Jack v Eaton [2003] NTSC 61

PARTIES:	JACK, Manic
	v
	EATON, Donald John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 63 of 2002
DELIVERED:	30 May 2003
HEARING DATES:	9 May 2003
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL
Justices appeal – appeal against sentence – manifestly excessive – insufficient weight to early plea and other mitigatory circumstances –jurisdictional limit.

Criminal Code 1999 (NT), s 188(2)

Najpurki v Luker (1993) 117 FLR 148 at 152; *Wurramara* (1999) NTSCCA 45 par 26, referred.
Kelly v The Queen (2000) 10 NTLR 39; *Veen v The Queen* (1988) 164 CLR 465 at 477; *Jack v Dixon* [2003] NTSC 58, 30 May 2003, applied.

REPRESENTATION:

Counsel:

Appellant:	D Bamber
Respondent:	C Roberts

Solicitors:

Appellant:	CAALAS
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	mar0326
Number of pages:	9

mar0326

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

Jack v Eaton [2003] NTSC 61
No. JA 63 of 2002

BETWEEN:

MANIC JACK
Appellant

AND:

DONALD JOHN EATON
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 30 May 2003)

[1] Appeal against sentence. The appellant was sentenced to a period of two years imprisonment by the Court of Summary Jurisdiction sitting at Alice Springs on 29 October 2002 for that on 19 October 2002 he unlawfully assaulted Susan Jugadai with circumstances of aggravation, namely that she suffered bodily harm, she was a female and he a male and that she was threatened with an offensive weapon, namely a steel jack handle (Criminal Code 1999 (NT) s 188(2)). The learned Chief Magistrate fixed a period of 18 months prior to which he would not be eligible to be released on parole.

[2] The admitted facts are that the appellant had an argument with the victim about her going for alcohol so he could continue drinking. She refused, and

the appellant picked up a solid steel jack handle, 52 centimetres in length, in his right hand and struck her once to the left side of her head causing a deep laceration. He then struck her to the base of the neck and she fell to the ground. He hit her with the handle to the left forearm three times and once under her arm near her left breast while she endeavoured to protect her upper body. One of the blows connected with her right hand, splitting the webbing between her thumb and index finger. She was also hit once to the lower left leg near the ankle causing a laceration. The appellant then walked away leaving the victim and she was assisted to the police station.

[3] The appellant was arrested by police shortly after they had taken the victim to the Health Clinic. When interviewed the appellant provided a similar account of events as to those alleged against him, stating that he had hit the victim on the head, once successfully, and twice on the leg. He told police he hit the victim on the leg because he wanted her to agree with him over going for grog and on the leg after she had fallen to the ground to prevent her from running away. He was charged and remanded in custody and remained there until dealt with by the court on 29 October 2002.

[4] The victim suffered no broken bones but severe pain, swelling, bruising and significant blood loss as a result of the injuries. The wound to the left lower leg was deep and was sutured at the clinic. There was a small puncture wound on her lower arm and two areas of swelling on her upper arm. On the left side of her head there was a long deep laceration which was sutured at

the clinic. Under the arm there was a deep wound which was sutured at the hospital and there was an abrasion to her upper back just below the neck.

[5] When the facts were admitted his Worship found the charge proved and then ascertained from the prosecutor and counsel, then appearing for the appellant, that they were each "happy for the matter to be dealt with" in the Court of Summary Jurisdiction. The maximum penalty for the offence is five years imprisonment, but there is a jurisdictional limit in the Court of Summary Jurisdiction of two years imprisonment.

[6] Counsel for the appellant explained to his Worship that the appellant was not from the Northern Territory but Fitzroy Crossing where he normally resided. He had been married to the victim since 1992. She came from Papunya and due to a death in the family the appellant had gone to Kintore, in the Northern Territory, with the victim in connection with that death and they then travelled to Papunya to visit the victim's family. They had lived there for about two weeks prior to this incident.

[7] His Worship was told that the appellant found it stressful living at Papunya because he had no family there and there were times when the victim would leave with members of her family, leaving him on his own which made him upset. On the day of the offence he had been drinking heavily, was feeling isolated and upset which led to an argument with her over alcohol and on the spur of the moment he picked up the jack handle and hit her with it "a few times". It was pointed out to his Worship that the attack ceased prior to any

intervention. His cooperation with police was referred to, as was the early plea of guilty.

[8] The appellant has a record of prior criminal offending, particularly at Fitzroy Crossing, commencing in 1987 for disorderly conduct and assault occasioning bodily harm, assault occasioning bodily harm in 1988, again in 1992, assault in the same year, assault occasioning bodily harm later that year, again in 1997 and two counts of common assault in 2001. Interspersed with these acts of violence have been sundry offences, such as disorderly behaviour, creating a disturbance, traffic matters, including driving under the influence on two occasions. In 1999 he was dealt with in the Court of Summary Jurisdiction in the Northern Territory for driving a motor vehicle whilst unlicensed and with a blood alcohol level in excess of .15 (.299). Without details of the assaults, the subject of the matters in Western Australia, his Worship found it difficult to obtain a perspective on what was involved, but noted that apparently the penalties in that State were not anything like that which would be regarded as appropriate in the Territory.

[9] As to the appellant's personal circumstances, his Worship was informed that he was 33 years of age, was born in Derby and grew up in Fitzroy Crossing where he had a disrupted life as a child. He was educated to year 10 and obtained work as a labourer assisting with the building of houses. He was blind in one eye caused by a kick to the head which had fractured his skull and was also said to have diabetes and a kidney problem. He had serious health problems contributed to by heavy drinking. He informed counsel that

he would really like to try and stop drinking, but that was very hard to do when everyone in the family was drinking.

[10] It is clear that it was anticipated that the appellant would be sentenced to a term of actual imprisonment in that his Worship was addressed as to the difficulties which the appellant would face in gaol, being a man from Western Australia and might confront some language problems. It was not suggested he was not reasonably conversant in the English language. He had no family near him in Alice Springs. The prosecutor responded by submitting that the assault was such as to justify a sentence near the maximum which his Worship had jurisdiction to impose. The continuation of the assault was noted and a brief mention made of the need for general deterrence.

[11] His Worship categorised the assault in the course of his sentencing remarks as being "a vicious, unprovoked, nasty, cowardly attack upon a person weaker than" the appellant and mentioned the attitude of Northern Territory courts in relation to this type of offending.

[12] In the course of his remarks his Worship referred to what I had to say regarding the concerns of this Court in relation to those who take up a weapon with a view to assaulting someone with whom they have a grievance in *Najpurki v Luker* (1993) 117 FLR 148 at 152 and the decision of the Court of Criminal Appeal in *Wurramara* (1999) 105 A Crim R 512. At par 26 the Court said:

> "The courts have been concerned to send what has been described as "the correct message" to all concerned, that is that Aboriginal women, children and the weak will be protected against personal violence insofar as it is within the power of the court to do so."

Reference was then made at par 44 to that Court's opinion that the objective circumstances of offences of unlawfully causing grievous harm made a sentence of at least three years imprisonment appropriate for each of the matters then before the court:

> "Such a term of imprisonment should generally be the starting point where there is 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 the community, and where an offensive weapon is used to achieve that end."

Those remarks were in the context of an appeal against sentence for the crime of unlawfully causing grievous harm for which the maximum penalty is 14 years imprisonment. It does not provide guidance in respect of sentences under s 188(2).

[13] Having referred to that observation in the Court of Criminal Appeal, his Worship went on to say that he had given serious consideration to referring the matter to the Supreme Court, no doubt a reference to the maximum penalty for the offence, but noted the jurisdictional limit when dealt with summarily. His Worship expressed himself satisfied that because of the early plea of guilty, the appellant came from another jurisdiction where such matters might be dealt with a little more leniently and by the other matters

raised in mitigation that he could deal with the matter, and looking at the maximum penalty of five years imposed the sentence the subject of appeal.

[14] The amended grounds of appeal are that the learned Chief Magistrate erred in giving insufficient weight to the defendant's early plea of guilty; that he erred in relation to the sentencing jurisdiction and that the sentence was manifestly excessive.

[15] It can not be doubted that the appellant was entitled to a significant discount from the sentence on account of the plea of guilty and cooperation with authorities (*Kelly v The Queen* (2000) 10 NTLR 39). His Worship indicated that he took the plea into account, but did not quantify it. In all the circumstances I think it is open to infer that he would have had in mind a benefit to the appellant of the order of 25 percent of the sentence which would otherwise have been imposed. If that be so, then the starting point in his Worship's mind in considering the appropriate sentence for the appellant must have been something in excess of 32 months to take account of the discount for the plea plus other mitigating factors.

[16] The next ground of appeal raises an issue which I have dealt with in the case of *Jack v Dixon* [2003] NTSC 58 delivered today. It is not an error for a sentencing Magistrate to note the maximum penalty for the offence is five years imprisonment and, if it is considered that the starting point for the sentencing process is in excess of two years, nevertheless to sentence within

the jurisdictional limit of two years after making the appropriate allowances for mitigatory circumstances.

[17] The question now is whether the sentence was manifestly excessive. It must be said at once that the offence was a serious one of its type. The attack upon the victim was prolonged, the appellant had taken up a weapon to inflict injury upon her, it was capable of producing injuries far more serious than those in fact suffered by her and those injuries were of themselves significant. I would not resile from his Worship's description, and as the appellant's antecedent criminal history shows this was not an uncharacteristic aberration. He has manifested in the commission of this offence a continuing attitude of disobedience of the law and thus retribution, deterrence and protection of society all indicate that a more severe penalty is warranted (*Veen v The Queen* (1988) 164 CLR 465 at 477).

[18] In my view the circumstances of the offence together with those considerations could justify a commencing point well in excess of two years imprisonment. However, there were a number of mitigatory circumstances. The voluntary cessation of the assault, cooperation with police, early plea of guilty and, as his Worship accepted, that the appellant would do his time in gaol harder than might others. As a consequence I am led to the opinion that there was reason for regarding the discretion confided in his Worship as having been improperly exercised. It is not possible to demonstrate any definite or specific error beyond saying that the mitigatory circumstances should have been given significant weight and if that were so then the

sentence ultimately imposed must be less than two years. The sentence imposed appears unreasonable. I say that notwithstanding the need for personal and general deterrence.

[19] The sentence imposed by the learned Chief Magistrate is quashed; in lieu thereof the appellant is sentenced to one year and six months imprisonment. I fix the period during which he will not be eligible to be released on parole at nine months.
