Wesley v The Queen [2005] NTCCA 7

PARTIES:	WESLEY, Walter Frederick
	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 16 of 2004 (20402392)
DELIVERED:	27 April 2005
HEARING DATES:	27 April 2005
JUDGMENT OF:	MARTIN (BR) CJ, RILEY & SOUTHWOOD JJ

CATCHWORDS:

CRIMINAL LAW
Appeal - appeal against sentence – assault – family circumstances not amounting to a mitigating factor of significance – appellant must demonstrate that sentence is manifestly excessive – sentence not manifestly excessive – appeal dismissed.

Wurramara (1999) 105 A Crim R 512 at 523, applied.

REPRESENTATION:

Counsel:

Appellant:	M Carter
Respondent:	D Lewis

Solicitors:

Appellant:	KRALAS
Respondent:	DPP

Judgment category classification:	C
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Wesley v The Queen [2005] NTCCA 7
No. CA 16 of 2004 (20402392)

BETWEEN:

WALTER FREDERICK WESLEY
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, RILEY AND SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 27 April 2005)

Martin (BR) CJ:

[1] This is an appeal by leave against a sentence of three years and six months' imprisonment imposed following the appellant's plea of guilty to the offence of unlawfully causing grievous bodily harm contrary to s 181 of the Criminal Code. A non parole period of 21 months was fixed and the appeal encompasses that period.

[2] The offence occurred on 28 January 2004. At that time the appellant was aged 25 years. He and the victim had lived together in a de facto relationship for approximately seven years. Two sons were born of the

relationship on 3 July 1997 and 14 October 2003. A third son born on 27 July 2002 died on 3 October 2002. The relationship ended in January 2004.

[3] On 9 January 2004 the victim obtained a domestic violence order against the appellant. No evidence or material was put before the learned sentencing Judge as to the basis on which the order was sought and made. No inference could be drawn in that regard.

[4] The order was in force for a period of 12 months and was served upon the appellant on 9 January 2004. In substance, the order prohibited the appellant from approaching the victim directly or indirectly, except indirectly through Family and Community Services, and from approaching or remaining at any place where the victim was living or staying. In addition, the order prohibited the appellant from assaulting or threatening the victim and from acting in an offensive or a provocative manner towards her.

[5] During the late afternoon of 28 January 2004, as the victim was catching a taxi in Katherine the appellant approached her and got into the taxi with her. Counsel for the appellant advised the sentencing Judge that the appellant and the victim spoke about getting back together. The victim told the appellant she was having a hard time without him and would go to the court during the following day to get the domestic violence order lifted.

[6] The appellant and the victim travelled to the victim's home together in the taxi. On the way the taxi stopped while the appellant purchased some beer.

At the victim's home the appellant and the victim consumed beer together. At around midnight an argument developed between the appellant and the victim about the victim leaving the house to obtain cigarettes. The victim walked out of the house and the appellant followed.

[7] The agreed facts of the assault which then occurred are as follows:

> "The appellant ran up to the victim and punched her to the head causing her to fall to the ground. As the victim lay on the ground the appellant continued to punch her around the neck and head area numerous times. She pleaded with the appellant to stop, but he continued the assault upon her. Eventually the appellant stopped punching the victim and she picked herself up off the ground and walked back into the house."

[8] Police were called by neighbours and the victim ran to them in an agitated state screaming about what the appellant had done. One of the officers approached the appellant and asked him what had happened, to which the appellant replied:

> "I've got that DVO. She was getting cheeky so I slapped her a bit in the face."

[9] The appellant was arrested. During the course of formal interview which occurred some hours later the appellant made partial admissions to the assault. When asked his reasons for breaching the domestic violence order, he responded that the victim had forced him to go back to her and was saying silly things like, "I'll kill the kids". When asked his reasons for assaulting the victim, the appellant responded that the victim had lost her temper first and he "wanted to calm her down".

[10] As a consequence of the assault, the victim sustained fractures to both sides of her jaw which caused a displacement of her teeth. She was initially taken to the Katherine Hospital in severe pain. On 30 January 2004 the victim was conveyed to the Royal Darwin Hospital where the fractures were treated surgically and screws were put in place to hold the jaw in position. The victim was hospitalised for five days and experienced considerable pain, bruising and swelling. In her victim impact statement the victim states that she has a numb and sometimes tingly sensation in her bottom lip and at times feels like she is dribbling. She also states that at times she feels lost and distressed.

[11] In addition to the offence to which the appellant pleaded guilty, the appellant asked the sentencing Judge to take into account an offence of unlawful entry into a dwelling house with intent to commit a simple offence, namely offensive behaviour. That offence was committed during the evening of 26 December 2003 when the appellant and co-offenders walked to a house in Katherine and called for an occupant to come out and fight. The appellant and his co-offenders entered the house and demanded to know the whereabouts of the person they had challenged to come out of the house. Two female occupants asked the appellant and his co-offenders to leave, but they refused until a co-offender had searched the house. The offence involved the potential for significant violence.

[12] The appellant experienced a difficult childhood. Notwithstanding those difficulties, the sentencing Judge noticed that the appellant had held a

variety of jobs and acquired skills that would make him employable in the future.

[13] Unfortunately the appellant has a record of prior convictions dating from February 1994. While many of the offences can be described as relatively minor, on 3 February 1994 the appellant was convicted of assaulting a defenceless person for which a suspended period of four months' detention was imposed. In August 1995 the appellant was convicted of three counts of stealing and four counts of unlawful entry. On 16 August 1999 the appellant was convicted of assaulting a member of the police force and a suspended sentence of three months' imprisonment was imposed. The appellant committed a further offence of assaulting a member of the police force on 18 April 2002. He was convicted of that offence on 27 June 2002 and a sentence of six months' imprisonment was imposed to be served cumulatively upon sentences imposed for other offences. That sentence was suspended on home detention conditions which the appellant completed. Counsel conceded that there was a 'flavour of difficulty with alcohol' apparent in the appellant's record of prior offending.

[14] In substance, counsel for the appellant argued that the sentence was manifestly excessive. In helpful and thorough submissions the emphasis was placed upon the appellant's relative youth, deprived background, admirably strong record of employment, dedication to his own training, plea of guilty and remorse. In addition, counsel pointed out that the offence occurred spontaneously at a time when the appellant's judgment was

impaired by alcohol and in the context of a heated argument. No weapon was used. Although in breach of the domestic violence order, that breach was condoned by the victim and the appellant believed that the victim would have the order set aside the following day.

[15] Counsel for the appellant also emphasised that the appellant was experiencing ongoing emotional difficulties following the death of his son in October 2002 in circumstances known as Sudden Infant's Death Syndrome, which in turn led to a period of heavy drinking. In addition, while remanded in custody, the appellant had experienced great stress and distress as a consequence of the circumstances of his 7-year old son who had been found to be a child in need of care, which stress would continue for the period of incarceration. The circumstances of the appellant's family were not, however, such that they could amount to a mitigating factor of significance.

[16] Finally, counsel pointed out that given the appellant's work history, skills and incentive, coupled with strong family support which would serve him well upon his release from prison, the appellant had good prospects of successful rehabilitation.

[17] There is no error apparent in the remarks and approach of the sentencing Judge. Her Honour specifically referred to all matters relevant to the imposition of sentence and the fixing of the non-parole period. In particular, her Honour recognised the matters of mitigation which were put to her and to this Court. She specifically found that the appellant has

prospects for rehabilitation and family support. Her Honour took into account the plea of guilty at the first reasonable opportunity together with the appellant's remorse.

[18] In these circumstances, in order to succeed with the appeal the appellant must demonstrate that the sentence is manifestly excessive, thereby giving rise to an inference of error by the sentencing Judge. Reference was made by counsel to a number of sentences for similar crimes which were less than the sentence imposed upon the appellant. As was pointed out during submissions, however, in other similar matters longer sentences have been imposed and, as sentencing courts have repeatedly observed, there is no tariff for the crime committed by the appellant. Each case must be assessed according to the individual circumstances of the offence and the offender.

[19] As this Court observed in the context of a Crown appeal in *Wurramara* (1999) 105 A Crim R 512 at 523, this Court 'must evaluate the permissible range of sentence in the light of all the admissible considerations affecting the case in hand and drawing upon its own accumulated knowledge and experience.'

[20] The learned sentencing Judge correctly categorized the appellant's offending as a vicious and sustained assault resulting in severe injury. In substance, the appellant king-hit the victim from behind and continued his attack notwithstanding that the victim was lying on the ground and pleading with the appellant to stop. The crime was unprovoked and occurred against the

background of the domestic violence order. In addition, the sentencing Judge was required to take into account a serious offence of aggravated unlawful entry, the maximum penalty for which was two years' imprisonment.

[21] The appellant was not entitled to the benefit of prior good character. Both specific and general deterrence were significant features in the exercise of the sentencing discretion. This Court has repeatedly emphasised that substantial sentences of imprisonment will be imposed on offenders who in drunken rages commit serious assaults upon vulnerable victims such as women and children.

[22] The sentence of three years and six months' imprisonment is undoubtedly a heavy sentence. If the sentencing Judge allowed a reduction of the order of 20 to 25% for the early plea of guilty, the starting point for her Honour's sentence would have been of the order of four and a half years or a little higher.

[23] Against the background of the maximum penalty of fourteen years, the gravity of the appellant's offending and the offence taken into account, notwithstanding the matters of mitigation to which I have referred, in my opinion, while the sentence is at the top of the proper range of the sentencing discretion, it cannot be said that that sentence was outside that range. Similarly, it cannot be said that the non-parole was outside the proper range of the sentencing discretion.

[24] In my view, the appeal should be dismissed.

Riley J:

[25] I agree and I have nothing to add.

Southwood J:

[26] I concur with the reasons of his Honour, the Chief Justice.
