*Taylor v Malogorski* [2011] NTSC 98

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| PARTIES: | TAYLOR, Darcy Christopher<br><br>v<br><br>MALOGORSKI, Mark Anthony |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 20 of 2011 (21122732) |
| DELIVERED: | 29 November 2011 |
| HEARING DATE: | 14 November 2011 |
| JUDGMENT OF: | BARR J |
| APPEAL FROM: | CAVENAGH SM |

**CATCHWORDS:**

APPEAL – Appeal against sentence – manifest excess – reduction of sentence for plea of guilty – whether discount awarded was within the learned Magistrate's sentencing discretion – whether discount awarded resulted in a substantial miscarriage of justice.

APPEAL – Appeal against sentence – manifest excess – non-parole period – whether learned Magistrate was in error in determination of non-parole period.

APPEAL – Appeal against sentence – suspended sentence – rehabilitation – whether learned Magistrate was in error by not partially suspending sentence.

*Justices Act* s 177(2)(f)
*Sentencing Act* s 54(1), s 103, s 105

*Clavell v Burgoyne* [1003] NTSC 29; *Kumantjara v Harris* (1992) 109 FLR 400; *Lo Castro v R* [2011 NTCCA 1; *Maynard v O'Brien* (1991) 105 FLR 63; *R v Wilson* [2011] NTCCA 9; *Sultan v Svikart* (1989) 96 FLR 457; *Wiltshire v Mafi* (2010) WASCA 111, followed

*Bugmy v R* (1990) 169 CLR 525; *Deakin v R* (1984) 58 ALJR 367, 11 A Crim R 88; *Grivell v The Queen and Mackley v The Queen* (2008) 184 A Crim R 375; *House v R* (1936) 55 CLR 399, considered

**REPRESENTATION:**

*Counsel:*

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| Appellant: | R Wild QC |
| Respondent: | C Dixon |

*Solicitors:*

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| Appellant: | North Australian Aboriginal Justice Agency |
| Respondent: | Office of the Director of Public Prosecutions |

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

*Taylor v Malogorski* [2011] NTSC 98
No. JA 20 of 2011 (21122732)

BETWEEN:

**DARCY CHRISTOPHER TAYLOR**
Appellant:

AND:

**MARK ANTHONY MALOGORSKI**
Respondent:

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 29 November 2011)

**Appeal against Severity of Sentence**

[1] The appellant and the victim had been in an on-again/off-again relationship for many years. They had commenced their relationship as teenagers. They had two small children. The relationship deteriorated over time, and on 27 May 2010 the appellant assaulted the victim. The appellant at that time was just 22 years old. He was later convicted of aggravated assault and released on an 18-month good behaviour bond. For the period 28 May 2010 to 27 May 2011 a domestic and family order was in place restraining the appellant from approaching, contacting or being in the company of the victim. The appellant engaged in conduct in contravention of that order on 2 November 2010, 25 January 2011 and on 17 February 2011. The less than

serious nature of those contraventions is indicated by the fact that two of them were dealt with by a fine of $100 and the third by a fine of $300.

[2] In the afternoon of 12 July 2011, the appellant went to the victim's home to visit the couple's children. On that occasion, the victim was in a wheelchair because she had a foot abscess which affected her mobility. The appellant and the victim became involved in a jealous argument. In the course of that argument, the appellant became very angry with the victim and accused her of wanting to have sexual relations with her male Facebook friends. The appellant verbally abused the victim and called her such derogatory names as "dog", "slut" and "cunt". The verbal abuse developed into physical abuse. The appellant spat in the victim's face, grabbed her by the hair as she sat in her wheelchair and then stubbed a burning cigarette into her left eyelid causing her substantial pain. The appellant then pushed the victim out of her wheelchair and onto the ground. The appellant and the victim then scuffled on the ground and some shards of glass from a broken vase entered the victim's eye.

[3] The victim was treated at the Royal Darwin Hospital for minor burns to the left eyelid and to flush out glass from her eye.

[4] When interviewed by investigating police officers on 13 July, the appellant made full admissions.

[5] The appellant came before the Court of Summary Jurisdiction on 14 July. He pleaded guilty to one count of assault with four admitted circumstances

of aggravation: that the assault was male on female; that the victim was threatened with an offensive weapon, namely a lit cigarette; that the victim suffered harm; and that the victim was unable to effectually defend herself due to disability.[1]

[6] The appellant's record tendered by the prosecutor disclosed, relevantly, the conviction for aggravated assault on the same victim committed on 27 May 2010, two contraventions of domestic violence orders (referred to above), and an aggravated assault upon a male person committed on 22 September 2010. The latter had been dealt with by the imposition of a fine of $400 and so was probably in the low range of seriousness for offences of that kind.

[7] In mitigation, counsel for the appellant told the court that the appellant had "just snapped" and that he was "quite ashamed of his behaviour". The court was asked to give emphasis in sentencing to the appellant's relative youth (he had turned 23 in May 2011, but his age was misstated by his counsel to be 24), his co-operation with police, and his early plea of guilty. Counsel referred to problems in the relationship between the appellant and the victim. The court was told that the appellant considered the relationship to be at an end because of his offending conduct.

[8] The court was told that the appellant had been engaged in employment "pretty much since he left school", mainly in labouring duties. The

[1] The appellant entered a further plea of guilty on the same day to a charge of engaging in conduct in contravention of a Domestic Violence Order contrary to s 120(1) of the *Domestic and Family Violence Act 2007*. This charge arose from the DVO contravention on 17 February 2010. No issue arises on the present appeal with the sentence imposed for that offending, a fine of $300.

appellant was living with his father and working in his father's plastering business as a labourer. The court was told that the appellant wanted to address problems of undiagnosed and untreated depression, which the appellant *thought* he may have suffered in the past. The court was also told that the appellant's grandfather was gravely ill and that this was causing stress to the appellant. The appellant was resigned to the fact that he would be serving a term of imprisonment and he was upset that his actions had led to his not being able to travel interstate to see his grandfather (for probably the last time). The appellant was a young Aboriginal man with close connections to family in Western Australia. The court was told that he had tried to "be there" for his young children, the older child was approximately 3 years old and the younger seven months old. The appellant's counsel told the court: "He says that he's a devoted family man to the children and always tries to make sure that they are in good care especially when the mother needs some assistance and despite the problems that he has with her he very much puts them as a priority above his own needs."

[9] The appellant's counsel finally submitted that, notwithstanding some entries in the appellant’s record for offences of violence, rehabilitation should be "at the forefront" of the court's concern. Counsel asked the magistrate to consider "some form of partially suspended sentence" describing her client as "truly remorseful" and indicating that a lengthy time in prison would have a very significant effect on him.

[10] The appellant did not give evidence. The matters summarised by me in the previous three paragraphs were stated by defence counsel, without objection from the prosecutor and without any adverse indication from the magistrate.

[11] The magistrate adjourned to consider the sentence and told counsel that he would consider partial suspension of any term of imprisonment imposed.

[12] When the court resumed (after a lunch adjournment) the magistrate imposed a head sentence of two years imprisonment with a non parole period of 15 months.

[13] In his sentencing remarks the magistrate described the offending as "one of the most outrageous, cruellest, and very serious attacks on a woman that I have heard in this court in 16 years on the bench, and a further 14 years before that appearing in this court."

[14] The magistrate reviewed the appellant's record of prior offending, and made comments as to the relevance and seriousness of some of the entries.

[15] The magistrate said that the offending conduct "almost amounted to torture". He referred to the need for denunciation. He indicated that, in considering the sentence, he had warned himself not to overreact to the "cruel brutality" manifested in the offending conduct.

[16] The magistrate accepted that the appellant was contrite and that he was ashamed of himself. His Honour referred to the appellant's co-operation with the police, to his complete and full admissions, and in particular to his

plea of guilty: "The best thing he's got going for him is his very, very early plea of guilty. But I can't think of much more".

[17] The magistrate indicated, as his starting point in sentencing, a head sentence of “about two and a half years” as appropriate for the appellant’s “brutality”. He then gave the appellant a 20 per cent discount for his early plea of guilty, resulting in the sentence of two years imprisonment.

[18] In then fixing a non-parole period of 15 months, his Honour did not give reasons for not partially suspending the sentence. However, his comments in relation to the non-parole period are indicative of his thinking:

> "... I will leave it up to the parole board to consider his release at that time, however (*unless*) there is explicit evidence of changes in attitude I would not have thought he'd be early released anyway. It's a matter for them, not me."

[19] By the amended notice of appeal, the appellant calls for the intervention of this Court on two grounds, namely:-

1. That the sentence imposed by the learned Magistrate was manifestly excessive in all the circumstances of the offence and the offender; and

2. That the learned Magistrate erred in failing to consider a partly suspended sentence.

**Ground 1 – Manifest Excess**

[20] The principles applicable to an appeal against sentence are well established. Those principles were recently summarised by the Court of Criminal Appeal in *Lo Castro v R* [2011] NTCCA 1 at [46], where the Court said as follows:

> "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".[2]

[21] It is therefore incumbent upon the appellant to demonstrate that the sentence imposed by the learned magistrate of two years imprisonment with a non-parole period of 15 months was "clearly and obviously" excessive.

[22] The maximum penalty for unlawful assault with the admitted circumstances of aggravation is a term of imprisonment of five years, but if the matter is dealt with summarily the Court of Summary Jurisdiction is limited to imposing a term of imprisonment of two years.

[23] Although the starting point of two and a half years adopted by the learned Magistrate was in excess of the summary jurisdictional limit, and the sentence consequently imposed was the maximum which could have been imposed summarily, there is no issue on this appeal that the learned Magistrate was in error in starting where he did.

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[2] see also *R v Woods* [2009] NTCCA 2; *Cransen v The King* (1936) 55 CLR 509; *Hedgecock v The Queen* [2008] NTCCA 1.

[24] In *Wiltshire v Mafi* (2010) WASCA 111 the Western Australian Court of Appeal held (per curiam) that it was necessary to distinguish between the maximum penalty for an offence and the jurisdictional limit when such offence is dealt with summarily. The Court stated:

> "In *Lapa v R* [2008] NSWCCA 331 it was held that it is open to a judge sentencing in summary jurisdiction to determine a starting point above the relevant jurisdictional limit. To support this principle, the court relied upon the reasons of Grove J (Spigelman CJ and Kirby J agreeing) in *R v Doan* [2000] NSWCCA 317; (2000) 50 NSWLR 115 who reviewed similar legislative provisions in other States and who said that 'where the maximum applicable penalty is lower because the charge has been prosecuted within the limited jurisdiction of the Local Court, that court should impose a penalty reflecting the objective seriousness of the offence, tempered if appropriate by subjective circumstances, taking care only not to exceed the maximum jurisdictional limit."

[25] A similar approach has previously been adopted in this Court - see *Sultan v Svikart* (1989) 96 FLR 457 at 460; *Maynard v O'Brien* (1991) 105 FLR 63; *Kumantjara v Harris* (1992) 109 FLR 400 at 406, and *Clavell v Burgoyne* [2003] NTSC 29.

[26] There was thus no error in the magistrate's taking a sentence in excess of the jurisdictional limit as his starting point.

[27] Moreover, the period of two and a half years or thereabouts was not excessive, and certainly not "clearly and obviously" excessive. The period is half the maximum sentence. It reflects the objective seriousness of offending conduct involving the use of a lighted cigarette applied to the victim's eyelid to threaten and hurt the victim, and the other three admitted circumstances of aggravation. It emphasizes denunciation and deterrence, both specific and general. Specific deterrence was an important consideration in the sentencing of the appellant, because he had a prior conviction for an aggravated assault committed against the same victim only 14 months previously.

[28] The reduction in sentence allowed by the magistrate for the appellant's plea of guilty represented a discount of 20 per cent of the period of two years and six months taken as a starting point.

[29] The appropriate discount for a plea of guilty was discussed recently by the Court of Criminal Appeal in *R v Wilson* [2011] NTCCA 9, where Riley CJ (with whom Kelly and Blokland JJ agreed) said as follows:

> "In *JKL v R* the court said that the value to be attributed to a plea remained discretionary, however 'a reduction of 25% will normally be given in circumstances where there has been an early guilty plea which is indicative of true remorse and resipiscence'. The court in *JKL v R* was not seeking to lay down a tariff as to the weight to be given to a plea of guilty as a mitigating factor. As was observed in *Kelly v R* it is not possible to lay down such a tariff. The weight to be given to the plea will vary according to the circumstances and any allowance for the plea may be reflected in different ways in the sentence imposed."

[30] Riley CJ said that, given the late plea and the limited remorse shown in *Wilson*, "whilst opinions may differ, I would have expected a discount in the order of 20 per cent in all the circumstances".

[31] In light of these comments, it would seem the appellant received a somewhat lesser discount than he might have expected given the very early stage at which his plea was entered and his acknowledged remorse. However, as the passage cited in par [29] above demonstrates, the weight to be afforded to a plea of guilty is a matter of discretion, and the principles in relation to an appeal against an exercise of discretion are well established. It is not sufficient that an appellate judge considers that, if he had been in the

position of the primary judge, he would have taken a different course. It must appear that some error has been made in exercising the discretion.[3]

[32] In my opinion, the discount awarded was within the magistrate's sentencing discretion and no discernable error can be detected from his Honour's reasoning. Moreover, there has been no substantial miscarriage of justice.[4]

**Non-Parole Period**

[33] The practical effect of fixing a non-parole period is that, after the expiration of the period, the Parole Board may, but need not, grant parole to an offender. In *Deakin v R*,[5] the High Court confirmed that the fixing of minimum terms (the Victorian equivalent of non-parole periods) was to provide for mitigation of the punishment of the offender in favour of his rehabilitation through conditional freedom, when appropriate, "once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence". In *Bugmy v R*,[6] the High Court said that the benefit of fixing a minimum term lies in providing the offender with a basis of hope of earlier release and in turn an incentive for rehabilitation.

[34] It must be assumed in the present case that the magistrate determined that justice required that the appellant must serve 15 months having regard to all the circumstances of his offending. It may be noted that the magistrate did

[3] *House v R* (1936) 55 CLR 399 at 504.
[4] *Justices Act* s 177(2)(f).
[5] *Deakin v R* (1984) 58 ALJR 367; 11 A Crim R 88 at 89, confirming the High Court's earlier decision in *Power v R* (1974) 131 CLR 623 at 629.
[6] *Bugmy v R* (1990) 169 CLR 525 at 526, per Dawson, Toohey and Gaudron JJ.

not simply opt for the statutory minimum non-parole period of 50 per cent of the sentence,[7] but made an apparently considered assessment. There is no issue on this appeal that the magistrate erred by treating the statutory minimum as a default provision.[8] There was no error on the part of the magistrate in his determination of the length of the non-parole period.

[35] The ground of appeal asserting manifest excess must be rejected.

**Ground 2 – failing to consider a partly suspended sentence**

[36] At the hearing of the appeal, senior counsel for the appellant did not press the ground that the magistrate failed to consider a partly suspended sentence, but instead argued that the magistrate's error was in not actually partially suspending the sentence.

[37] As mentioned in par [18] above, the magistrate did not give reasons for not partly suspending the appellant's sentence.

[38] Senior counsel for the appellant argued that the appellant's early plea of guilty, his contrition and remorse, his employment history and his youth should all have combined to secure the appellant a partially suspended sentence.

[39] In *R v Wilson* [2011] NTCCA 9, at [45] to [48], the Court of Criminal Appeal considered the principles involved in the competing dispositions of partially suspending a sentence and fixing a non-parole period. Although

[7] under s 54(1) *Sentencing Act.*
[8] See the discussion in *Grivell v The Queen and Mackley v The Queen* (2008) 184 A Crim R 375 at 386, par [59] per Martin CJ.

the Court dismissed the Crown appeal against the partial suspension of the respondent's sentence, the Court considered and referred to some of the advantages of fixing a non-parole period rather than partially suspending a sentence, including the incentive of a non-parole period to encourage efforts towards rehabilitation and the need for time for an offender to prove himself as being capable of resuming a responsible attitude to life.[9]

[40] Notwithstanding the matters favouring a suspended sentence set out in par [38] above, there were good reasons why the sentence ought not to have been suspended. These were touched on by his Honour in fixing the non-parole period. The offending was objectively very serious. The appellant had not undergone or been assessed for entry into rehabilitation programs (violent offender/anger management programs) in the community. The appellant's counsel did not seek an adjournment to enable the appellant to undergo a rehabilitation program or to be assessed for such a program. The appellant's counsel did not ask for a pre-sentence report under s 105 *Sentencing Act* or an assessment under s 103 *Sentencing Act* as to the appellant's suitability to be supervised on a suspended sentence. There was no character evidence before the court. The appellant did not give evidence. Although the magistrate acknowledged the appellant's contrition and shame, his Honour was not able to make an assessment at the time of sentencing as to whether the appellant had genuinely changed the attitudes and behaviours he had displayed in offending only two days before. The magistrate was

[9] See also the discussion in *R v Minor* (1992) 2 NTLR 183 at 188 per Martin J; *Dinsdale v The Queen* (2000) 202 CLR 321 at 347 [81] – [83] per Kirby J.

unable to make a reliable prediction as to the appellant's rehabilitation on the limited material before him.

[41] The appellant has failed to establish that the magistrate was in error in not partially suspending the appellant's sentence. On the material available at the time of sentencing, it was proper for the magistrate to fix a non-parole period which would leave it to the Parole Board to assess the progress of the appellant's rehabilitation at the end of the period to determine whether he might be released into the community on conditions appropriate to his then-determined circumstances.

[42] The appeal is dismissed.

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