Wheeler v Eaton [2012] NTSC 80

PARTIES:	WHEELER, Clint v EATON, Donald
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 12 of 2012 (21203594) JA 13 of 2012 (21203591) JA 14 of 2012 (21203607)
DELIVERED:	12 October 2012
HEARING DATES:	5 October 2012
JUDGMENT OF:	RILEY CJ
APPEAL FROM:	MR J NEILL SM

REPRESENTATION:

Counsel:

Appellant:	Mr Tapueluelu
Respondent:	Mr Kumar

Solicitors:

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

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Wheeler v Eaton [2012] NTSC 80
Nos. JA 12 of 2012 (21203594)
JA 13 of 2012 (21203591)
JA 14 of 2012 (21203607)

BETWEEN:

CLINT WHEELER
Appellant

AND:

DONALD EATON
Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 12 October 2012)

[1] On 28 May 2012, in the Court of Summary Jurisdiction at Alice Springs, the appellant was convicted of four offences of violence and sentenced to imprisonment for a period of 23 months with a non-parole period of 14 months. He appeals against that sentence on the grounds that the learned Magistrate erred in law when applying the principle of totality and that the sentence was manifestly excessive.

[2] Each of the offences was serious and occurred when the appellant was adversely affected by alcohol. Three of the offences involved an attack upon his former de facto wife and the other on another woman, being his auntie.

The first offence

[3] The appellant had been in a relationship with his victim for a period of some five years but they had separated prior to the offending. On 10 October 2011 he approached the victim who was seated in a car and grabbed her by the hair and pulled her from the vehicle. He then "went into a frenzy" and punched and kicked her five or six times to the face. He was arrested and when asked why he had attacked his victim he said that she had been "teasing" him over the telephone.

[4] The victim was treated at Alice Springs hospital for bruising and lacerations to her face. Photographs taken some time after the event reveal significant swelling and a partial closing of the left eye and swelling on the left cheek. It seems that at the time the photographs were taken the wounds were infected.

[5] In relation to this offence the appellant was sentenced to imprisonment for a period of six months.

The second offence

[6] The second offence occurred on 21 December 2011. There had been an argument between the appellant and his auntie, the victim, and she walked away. The appellant followed her and as he did he picked up a rock the size of a tennis ball. He threw the rock in an over arm action causing it to strike the victim to the left calf causing immediate pain, discomfort and swelling. He then picked up a second rock of similar size and threw it in an over arm

action causing it to strike the victim on the right calf causing immediate pain, discomfort and swelling. The appellant and his victim were later at another house where the appellant armed himself with a long handled shovel. He held the shovel in both hands and lifted it above his head before swinging it down striking the victim on the right shoulder blade. She attempted to escape and he struck her again with the shovel, this time to the jaw resulting in a large laceration. The victim was bleeding profusely. The appellant then threatened her by saying he would be back for her later that night.

[7] The victim of this assault required medical treatment for bruising and a laceration to her face. The photographs of the injuries reveal a significant laceration under the chin. In a victim impact statement the aunt complained that she had a cut jaw, a swollen wrist and bruises to her shoulders and legs.

[8] In relation to this offence the appellant was sentenced to imprisonment for a period of 12 months. In sentencing the Magistrate observed:

> The effects of a strong young man swinging a long handled iron shovel – it is not a spade this is a shovel – at an unarmed person, a woman could have been the worst possible consequences, it is sheer luck, nothing to do with your self-control, that led to them not being truly serious consequences as a result of this behaviour.

The third and fourth offences

[9] The third and fourth offences occurred on 26 January 2012 and again involved the former de facto wife of the appellant. There had been an argument between the appellant and his wife and the appellant then followed

her in a motor vehicle. He called upon her to get into the car and she refused. He left the vehicle and picked up a substantial rock. He approached the victim and grabbed her and pulled her by the hair and then struck her with the rock on the back of her head. The blow caused a laceration to her head. The appellant and his victim then got into the vehicle and, as the vehicle was travelling, the appellant punched her once to the mouth causing pain, discomfort and swelling. He then punched her to the forehead. The victim required medical treatment at the Alice Springs hospital for the cut to her head and the injuries to her lip and forehead. The relevant photographs show a large swelling to the right side of the forehead. When later asked for his reason for the assault he complained that she had "teased" him.

[10] In relation to those offences the appellant was convicted and sentenced to imprisonment for four months and three months respectively.

The sentencing process

[11] In the sentencing remarks his Honour noted that the appellant was 21 years of age and that he had no prior convictions for violent offending. It was observed that he had a significant problem with alcohol and that alcohol played a part in each of the offences. Credit was given to the appellant for the entry of his plea of guilty in each case and no complaint is made in this regard.

[12] In determining an appropriate sentence his Honour made orders as to accumulation and/or concurrency. In so doing it is clear that his Honour was

reflecting the fact that some of the offending was part of the one course of conduct and therefore deserving of a level of concurrency. In addition his Honour provided for a degree of concurrency as between offences occurring on different dates and in different circumstances. Although his Honour did not specifically mention the application of the totality principle at this time, he was applying the principle. This is apparent from earlier discussions between the Magistrate and counsel where the principle was raised and his Honour observed that totality "can be achieved by different ways including some concurrency where appropriate".

Ground 1: That the learned Magistrate erred in law when applying the principle of totality to the sentencing of the appellant.

[13] The appellant complained that the Magistrate did not adopt the approach of arriving at an appropriate head sentence in relation to each count and only then considering questions of accumulation or concurrence in light of the totality principle. As I have observed his Honour did apply the totality principle as is evident from the process of accumulation and concurrence undertaken in the course of the sentencing remarks. In my view his Honour provided for accumulation and concurrence directed towards imposing a total effective head sentence which was proportionate to his Honour’s view of the appellant's criminal conduct in all the circumstances.

[14] The appellant further submitted that the Magistrate erred in not ordering full concurrency in respect of the sentences imposed in relation to the third and fourth offences referred to above. It was submitted that the sentences should

have been made wholly concurrent "as the offending related to both counts constituted one criminal course of conduct". The Magistrate in fact ordered concurrency between the sentences to the extent of one month. Although the offending occurred in the one course of conduct there were two quite separate assaults. The first was an assault with a rock when the pair was outside the motor vehicle and the second an assault by punching which occurred sometime later whilst they were in the motor vehicle and the appellant was driving. I see no error on the part of the Magistrate in ordering partial concurrency.

[15] In determining an appropriate sentence the Magistrate regarded as relevant the fact that the appellant had been found guilty of an earlier assault even though no conviction had been recorded. His Honour made it clear that he treated the appellant as having no prior convictions but did take the conduct into account as part of the "overall picture". The Magistrate did not accept the submission that the offending was out of character for the appellant noting that the court was "dealing with three extremely violent offences over a period of months". I see no error on the part of his Honour.

Manifest excess

[16] The first submission made in this regard was that the Magistrate erred in his statement of the maximum penalty for an aggravated assault as being imprisonment for five years. It was submitted that because the matters were being dealt with summarily the maximum penalty was two years imprisonment. The submission demonstrates a misunderstanding of the

relevant part of s 188 of the *Criminal Code* which provides that in the case of assault "the offender is guilty of a crime and is liable to imprisonment for five years or, upon being found guilty summarily, to imprisonment for two years". The maximum penalty for the offence is imprisonment for five years, however if the matter is dealt with summarily the court may only impose a term of imprisonment of up to two years, being the jurisdictional limit of the court. Should the court consider that a sentence in excess of two years is required in relation to the offending the matter is to be referred to the Supreme Court.

[17] Recently in *Taylor v Malagorski*[1] Barr J reminded us that it is necessary to distinguish between the maximum penalty for an offence and the jurisdictional limit where the offence is dealt with summarily. His Honour referred to a number of authorities including *Kumantjara v Harris*[2] where Kearney J said:

> The sentencing task of his Worship was to consider the circumstances of the offence and the offender, assess the sentence which was merited bearing in mind that a "worst case" offence of this type merited five years imprisonment, and proceed to impose a sentence he considered fit, provided it did not exceed two years imprisonment. If he considered that the proper sentence was more than two years imprisonment his proper course was to decline to deal with the case summarily.

[18] The submission made on behalf of the appellant was misconceived.

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[1] (2011) NTSC 98 at [24].
[2] (1992 – 93) 109 9FLR 400 at 406.

[19] In my opinion it has not been demonstrated that the Magistrate erred either by acting on a wrong principle or in misunderstanding or wrongly assessing some feature of the facts. No error on the part of his Honour has been identified. Further, in my opinion, neither the head sentence nor the individual sentences were manifestly excessive.

[20] The appeal is dismissed.
