

*Maloney v Hales* [2003] NTSC 82

PARTIES: MALCOLM JAGAMARRA MALONEY

v

PETER WILLIAM HALES

TITLE OF COURT: SUPREME COURT OF THE NORTHERN  
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN  
TERRITORY exercising Territory jurisdiction

FILE NO: JA 53/03 (20218431)

DELIVERED: 23 July 2003

HEARING DATES: 13 June 2003

JUDGMENT OF: THOMAS J

**CATCHWORDS:**

CRIMINAL LAW – appeal against sentence- whether magistrate erred in the conduct of proceedings when dealing with an unrepresented offender – whether magistrate erred in failing to give weight to factors in mitigation – whether the sentence imposed was manifestly excessive.

*Criminal Code 1983* (NT) s 188 (2)

*Brown v Smith* (1974) 4 ALR 114, applied

*Cooling v Steel* (1971) 2 SASR 249; *Bates v Hayman* (1988) 90 FLR 55; *Ross v Peach* [2000] NTSC 19, considered.

**REPRESENTATION:**

*Counsel:*

Appellant: S Lacy  
Respondent: T Austin

*Solicitors:*

Appellant: North Australian Aboriginal Legal Aid Service  
Respondent: Office of the Director of Public Prosecutions

Judgment category classification: C  
Judgment ID Number: tho200326  
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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*Maloney v Hales* [2003] NTSC 82  
No. JA 53/03 (20218431)

BETWEEN:

**MALCOLM JAGAMARRA MALONEY**  
Appellant

AND:

**PETER WILLIAM HALES**  
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 23 July 2003)

- [1] This is an appeal against the sentence of a stipendiary magistrate imposed in the Court of Summary Jurisdiction at Darwin on 13 March 2003.
- [2] The appellant entered a plea of guilty to the following charge that: On 7 December 2002 at Darwin in the Northern Territory of Australia unlawfully assaulted Sharon Smith. AND THAT the said unlawful assault involved the following circumstances of aggravation namely:
- (i) that the said Sharon Smith suffered bodily harm.
  - (ii) that the said Sharon Smith was a female and the said Malcolm Maloney was a male.

Contrary to s 188(2) of the Criminal Code.

- [3] The learned stipendiary magistrate convicted the appellant, he sentenced him to imprisonment for a period of 12 months commencing 13 March 2003. The sentence was to be suspended on 13 April 2003, that is after serving one month of actual imprisonment.
- [4] The learned stipendiary magistrate specified pursuant to s 40(6) of the Sentencing Act a period of 25 months, that is two years and one month from 13 March 2003 during which the offender is not to commit another offence punishable by imprisonment if the offender is to avoid being dealt with under s 43 of the Sentencing Act.
- [5] Count 2 on the Information which was an allegation of unlawfully cause grievous harm to Sharon Smith was withdrawn and the defendant discharged.
- [6] The grounds of appeal are as follows:
- “1. The learned Magistrate erred in failing to accord the appellant the opportunity for legal representation, given the particular circumstances of the case and further erred in the conduct of proceedings in dealing with an unrepresented defendant.
  2. The learned Magistrate erred in failing to give any or sufficient weight to the mitigating features of:
    - i) previous good character;
    - ii) rehabilitation; and
    - iii) remorse.
  3. The learned Magistrate erred in placing too much weight on considerations of:
    - i) general deterrence;
    - ii) denunciation; and
    - iii) protection of the community.

4. In all the circumstances of the case, the sentence imposed was manifestly excessive.”

[7] I now deal with each of these grounds of appeal.

**Ground 1: The learned magistrate erred in failing to accord the appellant the opportunity for legal representation, given the particular circumstances of the case and further erred in the conduct of proceedings in dealing with an unrepresented defendant.**

[8] Although it is not set out in the transcript of proceedings of 13 March 2003, it is relevant to set out the background of the matter which is agreed by counsel for the appellant and the respondent.

[9] The charges on Information were adjourned from 19 December 2002 to 28 February 2003 for a committal hearing. At the committal hearing the appellant was legally represented by a solicitor from the North Australian Aboriginal Legal Aid Office. There were negotiations between the appellant’s lawyer and the prosecutor as to the agreed facts. When these agreed facts were settled, the appellant through his counsel indicated there would be a plea of guilty to Count 1 on the Information. The learned stipendiary magistrate who was presiding at the committal hearing was the same magistrate in charge of the proceedings on 13 March 2003 which have subsequently become the subject of this appeal. A plea of guilty was entered to Count 1 and the matter adjourned before the same magistrate to 13 March 2003.

- [10] The relevance of this is that when the appellant, Mr Maloney, appeared before the learned stipendiary magistrate on 13 March 2004, his Worship was well aware the appellant had previously obtained legal advice because the appellant's lawyer had represented the appellant at the committal hearing. At this time an agreed set of facts was negotiated between the crown and the appellant's lawyer. Following the plea of guilty on 28 February 2003 the matter was adjourned to 13 March 2003 for the facts to be read to the court and submissions on sentence. This was not a situation where the appellant appeared before the court and had not been informed he had a right to an adjournment so that he could seek legal advice and representation. The appellant had in fact received legal advice and had previously been represented in this matter.
- [11] The matter was listed for 9.00 am on 13 March 2003. When the matter was first called the appellant did not appear.
- [12] A short time later the court resumed. The appellant, Malcolm Maloney, was present when asked by the learned stipendiary magistrate why he was not in court at 9.00am, Mr Maloney had replied that he was downstairs waiting to take his CV to the Legal Aid lawyer, Chris George. The following interchange occurred between the learned stipendiary magistrate, the prosecutor Mr Harris and the appellant Mr Maloney (tp 4 - 5):

“HIS WORSHIP: I'm told that your lawyer's not here today. Mr Sharp appeared on your behalf on 28 February and I'm told that he's on leave. Is that the case, Mr Harris?

MR HARRIS: That's what I was informed.

HIS WORSHIP: Do you have a lawyer appearing for you today?

MR MALONEY: No I don't, Your Honour, but the buck stops with me and I - I pleaded guilty to - to those facts and I accept my - whatever comes.

HIS WORSHIP: So if I put - - -

MR MALONEY: And I'd like the matter to be dealt with today. It's cost me heavily mentally and physically and - - -

HIS WORSHIP: Well if I've heard the facts, I don't recall them. Did you read them?

MR HARRIS: No, the facts haven't been read yet, Your Worship.

HIS WORSHIP: That's - that's what I thought. Are you happy to represent yourself?

MR MALONEY: I am, Your Honour.

HIS WORSHIP: You realise that you could receive, as punishment, a term of imprisonment if I find you guilty of the charge?

MR MALONEY: I accept. I - - -

HIS WORSHIP: Right. The charge is that on 7 December you assaulted Sharon - 7<sup>th</sup> December 2002, you assaulted Sharon Smith. The prosecution allege that she was a female, you're a male. In this court, the maximum punishment for this offence is imprisonment for 2 years. ... an assault is an application of force to a person's body.

In this particular case, I see a reference to bodily harm. In other words, the prosecution is saying that you did something like hit her, kick her, spit at her, throw something at her. ... that application of force caused her harm, which is called bodily harm. In other words, her health was interfered with and she was a female.

When you applied force to her body in whatever fashion, you did so unlawfully. In other words, there was no permission, no authority, no justification, no self-defence for example. No provocation. It was, to summarise, an unlawful act.

Do you feel that you understand the charge?

MR MALONEY: I do, Your Honour.

HIS WORSHIP: Very well. And you're - you're happy to represent yourself?

MR MALONEY: Yes, Your Honour.

HIS WORSHIP: Right and very well.

Facts please. Would you listen carefully to these facts, because when the prosecutor's finished, I'm going to ask him if you - I'll ask you if you agree or disagree with the facts, thanks."

[13] The facts were then read to the court by the prosecutor as follows (tp 6 - 9):

"MR HARRIS: ... At about 6:20, the victim, Sharon Smith, was at 3 Nemarluk Court, Ludmilla, on the upstairs area of the verandah working on a painting, when she noticed her de facto, Malcolm Maloney, arrive at the premises. - - - The victim went to greet the defendant and said, 'Hello'. - - - The defendant said nothing and walked straight past. The defendant then said something to the owner of the house - that's a person by the name of Nerida Ridgers - R-I-D-G-E-R-S.

- - -

The victim overheard what was said and replied, 'Well you knew it was an unregistered car.' The defendant became angry with the victim and stepped onto the painting that the victim was working on at the time, smearing the paint with his feet.

The defendant said, 'You can't use my art; that's my art.'

- - -

The defendant then jumped on top of the victim while she was sitting down on an outdoor chair. The victim curled her knees ... up to her chest to protect herself.

And tried to kick the defendant away.

- - -

The defendant pinned the victim down on the chair by kneeling on the defendant and then punched the victim to the head area. - - - The victim said, 'Stop it, stop it.' The defendant then stood, picked up a clay ashtray with his right hand - - - raised it above his head as if he was going to throw it at the victim. - - - The victim turned to the left and covered her face with her hands to protect herself. - - - The defendant then threw the ashtray, hitting the wooden frame of the chair beside the victim's head.

- - -

The victim remained lying on the couch, curled up trying to protect herself. - - - The defendant then dropped both his knees into the victim's nose, left jaw and ear area. - - - So effectively the left-hand of the face encompassing the ear and nose as the extremities. - - - The victim heard a cracking noise near her jaw. - - - The victim repeatedly requested the defendant to stop. - - - The defendant then

pinned the victim down with his left knee and struck the victim with his right knee, impacting with the victim's face. - - - The victim remained curled up on the couch. - - - The defendant was restrained by another person and was walked off to the downstairs area of the residence. - - - As the victim went to take a breath, she swallowed a tooth that had been dislodged by the assault, causing the victim to choke. - - - Police later attended and located the defendant sitting at the rear of the residence. - - - The defendant was arrested and conveyed to Berrimah watchhouse and placed under section 137 of the Police Administration Act. In effect, Your Worship, he was allowed - he was given some time to sober up before any further questions were directed at him.

- - -

Between 7:20 pm and 7:22 pm, the police had recorded a conversation with the defendant as per section 140. - - - And between 10 pm and 10:37 pm, the defendant participated in an electronic record of interview. During that interview the defendant made partial admissions to the assault. - - - The defendant admitted to hitting the victim between 5 and 10 times with a clenched right fist to the right area. - - - The defendant admitted to holding the victim down on the chair with his right knee. - - - The defendant did not make admissions to striking the victim to the head with his knee or admissions as to throwing the ashtray at the victim. - - - When asked his reason for assaulting the victim, the defendant replied, 'Because I was angry.' - - - At no time did the victim give the defendant permission to assault her in any way, nor did she provoke the assault.

- - -

As a result of the assault, the victim attended at the Royal Darwin Hospital and received treatment for a bruised neck, bruised left cheek and nose. - - - The victim also attended at the Darwin Dental Clinic and received treatment for a lost tooth which was swallowed during the assault and another tooth which was broken."

[14] His Worship then summarised the allegation in the following way (tp 10):

"- - - Well let me just go over that. So you say he said, 'You can't use my art; that's my art.' He jumped on top of her while she was sitting on the outside chair, so there's an application of force there. He pinned her on the chair by kneeling on her and punched her to the head area. So we have an application of force consisting of kneeling on her and then we have an application of force involving a punch.

He then threatened an application of force by throwing the ashtray at her; it didn't hit her. And then he dropped both his knees under her.

Another application of force onto the left side - hand side of her face to her nose, left jaw and ear area. She heard a cracking noise. He then pinned her down with his left knee and struck her with his right knee, impacting with her face.

So they're the applications of force; an application of force."

The appellant Mr Maloney stated he agreed with those facts.

[15] The learned stipendiary magistrate proceeded to find the offence proved. A record of prior convictions was tendered. The appellant agreed that the record of prior convictions related to him and was a true record. The appellant was then shown the Victim Impact Statement. His Worship firstly asked the appellant if there was anything in the Victim Impact Statement that the appellant considered was wrong, an exaggeration or irrelevant. The appellant stated that it was relevant, he again used the words "the buck stops with me". He stated he agreed with the statement. The learned stipendiary magistrate then addressed the appellant as follows (tp 12):

"The buck stops with you, but I'm aware human nature, being what it is, that people will confess to behaviour for a variety of reasons. And in confessing to behaviour, some people exaggerate what they've done and some people will minimise what they've done.

You, by your plea of guilty, are confessing to something. I'm at pains to tell you that the fact that you're confessing to something does not mean that you have to accept it or does not mean that you're precluded from saying that there is something that you don't agree with.

So if there's a wrong thing said or an exaggeration or an irrelevant things said, the fact that you've pleaded guilty and have confessed to something doesn't mean to say that you're stopped from saying, 'Well hang on, this bit's not right or I don't agree with this bit.'

So I'll ask you again, is there anything in this document that you object to or that you don't agree with?"

[16] The appellant again stated he agreed with the statement. The Victim Impact Statement became Exhibit 2.

[17] The learned stipendiary magistrate then read out the contents of the Victim Impact Statement as follows (tp 13 - 14):

“I had a tooth broken off and I swallowed this at the time. Several other teeth were loose and I went to hospital for treatment. Now I have ongoing dentist treatment with a need to have my teeth pulled out and I’m faced with a denture plate. My dentist said that the bone that holds my top tooth was broken in the assault. I remember my injuries were extremely painful. My face was very sore and uncomfortable for about a week. I could only eat very soft food for several weeks because of my mouth. My mouth is still very sensitive and if I drink hot or cold liquid, my top teeth and my gums hurt. Now I still cannot eat solid food. I have cut it into very small pieces. I cannot bite into things like bread. I am very careful that I do not bump my mouth. It is extremely painful if I do. I feel my confidence is reduced since the assault. I do not feel like socialising now, as when I open my mouth, people look at my teeth and I feel embarrassed. I am more depressed and many times I just burst into tears for no reason. I think about what happened and everyday as I live with the pain everyday. I hope Malcolm will get his act together and we can work this out. I don’t want to see him go to gaol. I want him to get help with counselling and anger management. I am prepared to go to counselling with him, as I feel that this is our problem. I consent to the presentation of this victim impact statement in court. I feel my confidence is reduced since the assault. I do not feel like socialising now, as when I open my mouth, people look at my teeth and I feel embarrassed. I am more depressed and many times I just burst into tears for no reason.’

This is dated 26 February. The assault occurred on 7 December.

‘Now I still cannot [eat] solid food. I have to cut it into very small pieces. I cannot bite into things like bread. I am very careful that I do not bump my mouth. This is extremely painful if I do.’”

[18] A report from the Darwin Dental Clinic was shown to the appellant. In summary this report stated there was no actual break to the palate, there

were seven teeth remaining on the top jaw and 11 on the bottom. A number would require extraction because of decay. Some teeth could have been made looser by an assault, however, the teeth were noticeably loose in any event and the medium to long term prognosis would have been poor. The dental report from Dr Neil Blakely was tendered as Exhibit 3.

[19] The learned stipendiary magistrate then said to the appellant Mr Maloney (tp 15):

“... I shall be very fair and blunt with you. I’m considering a term of imprisonment that you’ll have to serve. This is a - um - savage assault. And I appreciate that Ms Smith, in her victim impact statement, says that she doesn’t want to see you go to gaol, but here are other factors involved in this case as well, and one factor that I have to give consideration to is sending a message to the community that people shouldn’t assault people, as you have done. And the best way to send that message can be a term of imprisonment that somebody serves.

What do you wish to say about this matter?”

[20] The appellant then made a number of submissions to his Worship which included the following:

- He is an Elder of the Warlpiri at Tanami Desert.
- He had been under a lot of pressure from his own community in South Australia.
- He had been looking after all his relations, many of whom had come to stay, but had not given enough attention to his relationship with his wife.
- All of his female relatives were in abusive relationships.

- He tendered his CV (Exhibit 4).
- He is an artist and had invented a Free Flow Paint which is now made and sold throughout Australia and is an environmentally friendly paint.
- The royalties from the sale of these paints go to up and coming aboriginal and white artists in Australia.
- The shame he felt at his behaviour and that he had now sought help from Danila Dilba, Amity House and CAAPU in Alice Springs.
- When asked if there were any aboriginal law issues in this case the appellant spoke of the difficulties with his own family because of this offending.
- That he was one of the stolen generation and probably the only one to have gone home, reclaimed their country and their dreaming and have gone through all ceremonies and been a role model for the stolen generation.
- The shame he felt for also letting down his European heritage and the cost to himself physically and mentally.
- His own physical health and the fact he had suffered three heart attacks.
- He speaks seven different languages.

- That as a member of the stolen generation he did not see his family for 18 years.
- That the attack on Ms Smith was not condoned in any way in aboriginal law.
- He had a capacity to earn up to \$360,000 a year. His base income would be \$70,000. Most of the money was spent on family obligations. He had very little money for himself.
- He is approximately 48 years of age.
- He had not been drinking on the day he committed the offence.
- He had attended Danila Dilba seven to nine times for counselling about anger management.
- He had previously attended Amity House over a period of about three years in respect of his anger at being taken from his own family and in dealing with his own identity and a previous gambling addiction which had led to the breakdown of his marriage.
- He had played football professionally for about 10 years.

[21] Ms Lacy, counsel for the appellant, submitted a number of authorities which have established principles for the guidance of judges and magistrates who are dealing with unrepresented litigants. In *Browne v Smith* (1974) 4 ALR 114 Muirhead J at 119:

“I digress to emphasize that every court dealing with a person on a serious charge who is unrepresented by counsel, should be meticulous to ensure the following and should not rely too far upon a defendant’s apparent disinterest or anxiety to have matters over and done with, attitudes not uncommonly encountered in the criminal jurisdiction. In the interests of justice the court should ensure:-

- (1) That the accused person understands the nature of the charge and, where appropriate, the seriousness of the charge.
- (2) That he understands his right to be represented by counsel, the availability of counsel through legal aid schemes or otherwise, and his right to apply for an adjournment to obtain legal advice.

If the court having been careful to ensure there is no misunderstanding, is left in the position where it must proceed in serious matters without the aid of defence, it must still endeavour to ensure that it is properly informed before passing sentence. ...”

[22] Muirhead J then referred to the decision of Wells J in *Cooling v Steel* (1971) 2 SASR 249 which details the procedures to be followed in courts of summary jurisdiction upon pleas of guilty by an unrepresented defendant.

At p 120 Muirhead J referred to the following quote:

“In general the court should ensure that the defendant is appraised of his rights and his duties at all times, and be vigilant to keep the proceedings free of error or misunderstanding.”

[23] The principles enunciated in *Browne v Smith* (supra) were affirmed by Martin J in *Bates v Hayman* (1988) 90 FLR 55 and Martin CJ in *Ross v Peach* [2002] NTSC 19, delivered 28 March 2002.

[24] In the matter which is the subject of this appeal the appellant had been represented when he entered a plea of guilty to the charge on 28 February 2003. When he appeared before the learned stipendiary magistrate on 13 March to conclude the sentencing submissions the appellant stated he did

not have a lawyer and that he wanted the matter to proceed that day because it had cost him “heavily mentally and physically”.

[25] With the benefit of hindsight, it may have been wiser had the learned stipendiary magistrate inquired about the role of the Legal Aid lawyer, Chris George. The appellant had mentioned her name as the Legal Aid lawyer when the learned stipendiary magistrate inquired why the appellant had not been present in court at 9.00 am that morning. The appellant had replied that he was down below waiting to take his CV into the Legal Aid lawyer Chris George.

[26] This Court was informed that in fact there was a Legal Aid lawyer who had been fully briefed and prepared to represent the appellant in the absence of Mr Sharp who had represented the appellant on 28 February. This fact was not made known to the learned stipendiary magistrate. It is not clear whether or not the appellant was aware of this and chose nevertheless to represent himself.

[27] I am not able to conclude that the learned stipendiary magistrate erred in not pursuing this matter further. It is true that courts should be concerned when people proceed in serious matters unrepresented and unaware of their entitlements and the possible consequences. It is also important to recognise that people are entitled to represent themselves if this is their preferred choice. His Worship was aware the appellant had previously had legal advice and was a person fully aware of his entitlement to legal

representation. The appellant told the learned stipendiary magistrate he wanted the matter to proceed without legal representation.

[28] From the extracts of the proceedings that I have set out above, the learned stipendiary magistrate explained the nature of the charge and that a penalty could include imprisonment. His Worship twice asked the appellant if he was happy to represent himself. The appellant replied in the affirmative.

[29] The learned stipendiary magistrate explained that the appellant should listen to the Crown facts and whether he agreed or disagreed with the facts alleged by the prosecution. The appellant stated he agreed with the facts after they had been read by the prosecutor. The appellant had previously had legal representation when the facts in support of the charge had been agreed between the defence and the Crown.

[30] Similarly, the learned stipendiary magistrate explained that the appellant could comment as to whether the other documents tendered were true and correct. These included a record of prior convictions and the Victim Impact Statement. The learned stipendiary magistrate was at pains to explain that he had a right to disagree with matters set out in the Victim Impact Statement. The appellant stated he agreed with the statement and that he accepted the record of prior convictions as true and correct.

[31] The learned stipendiary magistrate advised the appellant that he was considering a term of actual imprisonment for the offence. There then followed a quite lengthy discussion between the learned stipendiary

magistrate and the appellant in which the appellant in response to questions put to him by his Worship, put forward a number of matters which I have summarised above in mitigation both with respect to the offence itself and the appellant's personal circumstances.

[32] From a reading of the transcript of the proceedings the appellant is clearly an intelligent and articulate man who was able to represent himself very adequately.

[33] I am not able to find that the learned stipendiary magistrate erred either in failing to accord the appellant the opportunity for legal representation or in the conduct of the proceedings.

**Ground 2: The learned magistrate erred in failing to give any or sufficient weight to the mitigating features of: (i) previous good character; (ii) rehabilitation; and (iii) remorse.**

[34] In his reasons for sentence the learned stipendiary magistrate acknowledged that the appellant had not previously been in trouble for assault, that it had been many years since he had received a term of imprisonment for an unrelated matter. His Worship also made reference to the positive aspects of the appellant's character, the fact he was a role model, a senior Warlpiri man who met the many demands made upon him and had contributed both to the aboriginal and non-aboriginal community.

[35] His Worship referred to the steps taken by the appellant to seek rehabilitation which included counselling at Amity House and Danila Dilba.

Also included in the sentencing remarks were references to the appellant's sense of shame about his predicament and that he had not set a good example as a role model. These matters all go to this issue of remorse.

[36] The learned stipendiary magistrate stated that he did not consider there had been a timely plea. He stated had there been an indication on the first day of a plea of guilty to Charge 2 there would have been a 25 per cent discount. This statement is hard to understand in view of the fact the Crown ultimately withdrew Charge 2 as they did not have evidence to substantiate such a charge.

[37] Nevertheless, his Worship did allow a discount of 20 per cent for the plea of guilty made on 28 February 2003 to Count 1.

[38] I consider that a discount of 20 per cent is sufficiently substantial to acknowledge a plea of guilty at the first reasonable opportunity and in recognition of the expressed remorse. The end result of his Worship's determination on that point being a discount of 20 per cent. This was within his discretion and not a matter with which this Court should interfere.

[39] I would dismiss this ground of appeal.

**Ground 3: The learned magistrate erred in placing too much weight on considerations of: (i) general deterrence; (ii) denunciation; and (iii) protection of the community.**

[40] In his reasons for sentence the learned stipendiary magistrate did make reference to the aspect of general deterrence, denunciation of the offence

and protection of the community. These are all matters the learned stipendiary magistrate was properly required to consider and to take into account.

[41] I do not consider he placed too great a weight on these factors. His Worship stated the aspect of retribution had a minor role to play in this case. The learned stipendiary magistrate emphasised the appellant's contribution to the community, his sense of remorse and the steps he had taken to rehabilitate himself. These matters were all taken into account in the decision to suspend all but one month of the 12 month term of imprisonment.

[42] This ground of appeal is not made out.

**Ground 4: In all the circumstances of the case, the sentence imposed was manifestly excessive.**

[43] This is not a sentence which on its face can be said to be manifestly excessive. Violent offences particularly by men upon women are continually the subject of condemnation by this Court. The sentence of 12 months imp suspended after one month was within discretion. I am not persuaded it was manifestly excessive.

[44] The appeal is dismissed.

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