*Massie v The Queen* [2006] NTCCA 15

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| PARTIES: | MASSIE, James Lee |
| | v |
| | THE QUEEN |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | CA 3 of 2006 (20501685) |
| DELIVERED: | 18 JULY 2006 |
| HEARING DATES: | 4 JULY 2006 |
| JUDGMENT OF: | MARTIN (BR) CJ, ANGEL and SOUTHWOOD JJ |
| APPEAL FROM: | NORTHERN TERRITORY SUPREME COURT, 20501685, 13 JANUARY 2006 |

**CATCHWORDS:**

CRIMINAL LAW
Appeal – appeal against sentence for Dangerous Act – sentence manifestly excessive – appeal allowed – re-sentenced.

*Criminal Code* (NT), s 154(1), s 154(2), s 154(4) and s 181
*R v Bloomfield* [1999] NTCCA 137; *R v Wurramara* (1999) 105 A Crim R 512, followed.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | D Ross QC, P Dwyer |
| Respondent: | D Lewis, S Geary |

*Solicitors:*

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

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

*Massie v The Queen* [2006] NTCCA 15
No. CA 3 of 2006 (20501685)

BETWEEN:

**JAMES LEE MASSIE**
Appellant

AND:

**THE QUEEN**
Respondent

CORAM: MARTIN (BR) CJ, ANGEL and SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 18 July 2006)

**Martin (BR) CJ:**

**Introduction**

[1] The appellant appeals against a sentence of four years imprisonment imposed for the crime of Dangerous Act which was accompanied by circumstances of aggravation that the appellant caused grievous harm to the victim and was under the influence of alcohol at the time of the doing of the Dangerous Act. The learned sentencing Judge ordered that the appellant be released after serving 15 months and that the balance of the sentence be suspended on condition that the appellant be under the supervision of the Director of Correctional Services and obey the reasonable directions of the Director as to residence, employment, training and counselling or treatment

with respect to alcohol and drug abuse. In substance the appellant complains that both the head sentence and the period to be served are manifestly excessive.

**Facts of offending**

[2] The events occurred in the early hours of 1 January 2005. The victim and his friends were celebrating New Years Eve on the beach at Mandorah. The appellant had consumed a large quantity of alcohol during 31 December 2004 and, over the course of the evening at the Mandorah Hotel, continued to consume large quantities of alcohol. He also smoked cannabis. At the time of the commission of the crime, the appellant was grossly affected by alcohol and cannabis.

[3] At about 2am on 1 January 2005 the appellant and two friends approached the victim's group. The appellant began swearing at the group and two of the group told him to leave them alone. The victim and a friend stood up and walked towards the appellant with the intention of calming him down. The appellant and his friends walked away.

[4] A few minutes later the appellant and his friends returned. The appellant crouched down in an aggressive posture facing the victim's group. He was holding a full can of drink. The appellant and his friends yelled and swore at the victim's group with the intention of provoking them.

[5] Members of the victim's group were scared. Two of the group approached the appellant and his friends with the intention of calming them down. One

of those persons warned the appellant not to throw the can but, with full force, the appellant threw the unopened can at the two men who were approaching. The appellant was walking behind his friends. One of those persons moved to the side to avoid the can and the can struck the victim in the left eye causing him to fall to one knee. A confrontation followed. Security officers intervened. Police attended and took the appellant into protective custody.

[6] The victim sustained very serious injuries to his eye. His eye socket was fractured and his eye damaged. He has reduced central vision in his eye which will deteriorate in the future and there is a possibility that the damage to the eye may cause the victim to develop glaucoma in the future. In his victim impact statement the victim says that he has lost approximately 40 percent vision out of his left eye as a consequence of which he is unable to play football and experiences difficulties in everyday life, particularly with driving, as his sense of depth is minimal. The victim was unable to drive for three months after the attack which prevented him from carrying on his work as a sales representative. As a consequence he was retrenched.

[7] The objective circumstances of the appellant's offending were serious. Under the influence of alcohol and cannabis the appellant was aggressive and actively sought a physical confrontation. He was spoiling for a fight. The victim and his group were minding their own business and the appellant's actions were entirely unprovoked. In addition, the appellant persisted despite attempts to calm him down.

[8] Although the appellant did not aim the can specifically at the victim, in his intoxicated state the appellant deliberately hurled the can with force at the persons accompanying the victim. It was a dangerous act with the potential to cause significant injury. The only reasonable inference is that the appellant intended that the can strike either or both of those who were approaching him.

[9] There are no mitigating circumstances in connection with the commission of the crime. The appellant's intoxication is, by virtue of the statutory direction, an aggravating circumstance. Even in the absence of such a direction, in the particular circumstances intoxication could not be regarded as a mitigating circumstance. It apparent from the appellant's personal history that he has a long standing problem with alcohol and cannabis which is coupled with difficulties in connection with anger management.

**Matters personal to the appellant**

[10] The appellant was born on 9 October 1979. He was aged 25 at the time he assaulted the victim. The appellant has lived in Darwin since he was a few months old and completed year 10 before commencing an apprenticeship as an electrician. He lost that apprenticeship by reason of his involvement with drugs. He has had only minor employment in the last few years.

[11] The appellant now recognises that by the age of about 20 his habit of smoking cannabis had become an addiction. He also accepts that he has a problem with alcohol.

[12] The appellant has a record of prior offending dating back to 1996 when he first appeared in court for the offence of cultivating cannabis. On 15 November 1996 the appellant was convicted of assaulting police and sentenced to six months imprisonment, suspended after serving one month. The appellant successfully completed the good behaviour bond over a period of 18 months.

[13] On 17 August 1999 the appellant committed the offence of assaulting a person who suffered bodily harm. On 12 December 2000 the appellant was convicted of that offence and sentenced to three months imprisonment backdated such that the appellant was immediately released on a bond for a period of two years. Again the appellant successfully completed the bond.

[14] On 21 January 2000 the appellant committed an offence of assault by threatening a person with a weapon. He was convicted of that offence on 12 December 2000 and a sentence of six months imprisonment was imposed and backdated to 6 October 2000. The appellant was released immediately and, for the third time, successfully completed the period of the bond.

[15] The personal circumstances of the appellant are not capable of attracting significant mitigation. The appellant has not experienced the extremely traumatic upbringing in dysfunctional circumstances with which this Court is so familiar. On three occasions since 1996 the appellant has been given the opportunity by sentencing courts to achieve a successful and permanent rehabilitation. The appellant's actions during New Year's Eve 2004

demonstrate that those opportunities have not resulted in successful rehabilitation. That view is reinforced by the appellant's behaviour two weeks after his arrest when he committed a number of serious driving offences while intoxicated. Although the sentencing Judge found that the appellant has taken responsibility for his actions and has good prospects of rehabilitation, personal deterrence remains a significant factor in the exercise of the sentencing discretion.

[16] General deterrence is also significant. Unprovoked assaults with serious consequences committed by intoxicated and aggressive young male persons are prevalent in the Northern Territory. Those who are tempted to engage in this type of conduct must realise that even if they do not intend to cause serious harm, where such harm results from their aggressive behaviour their criminal conduct will be met with severe punishment.

**Other cases**

[17] The offence of Dangerous Act can be committed in a wide variety of circumstances. The maximum penalty begins at five years and increases to seven years if the offence is accompanied by the aggravating circumstance that grievous harm is caused to the victim. A further increase in the maximum penalty to 11 years occurs when, as in the case of the appellant, the offender is under the influence of an intoxicating substance at the time of the doing of the Act.

[18] There is no tariff or established range of penalties for the crime of Dangerous Act whether accompanied by aggravating circumstances or otherwise. The penalty must be proportionate to the gravity of the individual circumstances of the crime after consideration of the personal circumstances of the individual offender.

[19] Limited assistance is gained by considering previous sentences for crimes of Dangerous Act, but the decision of this Court in *R v Bloomfield* [1999] NTCCA 137 is helpful. The offender pleaded guilty to the offence of Dangerous Act accompanied by the circumstances of aggravation that he caused grievous harm to the victim and was under the influence of an intoxicating substance at the time of the offence. A sentence of two years and six months was imposed to be suspended after the offender had served six months. On an appeal by the Crown, the sentence was increased to three years and six months to be suspended after the offender had served 12 months. Martin CJ indicated that he had arrived at the new sentence after making a reduction to take into account that sentence was being imposed after a successful Crown appeal. Mildren J, with whom Bailey J agreed, indicated that an appropriate head sentence would be five years, but applying the principle of double jeopardy applicable to Crown appeals, the appropriate sentence was three years and six months.

[20] The offender in *Bloomfield* was sitting in front of a store in Alice Springs when a taxi driven by the victim pulled up in the vicinity. The offender attempted to get into the taxi, but was informed by the victim that he already

had a fare. An argument ensued between a friend of the offender and the victim during which the offender's friend punched the victim to the left side of the face. Those involved in the altercation were separated and the victim was leaning over a taxi when the offender approached and punched the victim to the right side of the face. The offender was restrained and the victim turned his back on the offender to argue with the offender's friend. The offender again approached the victim from behind and, after emerging in front of the victim, struck him to the front of the face with his right clenched fist. Mildren J described the blow as a "king-hit". The victim was unprepared. He was knocked to the ground where he struck his head on a concrete step and victim sustained serious head injuries with permanent and tragic consequences. A little over 12 months after the commission of the crime, the victim continued to suffer significant impairment and substantial disability secondary to severe head injury. At that time it appeared that he would require extensive support and supervision on a permanent basis. As the sentencing Judge put it, "effectively his life is wrecked".

[21] There are obvious differences between the facts in *Bloomfield* and the circumstances of the appellant's offending. In particular, the appellant did not directly apply force to the body of the victim and more serious injuries were caused to the victim in *Bloomfield*. Nevertheless, that decision is helpful in considering whether the sentence imposed by the Judge is outside the range of the sentencing discretion.

[22] It is also helpful to have regard to the general level of sentences imposed for the offence of unlawfully causing grievous harm contrary to s 181 of the Criminal Code. That offence requires that the offender possess foresight of the type of harm caused and the maximum penalty is 14 years. In *R v Wurramara* (1999) 105 A Crim R 512 this Court indicated that a term of imprisonment of at least three years imprisonment should generally be the "starting point" following a plea of guilty "in relation to an infliction of serious injury upon a woman, child, or other person in a position of weakness within [an Aboriginal] community, and where an offensive weapon is used to achieve that end".

[23] The offender in *Wurramara* used a knife to stab his wife and, in a separate incident, used a machete to injure his male neighbour. The offences occurred within an Aboriginal community. The offender was aged 23 years and had a record of convictions dating back to 1991. Before allowing for considerations of totality and restraint applicable to re-sentencing on Crown appeals, the Court indicated that sentences of three years and six months and four years would be appropriate for each of the crimes.

[24] Although the appellant's conduct was dangerous, it was not as overtly dangerous or serious as the direct application of physical force with an obvious weapon such as a knife or a machete. The decision in *Wurramara* was delivered in 1999 and penalties for violent crimes involving the use of weapons have, generally speaking, increased since 1999. Notwithstanding that general increase, a review of the cases suggests that there is

considerable force in the view that a number of sentences imposed in recent years have been at the lower end of the scale of penalties for such offending and have not adequately reflected the gravity of the criminal conduct.

[25] Notwithstanding that the direct application of physical force with an obvious weapon such as a knife or machete should, generally speaking, be viewed as more serious conduct than throwing a can of drink, it would be an error to dismiss the appellant's conduct as relatively harmless. It would also be an error to dismiss the offending as merely loutish type behaviour. The appellant's criminal conduct was dangerous and unprovoked. It occurred in the context of the appellant's previous aggressive attempt to provoke a fight and in the face of attempts to defuse his anger. In addition, there is an absence of mitigating circumstances attaching to the appellant's criminal conduct or his personal situation.

[26] Importantly, the appellant's criminal conduct was attended by two significantly aggravating circumstances. First, grievous harm was caused to the victim. That harm was particularly serious. As the Chief Justice pointed out in *Bloomfield*, "the greater the harm, the greater it's weight in the balance of conflicting interests against the offender by way of punishment as a general deterrent" [19]. Mildren J said [30]:

> "What is relevant, is that the legislature has made the consequences to the victim an aggravating factor which increases the maximum penalty: see s 154(2). And, of course, the more serious the consequences to the victim, the greater the responsibility which must be borne by the defendant: see *Timothy Brian Amituanai* (1995) 78 A Crim R 588 at 589, 596-7."

[27] Secondly, the appellant's criminal conduct was, through the operation of s 154(4) of the Code, aggravated by the additional circumstance of intoxication. The sentence imposed must give effect to the existence of this circumstance of aggravation.

[28] I am not unmindful of the submission that the sentence of four years is longer than many sentences imposed for crimes of Dangerous Act. As I have said, however, this crime is committed in an infinite variety of circumstances and there is no tariff or standard range of penalties. As Mildren J pointed out in *Bloomfield*, s 154 "casts a wide net, covering an enormous range of conduct from the comparatively trivial to the most serious" [29]. In addition, accepting that the sentence of four years is longer than many imposed for this crime, in my opinion that circumstance does not establish that the sentence is manifestly excessive. A review of the sentences demonstrates a tendency for sentences for this crime to be too low, but falls short of demonstrating manifest excess or injustice to the appellant. The remarks of King CJ, with whom Mitchell and Legoe JJ agreed, said in *Yardley v Betts* (1979) 22 SASR 108 are apposite (113 – 114):

> "The first point reserved to this Court also raises the question of the place of warnings, where an increase in the previously observed standard of penalties is contemplated. The case for judicial warnings of an intention to increase penalties is sometimes put in an exaggerated way. It was argued before us that an offender who was to suffer a penalty greater than the hitherto observed norm would be justified in entertaining a sense of injustice. I cannot accept the argument so formulated. When a person commits a crime he renders himself liable to the punishment prescribed by law. He suffers no

> injustice if the punishment imposed is within the statutory maximum and is not excessive having regard to all the circumstances. The notion of a criminal complaining that he experiences a sense of injustice, because he committed his crime on the faith of the current practice of the courts and then got more than he bargained for, strikes me as ludicrous. Is the same criminal justified in entertaining a sense of injustice, if the warning, although given, was not published by the media or not by the section of the media which he sees or hears? He might perhaps have been out of the State when the warning was given. I am firmly of the view that an offender has no cause for complaint, if he receives a sentence which is within the legal maximum and is fair and reasonable having regard to all the circumstances of the case, simply because courts have been in the habit hitherto of imposing somewhat lighter sentences."

[29] In considering penalties involved in other cases, and the sentence under consideration, it is necessary to bear in mind that in each instance there was a range of sentence open to the sentencing Judge. The existence of that range requires caution in the use of other sentences, many of which were in the middle or toward the lower end of the available range. It is not appropriate for this Court to interfere merely because the sentence is longer than the sentence that individual members of the Court would have imposed if sitting at first instance. The critical question is whether the sentence imposed is beyond the range of the sentencing discretion.

[30] My mind has vacillated. On one view, notwithstanding the harm caused, five years as a starting point, and the ultimate sentence of four years, appear to be manifestly excessive for throwing a can of drink at another person. On the other hand, for the reasons I have discussed, it is not appropriate to view the appellant's offending as merely throwing a can of drink.

[31] Having regard to all the circumstances, and after careful consideration of the level of penalties imposed in recent years for the crimes of dangerous act and unlawfully causing grievous harm, not without considerable hesitation I have reached the conclusion that the sentence is manifestly excessive. I would allow the appeal and, after a reduction of 20 percent to reflect the appellant's plea, I would impose a sentence of three years imprisonment. That sentence should be suspended after the appellant has served a period of 12 months imprisonment on condition that the appellant be under the supervision of the Director of Correctional Services and obey the reasonable directions of the Director, including directions as to reporting, residence, employment, training and counselling or treatment with respect to alcohol and drug abuse. That supervision should be for a period of two years commencing upon the appellant's release having served the period of 12 months.

[32] The appellant has sought the leave of this Court to appeal on grounds in respect of which a Judge of this Court refused leave to appeal. Those grounds allege errors by the sentencing Judge, but counsel for the appellant did not argue those grounds. Counsel's choice was appropriate as there is no substance to the complaints. Leave to appeal in respect of the other grounds should be refused.

**Angel J:**

[33] I concur.

**Southwood CJ:**

[34] I concur.

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