Martin v Kendrick [2015] NTSC 38

PARTIES:	MARTIN, Wayne v KENDRICK, Suzanne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 36 of 2013 (21227813)
DELIVERED:	30 June 2015
HEARING DATES:	7 August 2014
JUDGMENT OF:	KELLY J
APPEAL FROM:	HANNAM CM

CATCHWORDS:

APPEALS – Appeal against conviction – Self-defence - Whether magistrate erred in application of principle – Onus on prosecution to prove offence and negative self-defence – Held no error

APPEALS – appeal against conviction – whether magistrate reversed onus – Held no error

APPEALS – Appeal against conviction – Evidence – Statement admitted by consent – maker not required for cross examination – magistrate erred in giving statement “less weight” for this reason – Magistrate nevertheless entitled to reject evidence found to be inconsistent with other evidence in the case

APPEALS – appeal against conviction – whether verdict unsafe and unsatisfactory – Application of principles – Held magistrate not bound to have reasonable doubt – verdict supported by the evidence - Evidence – No error in magistrate's use of evidence – No reasonable doubt about appellant's guilt – Appeal dismissed

APPEALS – Appeal against sentence – Head sentence not manifestly excessive – imposition of non-parole period manifestly excessive in light of the appellant's personal circumstances – Appeal allowed

Criminal Code (NT) s 29

Carr v The Queen (1988) 165 CLR 314; *Gipp v R* (1998) 194 CLR 106; *M v R* (1994) 181 CLR 487; *Jones v The Queen* (1997) 191 CLR 439; applied

Burkhart v Bradley [2013] NTCA 5; *C v Gokel* [1999] NTSC 93; *Clark v Trenerry* [1999] NTSC 17; *Fox v Percy* (2003) 214 CLR 118; *Knight v The Queen* (1992) 175 CLR 495; *Morris v R* (1987) 163 CLR 454; *R v AWF* (2000) 2 VR 1; *R v Hawes* (1994) 35 NSWLR 294; *R v Tait and Bartley* (1979) 24 ALR 473; *Salmon v Chute* (1994) 94 NTR 1; *Taylor v Malagorski* [2011] NTSC 98; *Wheeler v Eaton* [2012] NTSC 80; *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645; referred to

REPRESENTATION:

Counsel:

Appellant:	M Burrows
Respondent:	D Jones

Solicitors:

Appellant:	Maley & Burrows
Respondent:	Director of Public Prosecutions

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

Martin v Kendrick [2015] NTSC 38
No. JA 36 of 2013 (21227813)

BETWEEN:

WAYNE MARTIN
Appellant

AND:

SUZANNE LOUISE KENDRICK
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 30 June 2015)

Background

[1] On 21 June 2013 the appellant Wayne Martin was convicted of an aggravated assault on Mr Jay Knight and sentenced to a term of imprisonment of 16 months with a non-parole period of eight months. In delivering judgment, the learned chief magistrate noted that the following matters were not in dispute.

- The alleged victim, Mr Jay Knight suffers from schizophrenia for which he was prescribed medication. On the date of the alleged assault (22 March 2012) he had failed to take his medication and drank alcohol, contrary to his treatment directions.

- That night Mr Knight broke into 18 Troughton Court, the house next door to the appellant's residence.

- In the early hours of the morning the appellant struck Mr Knight with an implement and Mr Knight was injured. His injuries included a fractured left wrist and a fractured left ankle and he spent 11 weeks in hospital.

- Mr Knight did not give permission for the appellant to strike him.

- Shortly after striking Mr Knight, the appellant was riding a bicycle and encountered Mr Hartonga and Mr Carson. He indicated Mr Knight on the side of the road and asked Mr Hartonga to call an ambulance. Mr Hartonga did so. At this time the appellant was holding a bat. He dropped it and invited Mr Hartonga to use it on Mr Knight.

- The appellant left the area before police and ambulance arrived. When police arrived, they found Mr Knight in Lens Court about 15 to 20 metres from the corner of James Circuit.

- As Mr Hartonga was walking home, the appellant pulled up in a four wheel drive and asked Mr Hartonga if the police were still there.

- On about 15 June 2012, Mr Knight told police he had broken into 18 Troughton Court.

- In the course of conducting a doorknock in the area of Troughton Court, police spoke to the appellant. He told them he had no knowledge of any unlawful entry at 18 Troughton Court on 22 March.

- Some time later, the appellant went to Mr Hartonga's house. He asked Mr Hartonga whether he had made a statement to police. He also asked Mr Hartonga to defend him in court and to give police a statement,[1] and offered him $1500 to do so.

- In about July 2012, the appellant again went to Mr Hartonga's home. He spoke to Mr Hartonga's flatmate, Mr Heyworth. He told Mr Heyworth that police were harassing him in relation to the incident that had happened around the corner and said words to the effect of, "I beat a bloke half to death."[2]

[2] Her Honour identified the main areas of dispute as the incidents leading up to the appellant striking Mr Knight which were relevant to the appellant's state of mind at the time, and the circumstances of the striking itself before Mr Hartonga arrived.

[3] Mr Knight gave evidence that on that night he was having a drink at home, having missed his medication. He fell asleep watching TV and woke up having delusional thoughts that his health support worker was being held

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[1] This may be an error in the transcript of her Honour's decision. The transcript of the trial appears to indicate that the appellant asked Mr Hartonga (referred to elsewhere in the transcript as Mr Shaw) not to give a statement or to withdraw a statement he had given.

[2] Although her Honour identified this as not being in dispute, the appellant in fact denied having said that. He said he had referred only to having a fight.

hostage by his brother. He went to 18 Troughton Court thinking (mistakenly) that it was his health worker's house. He broke a window and cut his bare feet. He found no-one there and left to try to go home. He was lost. As he was walking down the street, the appellant came out of the shadows riding a push bike and yelled out, "You've been stealing something." Mr Knight answered, "No, I haven't stolen anything, I just want to go home." There was further yelling. Mr Knight tried to run but the appellant was on a push bike and chased him. He remembered the appellant saying, "I own this town you little shit, and I can do this all night." The appellant caught Mr Knight and cornered him on the side of the street. Mr Knight knew he was in trouble then so he curled up in a ball and the appellant attacked him with a wooden baseball bat. Mr Knight tried to take it on the left side because he is right handed. The appellant just swung the bat into him – it seemed like 50 times or 20 times – something like that. The appellant hit him all over, on his back, his bum, his left ankle, left wrist, and the back of his head. He broke his left ankle and chipped his left wrist. He thinks that happened when he put his hands up behind his head to protect his head. He tried to get up to walk but the appellant came back and hit him again – maybe once or twice – so he decided to lie on the side of the road.

[4] The appellant's evidence about what happened was very different. He said that on that evening he was at home with his new girlfriend, Jessica Mathers and their respective daughters. He was woken by a big bang which he

thought was the slamming of the metal gates next door. He went back to sleep for about 15 minutes to half an hour and then was woken again with his dogs going crazy. He got up, opened his bedroom door and saw the kitchen and main doors open and the shadow of a man standing at the doorway about six metres away. The man said, "I've got a screwdriver." The appellant responded, "What the hell are you doing here?" or something to that effect. The appellant walked three or four steps to a pot plant stand, picked up a pot plant and threw it at the man. The pot plant hit the man around the chest and shoulder and knocked him down. The man then got up and ran away towards the front gate. The appellant did not see where he went. The appellant said he walked out the front to see if the man was still there and noticed his neighbour's gates were open and a window smashed. Then he decided to go and see where the man was. He said he got onto his pushbike and rode up around to the corner of Troughton Court and James Circuit. He stopped on the corner and looked up James Circuit. He couldn't see anyone. He said that at this point all of a sudden Mr Knight came over a fence on the corner with what he at first thought was a little bat. (He later took it home and discovered it to be an unscrewed table leg.) He said Mr Knight was swinging the table leg at him wildly and yelling and screaming about his brother and this being a family dispute. He said Mr Knight hit him on the side, in the ribs with the table leg. The appellant said he picked up his bike and used it as a shield. Mr Knight kept swinging and got him a couple of times on the forearms. The appellant then threw the bike at Mr

Knight which knocked the table leg out of his hands. There was a tussle or wrestle and the appellant ended up picking up the table leg. He told Mr Knight to get away and hit him on the hand with the table leg one handed. He said, "Get away, just get away mate." Mr Knight kept yelling, "This is a family dispute," and "My brother, my brother." Mr Knight was still coming at him so the appellant gave him one angry "whoosh" and he still didn't go down so he gave him one more. He said, "Maybe in anger I've hit him once – once more – three or four times tops is what I swung at him and probably hit him." He didn't want to hit him on the head or anything. He didn't want to hurt the bloke, so he hit him on the leg to stop Mr Knight coming at him. The last hit to the ankle put Mr Knight on the ground and that stopped him. The appellant swore at Mr Knight and called him an idiot and then rode away. About two houses away he came across Kallon and another bloke (presumably Mr Hartonga and Mr Carson). The men told him their cars had been broken into and they had a discussion about the appearance of the offender. The appellant said that sounded like the bloke he had on the ground. They walked up to the corner where the incident had happened, but Mr Knight had moved. He had gone three houses down to the corner of Lens Court and James Circuit and was lying on the ground there. The appellant asked Mr Hartonga to call the ambulance and police for him because he didn't have a phone. Asked if he had said anything to Mr Hartonga about hitting the man, the appellant said that after he'd been told that Mr Knight was the bloke who'd broken into the car, he threw the bit of

wood on the ground and said, “Youse hit him if you want.” The appellant said he started to ride home and felt really sick and overwhelmed by everything that had happened and vomited at the driveway. Initially he said he cleaned up the pot plant and dirt and went to bed. When asked whether he went out again after returning home, he said that he wanted to make sure the bloke was alright so he and Ms Mathers got in the car and drove round the corner to make sure the police and ambulance were there.

[5] The appellant said that the first time police asked him if he knew about a smashed window next door he did not connect the two events and said he did not. However, he admitted that when they came back and asked him about the assault, he lied. He said it was because he had had bad experiences with police in the past and wanted nothing to do with the matter. He admitted offering to pay Mr Hartunga $1500 to come to court and be on his side, but said he was not asking him to lie, rather to “represent” him.

[6] Under cross-examination the appellant remained firm about where he said the incident took place and denied having chased Mr Knight up Lens Court.

[7] Under cross-examination, Mr Knight denied going into the house next door to 18 Troughton Court, being confronted by the appellant, threatening him with a screwdriver or having a pot plant thrown at him, and he denied ambushing or hitting the appellant. It was put to him that he had attacked the appellant during a psychotic episode and he denied it. He said that he

was confused as to why he had gone out that evening, but not about what he had seen and heard.

[8] The appellant's partner, Ms Mathers made a statement that partly supported the appellant's version of events and which was admitted into evidence by consent. Ms Mathers was not required for cross-examination. In her statement she said that on the night in question the dogs were barking and carrying on; the appellant left the bedroom; that almost immediately after she had heard a male voice say, "I got a screwdriver," and that she then heard what sounded like a pot plant smashing.

[9] Mr Hartonga[3] gave evidence that he had heard a loud noise and he and his friend had gone out to investigate. They came across the appellant who told them, "There's a bloke on the side of the road. He was bashed. I bashed him." The appellant asked him to go inside and grab a phone to call an ambulance. He did so and then followed the appellant to where Mr Knight was lying on his side. Before that, he mentioned to the appellant that two cars had recently been broken into by some unknown person and the appellant, who was still on his bike, dropped his bat and told Mr Hartonga to finish off Mr Knight if he was the one who had been breaking into cars. (He described it as a rough handmade bat about two feet long.) In cross-examination he agreed that the words spoken by the appellant were more along the lines of, "You can hit him if you like", or "You can have a go at

[3] In the transcript of her Honour's reasons this witness is referred to as Mr Hartonga and in the trial transcript as Mr Hautonga. During submissions he appears to be referred to by counsel and the trial magistrate as Mr Shaw.

him too if you like," or "Well this is the guy that broke into your car, so you can do what you want."

[10] Mr Hartonga also gave evidence about the offer of $1500 to defend the appellant and about a subsequent conversation (denied by the appellant) in which he said the appellant told him, "I know people if you don't protect me."

[11] Another resident of the area, Ms Everly gave evidence that she woke up when she heard dogs barking next door and someone yelling. She went to her back door step and saw someone on a push bike and another person running in the direction as if they were leaving the street. She described them as two white men. After they were going out of the street she saw one of the people hitting or bashing the other on the ground. This occurred outside 3 or 4 Lens Circuit. She said the person doing the hitting looked like he had something in his hand and gestured by having two hands together over her right shoulder and making downward arm movements. She said the other person was just lying on the ground.

Appeal

[12] The appellant has appealed against both the conviction and the sentence. The grounds of appeal are as follows.

(a) The verdict was unsafe and unsatisfactory having regard to the evidence.

(b) The magistrate erred in her approach to the evidence of Jessica Mathers.

(c) The magistrate erred in imposing a non-parole sentence.

(d) The sentence was manifestly excessive.

[13] Under the first ground of appeal (the unsafe and unsatisfactory ground) the appellant also argued that the learned chief magistrate erred in her approach to the question of whether defensive conduct had been established; argued that her Honour had misconstrued the evidence of one witness, Ms Everly, and that her Honour had effectively reversed the onus of proof by observing that the table leg referred to in the appellant's evidence had not been produced. Counsel for the respondent contended that these ought to have been separate grounds of appeal, not subsumed under the unsafe and unsatisfactory ground, but nevertheless dealt with the appellant's arguments in relation to these matters.

[14] Dealing first with the alleged reversal of the onus of proof, counsel for the respondent submitted that although it is unclear from the transcript whether her Honour was suggesting it was for the appellant to produce the weapon or merely noting that it had not been produced, from the outset of her reasons for decision her Honour clearly articulated that it was for the prosecution to prove each element of the evidence beyond reasonable doubt and also to negative self-defence. I agree. In delivering judgment her Honour said:

> The defendant has been charged with aggravated assault in relation to an incident on 22 March 2012. Being a criminal prosecution the prosecution must prove each of the elements of the offence beyond reasonable doubt and if the court is not so satisfied as to any one element then the charge against him must be dismissed.

[15] Later in her reasons, in considering self-defence, her Honour said:

> In his version of the events the defendant raises the issue of self-defence. If the court finds that it's possible to accept the defendant's version of events prior to the striking then the issue of self-defence arises. If it does arise then the onus is on the prosecution to negative self-defence: that is prove that the defendant did not act in self-defence.

[16] The appellant contends that, despite this statement, her Honour did not give full consideration to whether the defence of defensive conduct was open. Counsel for the appellant contends that the error is manifested in the following statement by her Honour:

> I find that the prosecution has proved its version of events beyond reasonable doubt. As the issue of self-defence only arises in the defence version, self defence did not arise.

[17] Counsel for the respondent conceded that her Honour, "… poorly articulated her comments on defensive conduct" but contended that this did not amount to error. The respondent submitted that, after analysing all of the evidence presented by the prosecution and the defence, her Honour came to the conclusion that she did not accept the defendant's version of events. It was because of that finding of fact that she concluded that the issue of defensive conduct did not arise for her consideration. I agree. After a lengthy analysis of the evidence, including an analysis of the appellant's evidence

and his conduct and demeanour in giving evidence, her Honour concluded (immediately before the passage objected to by the appellant):

> In the circumstances I not only prefer the version of the prosecution, but I find that it is not possible to accept the version of the defendant.

[18] In *Burkhart v Bradley*[4] the Court of Criminal Appeal held that the test for defensive conduct in s 29 of the *Criminal Code* (NT) essentially enacts the common law in relation to self-defence[5] as expounded in *Zecevic v Director of Public Prosecutions (Victoria)*[6] and *R v Hawes.*[7]

[19] According to those principles the question to be asked is whether the accused believed on reasonable grounds that it was necessary in self-defence to do what he did.[8] This is not a wholly objective test: it is the belief of the accused, based on circumstances as he perceived them to be, which must be reasonable.[9]

[20] If the Crown does not establish beyond reasonable doubt that the accused had a reasonable belief that it was necessary to do what he did in self-defence, then it is necessary to go on to consider the reasonableness of the response and, once again, the onus is on the Crown to prove beyond

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[4] [2013] NTCA 5
[5] *Ibid* at [23]
[6] (1987) 162 CLR 645
[7] (1994) 35 NSWLR 294
[8] *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645 per Wilson, Dawson and Toohey JJ (with whom Mason CJ agreed) at p 661
[9] *R v Hawes* (1994) 35 NSWLR 294 per Hunt CJ at CL (with whom Simpson and Bruce JJ agreed) at p 306

reasonable doubt that the response was not reasonable in the circumstances reasonably perceived by the accused.

[21] Counsel for the appellant contended that because the appellant's evidence (in part supported by the evidence of Ms Mathers) was to the effect that he entertained the requisite belief, it was an error of law for her Honour not to go on to consider the reasonableness of the response, applying in that process the correct burden and standard of proof.

[22] I do not agree. In rejecting the appellant's evidence, and accepting the evidence of Mr Knight, her Honour effectively found that the Crown had negated the first requirement for the defence of self-defence to be made out, namely the existence of the relevant belief in the mind of the accused. It was not therefore necessary for her to go on to consider the second requirement - the reasonableness of the response. It is not necessary for the Crown to negative both requirements.[10]

[23] Counsel for the appellant submitted that the learned chief magistrate had misconstrued the evidence of the witness Ms Everly. Just how her Honour is said to have misconstrued this evidence is not stated. In written submissions the appellant simply submitted that Ms Everly's evidence was not inconsistent with that given by the appellant and was only partially consistent with that given by Mr Knight.

[10] *Burkhart v Bradley* [2013] NTCA 5 at [23] and [24]

[24] I see nothing in her Honour's treatment of the evidence of Ms Everly to indicate error or to support the contention that the verdict was unsafe and unsatisfactory. The learned chief magistrate identified the key elements of Ms Everly's evidence as, "the fact that she saw two white men one on a push bike and another running out of the street" and that she saw "one of the people hitting or bashing the other on the ground in Lens Circuit". The appellant did not identify any error in her Honour's summary of Ms Everly's evidence or her identification of its key elements.

[25] Ms Everly did not identify the person on the ground or the person doing the hitting and her Honour did not say that she had. The only use her Honour made of Ms Everly's evidence was in assessing the reliability of the evidence of Mr Knight. In doing so her Honour said:

> So far as consistency with other witnesses is concerned Mr Knight is corroborated by Ms Everly in relation to the location at which the assault occurred and the fact that he was struck when he was on the ground. The location where Mr Knight was found by police is also consistent with the assault having occurred there, that is in Lens Court near the corner of James Circuit and in light of the seriousness of his injuries it is extremely unlikely for him to have been able to move himself there from another location.

[26] I see no error in this use of Ms Everly's evidence. In particular it contradicted the appellant's evidence about where the incident had taken place and his evidence that when he hit Mr Knight, Mr Knight was standing until he delivered the last blow to the ankle which made him fall down.

Principles

[27] In considering whether the guilty verdict should be set aside as unsafe and unsatisfactory, the question the court must ask itself is whether, upon the whole of the evidence, it was open to the jury (or in this case the trial magistrate)[11] to be satisfied beyond reasonable doubt that the accused was guilty.[12] If upon the whole of the evidence the trier of fact, acting reasonably, was bound to have a reasonable doubt, then the verdict of guilty must be set aside.

[28] In carrying out its role, the appeal court must make an independent assessment of the evidence. It is not sufficient simply to consider whether there was evidence to sustain a conviction, "for a verdict may be set aside as unsafe and unsatisfactory notwithstanding that there was, as a matter of law, evidence upon which the accused could have been convicted."[13]

[29] However, the court must keep in mind that the jury (or other trier of fact) is the body entrusted with the primary responsibility of determining guilt or innocence, and that the jury (or magistrate) has had the benefit of having seen and heard the witnesses.[14]

> An appellate court must itself consider the evidence in order to determine whether it was open to the jury to convict, but the

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[11] The same principles apply whether the appeal is against a jury verdict or a decision of a magistrate. See for example *Clark v Trenerry* [1999] NTSC 17 at [58]

[12] *Gipp v R* [1998] HCA 21; (1998) 194 CLR 106 per McHugh and Hayne JJ p 123 at [49] re-affirming the test laid down in *M v R* [1994] HCA 63; (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ p 493 at [7] and affirmed in *Jones v The Queen* [1997] HCA 56; (1997) 191 CLR 439; (1997) 72 ALJR 78; 149 ALR 598. See also *Arroyo v R* [2010] NTCCA 9 at [84] to [87]

[13] *Morris v R* (1987) 163 CLR 454 per Mason CJ at p 461

[14] *M v R* per Mason CJ, Deane, Dawson and Toohey JJ at [**7**]

> appellate court does not substitute its assessment of the significance and weight of the evidence for the assessment which the jury, properly appreciating its function, was entitled to make.[15]
>
> The appellate court's function is to make its own assessment of the evidence not for the purpose of concluding whether that court entertains a doubt about the guilt of the person convicted but for the purpose of determining whether the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused.[16]

[30] In my opinion, this ground of appeal cannot succeed. The appellant relied upon the fact that Mr Knight was a schizophrenic who had not taken his medication and was suffering from delusions at the time to submit that his evidence was intrinsically unreliable. However, as her Honour pointed out, his evidence was supported (and the appellant's evidence contradicted) in several important respects by the evidence of the independent witness, Ms Everly. She witnessed a man (who could only have been the appellant) on a bike and another man (who could only have been Mr Knight) running out of the street, and one of the people hitting or bashing the other on the ground in Lens Circuit. This is entirely consistent with the evidence of Mr Knight as to how and where the assault occurred and entirely inconsistent with the evidence of the appellant on those matters. Moreover, in assessing the appellant's credit, her Honour took into account, as she was entitled to do, certain inconsistencies in the appellant's evidence, the admitted fact that the appellant had lied to police about the incident, and his apparent attempts to secure favourable testimony from Mr Hartonga. In my view it cannot be

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15 *Carr v The Queen* [1988] HCA 47; (1988) 165 CLR 314 per Brennan J at 330-334, applied by Gaudron J in *Gipp v R* p 114 at [18]

16 *M v R* per Brennan J at [3] citing *Knight v The Queen* 26 [1992] HCA 56; (1992) 175 CLR 495

said that upon the whole of the evidence her Honour was bound to have a reasonable doubt as to the appellant's guilt.

[31] In his second ground of appeal against conviction, the appellant complains that the learned chief magistrate erred in her approach to the evidence of Ms Mathers. In dealing with Ms Mathers' evidence, her Honour said:

> Although the defendant's evidence is corroborated by Ms Mathers to the extent to which she heard a person in the house saying he had a screwdriver, Ms Mathers is not an independent witness because of her relationship at that time with the defendant. Although the prosecution did not require her for cross-examination, her evidence was nonetheless not scrutinised by cross-examination and for that reason I attach less weight to it. *[emphasis added]*

[32] The appellant complains that the last sentence manifests an error of principle and that, far from being accorded less weight, Ms Mathers' evidence should have been treated as uncontested and that, accordingly, unless it was inherently unreasonable or improbable, her Honour was bound to accept it. Counsel relied on *R v AWF*[17] for that contention. That decision of the Victorian Court of Appeal does not go so far as to establish that proposition of law. It was an appeal against sentence in a case in which the appellant had pleaded guilty to five counts of indecent assault and one count of an indecent act with a child under the age of 16. The sentencing judge had said that the evidence (in the form of a psychiatric report) that the history of the sexual abuse of the appellant as a child, and the claim that it contributed to or precipitated his offending conduct, was not "compelling";

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17 (2000) 2 VR 1

and also that, on the assumption which she made for sentencing purposes that such abuse had occurred, that it was not relevant to the sentencing exercise. The appeal was allowed. However, the closest that decision comes to supporting the proposition urged by the appellant is in the following remarks by Ormiston JA:

> [2] … The error of fact is carefully demonstrated by Chernov, J.A.[18] Not merely was there no challenge to the opinion of Professor Ball that there was an association between the appellant's having been personally abused and his tendency, borne out in fact, to abuse his own daughter and stepdaughters, but the appellant's own allegations of abuse were never controverted by counsel for the prosecution in the course of the plea. Upon the facts so accepted there would seem, on the balance of probabilities, to have been a connection between the appellant's unfortunate childhood and his later aberrant behaviour, at least according to the only evidence before the judge on that issue. It is therefore difficult to accept the judge's conclusion that the history of the personal abuse of the appellant and the claim that it contributed to or precipitated his offending conduct was not "compelling".

[33] It does not seem to me that this case provides any real support for the proposition contended for by counsel for the appellant. In *Fox v Percy*[19] the

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[18] Reliance on this case is complicated by the fact that Chernov J actually found that there had been no error of fact. At [25] and [26] his Honour said:

> … It was argued under ground 6 that her Honour erred in treating the appellant's childhood victimisation as irrelevant to the sentencing process and ground 7 alleged that her Honour erred in finding that the appellant had not established, on the balance of probabilities, that he had been sexually abused as a child.
>
> It is convenient, at the outset, to dispose of the submissions made in relation to ground 7. It was contended by Mr Langslow that her Honour made a finding that the appellant's alleged childhood abuse was not established. In my opinion, however, a fair reading of her Honour's sentencing remarks shows that she stopped short of making such a finding and merely expressed a reservation on the issue. In any event, it is not necessary to decide this point because her Honour assumed for sentencing purposes that the appellant was victimised during his childhood although she went on to say that this was not relevant to the appropriate sentencing disposition in this case.

[19] [2003] HCA 22; (2003) 214 CLR 118;

High Court considered the role of an appeal court in reviewing findings of fact by a trial judge and concluded:[20]

> Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect." *[references omitted]*

This conclusion is not directly relevant to the issue in the present case. However, in looking at the facts of the case before it,[21] their Honours[22] did not treat uncontested evidence as equivalent to agreed facts which must be accepted by the Court unless they were inherently unreasonable or improbable, as the appellant urged should be the case. Rather, evidence referred to as uncontested was treated as part of the mix – one of the matters before the trial judge (and the Court of Appeal) to be taken into account in reaching a decision.

[34] In this case, while it may have been an error for the learned chief magistrate to say that she gave **less** weight to Ms Mathers' evidence because she was not cross examined, I do not accept that, having found for good and adequately explained reasons that she accepted the evidence of Mr Knight and rejected that of the appellant, the learned magistrate was nevertheless bound to accept the evidence of Ms Mathers which was inconsistent with the

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20 at [25]
21 at [34] to [37]
22 Gleeson CJ, Gummow and Kirby JJ

evidence of Mr Knight. Ms Mathers' statement was part of the evidence, but no more, and her Honour was entitled, when considering the whole of the evidence, to reject it notwithstanding that Ms Mathers was not required for cross-examination and, in doing so, to take into account as she did, that Ms Mathers was not an independent witness, but the appellant's partner. To hold otherwise would be the equivalent of saying that a forensic decision by the prosecution to allow a statement to go into evidence would dictate the outcome of the trial regardless of the weight of the other evidence. It should also be noted that her Honour was in error in saying that the prosecution did not require Ms Mathers for cross-examination. Her statement was tendered in the Crown case, with the appellant's consent, presumably pursuant to the duty of the prosecutor to call all relevant witnesses favourable or unfavourable.[23] The Crown had no right to cross-examine her and the appellant had no interest in doing so, her evidence being favourable to him. In those circumstances, it would be absurd to say that the trial magistrate was bound to accept her evidence regardless of the other evidence in the case.

[35] The appeal against conviction is dismissed.

The appeal against sentence

[36] The appellant complains that the learned chief magistrate erred in imposing a non-parole period and that the sentence was manifestly excessive. The

[23] The prosecutor explained to the trial magistrate that the statement was tendered rather than Ms Mathers being called to give evidence because she was unable to attend court due to a medical condition.

principles to be applied in appeals of this nature are well known. The trial judge's exercise of the sentencing discretion is not to be disturbed on appeal unless error has been shown in the exercise of the discretion. The presumption is that there is no error. The appeal court will interfere only if it is shown that the sentencing judge acted on a wrong principle. The error may appear in what the sentencing judge has said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error.[24]

[37] The appellant submits that her Honour was wrong to find that there was no element of provocation or defensive conduct and this finding was inconsistent with her Honour's characterisation of the offence as an act of vigilantism. I disagree. In my view her Honour was perfectly correct in rejecting the submission that Mr Knight's having broken into the house next door amounted to some form of provocation towards the appellant, and perfectly correct to characterise the brutal attack by the appellant on Mr Knight as an act of vigilantism. Her Honour was also correct in taking into account the maximum penalty prescribed by the legislation (imprisonment for five years) and not the jurisdictional limit of the court (imprisonment for two years)[25] and in my view she was correct in viewing the offence as "an example of an offence that falls towards the more serious end of offences of that kind".

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[24] *R v Tait and Bartley* (1979) 24 ALR 473 at 476 and *Salmon v Chute* (1994) 94 NTR 1 at 24.

[25] *Wheeler v Eaton* [2012] NTSC 80 at [17] referencing *Taylor v Malagorski* [2011] NTSC 98 at [24] and *C v Gokel* [1999] NTSC 93 at [14]-[15]

[38] Having regard to the objective seriousness of the offending, the appellant's lack of remorse, and the need for denunciation and general deterrence in relation to acts of vigilantism I do not regard the head sentence imposed as manifestly excessive.

[39] However, when combined with the fixing of a non-parole period which required the appellant to serve eight months in prison, I do think the sentence was manifestly excessive when considered in light of the appellant's personal circumstances. Moreover, although her Honour gave coherent reasons for rejecting the defence submission that a home detention order would be an appropriate disposition, it is difficult to understand her Honour's reasons for fixing a non-parole period rather than a suspended or partially suspended sentence. In relation to that she said:

> I will fix a non-parole period rather than a period of suspension because it is difficult for me today in the absence of any other form of reports or anything other than your lack of remorse to assess your prospects of rehabilitate, and I also add the absence of a prior history.

[40] First, it seems to me that her Honour was in error in saying that she had no material other than the appellant's lack of remorse on which to base an assessment of his prospects of rehabilitation. She had the knowledge of his lack of prior convictions for violent offences, and of the fact that he was a family man with steady employment. She also had before her a number of references which spoke of him as a good neighbour and a good parent. Her Honour herself characterised the offending as "an aberration". All of these

matters were factors pointing to relatively favourable prospects of rehabilitation. Moreover, if her Honour considered she did not have sufficient material in the form of reports to form an adequate assessment, the appropriate course would have been to order a supervision report or a presentence report, not to simply impose a non-parole period as the default option.

[41] It is hard to know what to make of the remark, "and I also add the absence of a prior history". If her Honour meant an absence of information about the appellant's background, it seems to me that the remark is inaccurate. Defence counsel provided her Honour with at least the usual amount of background information concerning the appellant's upbringing, education, personal and family relationships and work history. If she was referring to his prior criminal history, that too, it seems to me is incorrect. She did have the appellant's prior criminal history before her and noted that it consisted of relatively minor matters and no prior violent offences.

[42] It seems to me therefore that her Honour made errors of principle in fixing a non-parole period, and also that that resulted in a sentence which was manifestly excessive in the circumstances. The appeal against sentence is allowed. I intend resentencing the appellant and will fix a date for sentencing submissions.