Wesley v The Queen [2014] NTCCA 17

PARTIES:	WESLEY, Teddy 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 6 of 2014 (21346451)
DELIVERED:	17 October 2014
HEARING DATES:	25 September 2014
JUDGMENT OF:	Riley CJ, Kelly and Blokland JJ
APPEALED FROM:	Hiley J

CATCHWORDS:

CRIMINAL LAW – Sentencing – Relevant sentencing factors – Rehabilitation – Sentencing Judge did not fail to accord proper weight to the appellant's prospects of rehabilitation.

CRIMINAL LAW – Sentencing – Relevant sentencing factors – Rehabilitation – Failure to order a pre-sentence report – No failure where the necessary information was before the Court in a psychiatric report.

CRIMINAL LAW – Sentencing – Co-offenders – Principal of parity – Similar sentences imposed – No disparity in sentences.

CRIMINAL LAW – Sentencing – Appeal against sentence – Manifest excess – Non-parole period – Juvenile offenders – No minimum non-parole period – Non-parole period manifestly excessive –Appellant resentenced – Non-parole period reduced from two years and six months to 18 months.

Youth Justice Act 2005 (NT) ss 69, 70.
Sentencing Act 1995 (NT).

R v Gurruwiwi (2008) 23 NTLR 68, applied.
R v Liddy [2005] NTCCA 4, referred to.

REPRESENTATION:

Counsel:

Appellant:	J Tippett QC
Respondent:	P Usher

Solicitors:

Appellant:	Maley and Burrows
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	18

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

Wesley v The Queen [2014] NTCCA 17
No CA 6 of 2014 (21346451)

BETWEEN:

TEDDY WESLEY
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, KELLY AND BLOKLAND JJ

REASONS FOR JUDGMENT

(Delivered 17 October 2014)

THE COURT:

[1] On 25 September 2014 the Court allowed the appeal of the appellant to a limited extent and resentenced him accordingly. These are the reasons for doing so.

The offending

[2] The appellant pleaded guilty in the Supreme Court to 10 charges arising out of two separate incidents which occurred on 17 and 18 October 2013. The offending consisted of assaults upon nine separate victims whilst the appellant was in company with other people. At the time of the offending the appellant was aged 15 years and 10 months. He was sentenced to

imprisonment for a period of five years with a non-parole period of two years and six months. He appealed against that sentence on a range of grounds.

[3] The offending conduct commenced at about 8:30 pm on 17 October 2013 with what was described as the first incident. The appellant and two co-offenders were driving along Trower Road in Casuarina when they observed a cousin of the appellant, Jessica Hewitt, walking with three young men, Jake Watterston, Jeremy Dux and Kingsley Martin. The young men were walking her home at her request. The driver, Robert Wesley (a cousin of the appellant), stopped the vehicle near the four people and yelled out, “What are you doing with my cousin? What are you doing? Wait there you cunts”.

[4] The driver parked the vehicle and he and the appellant ran towards the group. The two initially approached Mr Dux in an aggressive manner and Robert Wesley threw several punches at him striking him to the arm and the head. The appellant pleaded guilty to having unlawfully assaulted Mr Dux on the basis of common purpose. That is count 2 on the indictment.

[5] Robert Wesley then punched Jake Watterston at least six times to the face. He grabbed Mr Watterston, tripped him, and kicked him to the face whilst he was on the ground. Mr Watterston managed to get back to his feet and the appellant then grabbed him and held him and punched him another four times to the face. He also “kneed him” but the agreed facts do not state where. At the same time, Robert Wesley kicked Mr Watterston in the middle

of the back. Both young men then punched him around the head. Mr Watterston was dazed and bleeding and, again, fell to the ground. The appellant then punched him and repeatedly kicked him about the head and body while he was attempting to roll away. The appellant stood over Mr Watterston and kicked him two more times and then stomped on his head. Those actions constituted count 1 on the indictment.

[6] Count 3 occurred when the victim, Phillip Cutting, stopped his car at the scene. The appellant approached Mr Cutting and said, “What are you looking at?” He then attempted to punch Mr Cutting through the open portion of his car window. The appellant said, “I will stab you” and pulled out a Swiss Army knife which he thrust at Mr Cutting.

[7] When the appellant thrust the knife towards Mr Cutting, the blade struck the window causing the window to be knocked off its runners and leaving a gouge mark. Count 4, to which the appellant pleaded guilty, was an offence of causing damage to property.

[8] Another motorist, a schoolteacher, witnessed the events and stopped to assist. Robert Wesley approached him and adopted a fighting stance saying, “Who the fuck are you? I am going to kill you”. The appellant ran up to the teacher and attempted to punch him. He threatened the teacher that he would kill him if he did not put his phone away.

[9] Shortly thereafter, two off duty officers of the Australian Federal Police arrived. They identified themselves as off duty police officers. The appellant

threw the Swiss Army knife, which was closed, in the direction of one officer, Aaron Benjamin Coleman. The officer feared the knife would hit him. This conduct constituted count 5 on the indictment.

[10] As a consequence of the assault, Mr Watterston suffered a dislocated wrist, dental injuries, tinnitus, headaches, cuts and bruises. He was hospitalised but later discharged on the same day. He has substantial memory loss and is unable to recall the names of some of his friends and family members. He feels unsafe around people, is reluctant to leave his home, and feels "useless" because he has to relearn things. He suffered significant financial loss.

[11] Mr Dux suffered pain to his arm. He attended at the hospital but did not require treatment.

[12] Mr Cutting provided a victim impact statement in which he described himself as being "shook up" thinking he may have died when threatened with the knife.

[13] The second incident occurred some hours later on 18 October 2013 at the Beachfront Hotel in Nightcliff. The appellant was in a group of about eight people and during the course of the evening consumed alcohol and became intoxicated. A female member of the group was directed to leave the premises because she was intoxicated and she and others began leaving. However the appellant and some members of the group became abusive and antagonistic towards the security officers. As the group was leaving, Robert

Wesley dropped his shoulder into the chest of a security officer, Mr Vos, knocking him backwards. Mr Vos and a fellow security officer Mr Kovic were then surrounded in an intimidating manner by members of the group, including the appellant. Jonathan Wesley (a brother of the appellant) sprayed beer over the two security officers. The appellant threw a bottle at Mr Vos striking him on the head. He then picked up a large pot plant and threw it at Mr Vos and Mr Kovic showering them with dirt. The security officers managed to retreat into the hotel and call for help. Two members of the appellant's group forced their way into the hotel and confronted Mr Vos and Mr Kovic before leaving the premises. Count 9 referred to the assault upon Mr Vos.

[14] Thereafter, there was a confrontation between members of both groups of people including the two security officers.

[15] Count 10 related to an assault upon Mr Kovic. The appellant had already thrown the pot plant at Mr Kovic and then, during the later confrontation, obtained a solid metal ladder approximately 8 feet in length which he used as a weapon. He ran towards members of the group swinging the ladder with force in a downward motion into the group. Mr Kovic was struck on the top of his head. Another patron, Dylan Kriebke, was also struck on the top of his head with the ladder.

[16] Dylan Kriebke and Reeves Miller moved away from the group and as they did so the appellant and another followed throwing punches at Mr Kriebke

causing him to fall to the ground. Mr Miller sought to intervene to assist his friend but was attacked by two members of the group, Robert Wesley and Jonathan Wesley. He received “uppercut” punches to the face from both men. Count 7 related to the unlawful assault upon Mr Miller in relation to which the appellant acknowledged he was guilty by reason of common purpose.

[17] A female, Stephanie Guan, went to help Mr Miller and she was assaulted by Robert Wesley who grabbed her by the throat, dragged her to the ground and punched her to the chest. Robert Wesley then joined in the attack on Mr Kriebke and when Ms Guan again intervened she received numerous punches about the head from Jonathan Wesley. Count 8 related to the unlawful assault upon Ms Guan in relation to which the appellant acknowledged he was guilty by reason of common purpose.

[18] In relation to count 6, the appellant pleaded guilty to having unlawfully caused serious harm to Dylan Kriebke. Mr Kriebke was punched unconscious by Robert Wesley and then the appellant struck him four times with the ladder while he lay on the ground. Robert Wesley and Jonathan Wesley then jumped repeatedly upon his head and body whilst he was on the ground.

[19] Mr Kriebke sustained injuries to his head and torso. Those injuries included a laceration to the occipital area of his head, a large scalp haematoma near his ear, a left temporo-parietal contusion, bleeding from both ears, loss of

sensation to the right side of his face and hearing loss consequent upon his injuries. He continues to suffer partial hearing loss in his left ear. He suffered extremely painful headaches for two weeks. He had impaired vision for at least a month. He cannot remember the events of the night. The attack made him emotional. It was also a distressing event for his "entire family".

[20] Mr Miller received four stitches to a laceration at the back of his head, bruising to his face, two black eyes and "pain around the head".

[21] Ms Guan suffered grazes on her right thigh, right knee and left ankle and general bruising and pain to the chest. She subsequently suffered anxiety attacks and, for a time, was too scared to go out.

[22] Mr Vos suffered a lump on the back of his right ear and some concussion. Mr Kovic suffered "pain to the head".

[23] In summary, the offences to which the appellant pleaded guilty and the resulting sentences were as follows:

(a) Count 1: aggravated assault causing harm to Mr Watterston when Mr Watterston was unable to effectually defend himself for which the maximum penalty is imprisonment for five years. The appellant was sentenced to imprisonment for two years and six months.

(b) Count 2: aggravated assault causing harm to Mr Dux for which the maximum penalty is imprisonment for five years. The appellant was sentenced to imprisonment for six months.

(c) Count 3: aggravated assault upon Mr Cutting, who was threatened with an offensive weapon, for which the maximum penalty is imprisonment for five years. The appellant was sentenced to imprisonment for nine months.

(d) Count 4: causing damage to the property of Mr Cutting for which the maximum penalty is imprisonment for 14 years. The appellant was sentenced to imprisonment for three months.

(e) Count 5: assault upon Mr Coleman, a policeman acting in the execution of his duty, for which the maximum penalty is imprisonment for five years. The appellant was sentenced to imprisonment for six months.

(f) Count 6: unlawfully causing serious harm to Mr Kriebke for which the maximum penalty is imprisonment for 14 years. The appellant was sentenced to imprisonment for two years and six months.

(g) Count 7: assault causing harm to Mr Miller and threatening him with an offensive weapon, the ladder, for which the maximum penalty is imprisonment for five years. The appellant was sentenced to imprisonment for six months.

(h) Count 8: assault causing harm to Stephanie Guan when the appellant was a male and the victim a female, for which the maximum penalty is imprisonment for five years. The appellant was sentenced to imprisonment for six months.

(i) Count 9: assaulting Mr Vos who was working in the performance of his duties, for which the maximum penalty is imprisonment for five years. The appellant was sentenced to imprisonment for nine months.

(j) Count 10: assaulting Mr Kovic who was working in the performance of his duties, for which the maximum penalty is imprisonment for five years. The appellant was sentenced to imprisonment for two years.

[24] The sentences imposed by the sentencing judge totalled a period in excess of 10 years. However his Honour considered the need for concurrency and also applied the totality principle and, as a consequence, structured the sentences so that the effective head sentence was imprisonment for a period of five years. A non-parole period of two years and six months was set.

The grounds of appeal

[25] The proposed grounds of appeal were as follows:

(a) the sentence was manifestly excessive;

(b) the sentencing judge failed to give proper weight to the appellant's prospects of rehabilitation;

(c) the sentencing judge having found, in his opinion, that the materials before him made it difficult to predict the appellant's prospects of rehabilitation, erred in not ordering a sentencing report pursuant to s 69 of the *Youth Justice Act 2005* (NT) with a direction that specific attention be given to that issue.

Prospects for rehabilitation – Sentencing report

[26] It is convenient to deal with the grounds relating to the appellant's prospects of rehabilitation and the failure to obtain a sentencing report together and before dealing with the claim of manifest excess.

[27] At the time of the offending the appellant was a youth aged 15 years and 10 months and, therefore, the provisions of the *Youth Justice Act* were available to the sentencing judge for the purposes of the sentencing process. It was submitted on behalf of the appellant that the sentencing judge had the power to require a presentence report and should do so unless satisfied that the information necessary to determine an appropriate sentence was available.[1] It was further submitted that in circumstances where, in the sentencing remarks, the sentencing judge expressed the view that it was difficult to predict the prospects of the appellant for rehabilitation "at this point in time" it was an error for his Honour not to have ordered such a report.

[28] These submissions ignore what took place at the hearing. At the request of counsel for the appellant, the sentencing judge received a report from a consultant psychiatrist, Dr Walton. The psychiatric report provided information regarding the offending, the personal history of the appellant, a mental status evaluation of the appellant and concluded with an appropriate psychiatric opinion. The report included all of the information that would

[1] *Youth Justice Act 2005* (NT) s 69.

have been the subject of any sentencing report.[2] The report included the following:

> (a) the age of the appellant,
>
> (b) his social history and background,
>
> (c) his medical and psychiatric history,
>
> (d) his relevant educational background,
>
> (e) his lack of any relevant employment history,
>
> (f) the circumstances of the offences to which he pleaded guilty,
>
> (g) the circumstances of other offences,
>
> (h) his relevant diversion history,
>
> (i) his history of alcohol and drug use,
>
> (j) comment upon courses and rehabilitation that may be of benefit to the appellant, and
>
> (k) comment upon risk issues in relation to the appellant including in relation to fresh offending.

[29] The report concluded:

> On the one hand, it is worrisome that a young person is engaged in an extended period of serious violence with, objectively, minimal provocation. On the other hand, it is reassuring that, apart from his substance abuse, (the appellant) does not have an established history of antisocial conduct and thus there would seem to be a reasonable prospect that he may be rehabilitated. The primary focus needs to be on the alcohol and cannabis abuse. Prognostically, both in relation to mental health and recidivism, the outcome rather hangs in the balance at present. There are reasonable prospects for reformation

[2] Section 70 of the *Youth Justice Act2005* (NT) details the information to be provided in such a report.

> but also some risk of continuing substance abuse with an elevated risk of reoffending. The picture likely will clarify over the next year or so.

[30] At the sentencing hearing, counsel for the appellant relied upon the psychiatric report and addressed it in some detail. When the issue of the need for a sentencing report was raised with his Honour counsel agreed that the psychiatric report provided the necessary information. On the hearing of the appeal, counsel for the appellant was unable to assist this Court by identifying further meaningful information that may have been revealed by obtaining a presentence report.

[31] The appellant complained that the sentencing judge failed to give proper weight to the appellant's prospects of rehabilitation. In the sentencing remarks, his Honour revisited the material that had been placed before him by way of submission and by the tender of reports. His Honour referred to the psychiatric report and quoted from it. The requirement that consideration be given to how the appellant could be rehabilitated was identified by his Honour who then went on to observe:

> In terms of rehabilitation, I find it difficult to predict your prospects of rehabilitation at this point in time. The fact that you wish to get a job and stay out of trouble, that you have support of parents and the fact that you have no prior criminal history all suggest that once you get out of prison you may be able to become a worthwhile member of the community and follow the good standards that your parents have tried to set. However, I think that the situation will be much clearer after you have had the benefit of further counselling and education at the Don Dale Centre.

> I will repeat what Dr Walton said in his report. He said "prognostically", in other words, he is looking ahead, "both in relation to mental health recidivism", recidivism is the likelihood that you will reoffend, he says the "outcome rather hangs in the balance at present. There are reasonable prospects for reformation, but also some risk that with continuing substance abuse, there is an elevated risk of reoffending. The picture will likely clarify over the next year or so".

[32] In our opinion, the assessment of the sentencing judge of the prospects of rehabilitation was apt and reflected the effect of all of the material before the court including the psychiatric advice. His Honour referred to all the relevant material placed before the Court and, subject to what we say about the non-parole period, in our opinion, cannot be said to have failed to accord proper weight to the appellant's prospects of rehabilitation.

[33] These grounds of appeal were not made out.

Manifest excess

[34] The first complaint of the appellant under this ground of appeal was that the sentence imposed upon the appellant was greater than that imposed upon his older cousin Robert "who was engaged in the same incidents". It was contended that the principal of parity in sentencing had been breached.

[35] The appellant was the first of the offenders to be sentenced and the cousin was sentenced on a later occasion by a different judge. The cousin pleaded guilty to a range of offences arising out of the same incidents but faced only seven counts as distinct from the 10 counts faced by the appellant. He was not involved in, nor charged with, any offences relating to the police

officers Mr Cutting and Mr Coleman. When dealing with the cousin, the sentencing judge recounted the involvement of each offender in each of the incidents. The sentences imposed upon the cousin were similar to those imposed upon the appellant where their involvement was similar. The need for parity was reflected in the relevant sentences. The cousin was sentenced to imprisonment for a total period of four years and six months compared with the sentence imposed on the appellant of five years for greater offending. The age difference between the two was not great and, in all the circumstances, did not warrant any adjustment of the sentence. There was no disparity in the sentences imposed and the appellant's complaint cannot be sustained.

[36] The appellant did not make any complaint regarding the individual sentences imposed upon the appellant for each of the offences to which he pleaded guilty. It was not submitted that any such sentence was manifestly excessive or, indeed, excessive. However, it was argued that the overall sentence was manifestly excessive when consideration was had to the following matters:

(a) the age of the appellant at the time of the offending;

(b) his lack of any relevant criminal history;

(c) his supportive family;

(d) his early plea of guilty;

(e) work was available to him;

(f) he was assessed as suitable for supervision by Community Corrections; and

(g) his crimes were committed in company and in three instances he pleaded guilty pursuant to the doctrine of common purpose.

[37] It was also pointed out that the appellant had been found by Dr Walton to be an immature youth of "lowish intelligence" who suffered from a chronic depressive disorder.

[38] It was submitted on behalf of the appellant that, although his offending was serious, his youth, his lack of prior convictions, his supportive family and his prospects for rehabilitation meant that the sentence of imprisonment for five years with a non-parole period of two years and six months was manifestly excessive in the circumstances.

[39] At the time of the offending, the appellant was aged 15 years and 10 months. His co-offenders were his cousin, aged 17 ½ years, and his brother, aged 20 years. It was submitted that he was in the company of older people and led by them. Each of the incidents was recorded on CCTV and the relevant footage was played to the sentencing judge and was also viewed by the members of this Court on the hearing of the appeal. The footage revealed the appellant to be a large youth. He was said to be around 110 kg at the time of the offending. The CCTV footage also revealed him to be enthusiastically physically involved in each incident. Whilst he was not the first to act in either incident he soon became actively involved. His actions were violent and undertaken without reference to his co-offenders. For example, in the first incident he separately approached Mr Watterston and repeatedly kicked

him whilst he was on the ground. He continued the assault after others had desisted. In relation to the incident at the hotel, he picked up a bottle and threw it at Mr Vos hitting him on the head. He picked up the pot plant and used that as a weapon. When the altercation moved outside, he left the group and obtained the ladder which he then used as a weapon. He was on each occasion active in elevating the level of violence. He was not looking to his co-offenders for approval or encouragement, he acted of his own volition. This was not a case of a young offender being led by others.

[40] It was not disputed that each of the identified mitigatory matters was referred to by his Honour in the sentencing remarks. All of those matters were taken into account. In particular, his Honour discussed the importance of rehabilitation and the need to avoid imprisoning young offenders where possible.

[41] The principles applicable to an appeal alleging manifest excess are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error and the appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive as to manifest such error. In relying upon this ground, it is

incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive.[3]

[42] The offending of the appellant involved very violent conduct on two separate occasions against nine different, innocent, victims and led to significant physical and emotional harm being suffered by the victims. He used weapons as part of his violence. As the sentencing judge observed the offending was senseless, unprovoked and random upon innocent victims. The offending occurred at two different locations at times about four hours apart. They were committed in company. Some of the victims were on the ground and defenceless when attacked. Some of the victims were Good Samaritans who came to the aid of others and were then themselves attacked.

[43] The appellant is a young man who had been consuming alcohol and cannabis to excess since he was 14 years of age. He had withdrawn from school at the start of year 10. His prospects for rehabilitation were expressed to be reasonable but with an elevated risk of reoffending in the event of continuing substance abuse. As was observed by his Honour, the situation will be clearer after the appellant has had the benefit of further counselling and education. In all the circumstances, in our opinion, the head sentence imposed by his Honour may be described as stern but could not be described

[3] *R v Liddy* [2005] NTCCA 4 at 15.

as manifestly excessive. We found no basis upon which to interfere with any of the individual sentences imposed or with the ultimate head sentence.

[44] The sentencing judge imposed a non-parole period of two years and six months, half the head sentence. Under that order, the appellant would become eligible to apply for parole in April 2016. It is not clear from the sentencing remarks why that period was chosen. The observations of Dr Walton were that the "picture likely will clarify over the next year or so" or by around February 2015. Given the age of the appellant the sentencing judge was not required to set a minimum non-parole period of not less than 50% of the period of imprisonment as required under the *Sentencing Act 1995* (NT) for adults. Under the terms of the *Youth Justice Act,* a sentencing judge is not so constrained in setting a non-parole period.[4] In our opinion, in all the circumstances and in light of the age of the appellant, the non-parole period of two years and six months was manifestly excessive and we therefore intervened to impose a non-parole period of 18 months dated from 20 October 2013.

[45] These are our reasons for decision.

---

[4] *R v Gurruwiwi* (2008) 23 NTLR 68.