for forming the conclusions that he did. The head sentence he imposed is acknowledged to be within range, although at the top of the range. The learned Magistrate accepted that the appellant had reasonable prospects for rehabilitation and that is reflected in the suspension of a substantial part of the head sentence. Whilst the sentence may be described as stern and may not be what I would have imposed, I do not consider that the learned Magistrate has been shown to be in error or that any part of the sentence is manifestly excessive. The appeal is dismissed.

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