Jack v Dixon [2003] NTSC 58

PARTIES:	JACK, Zachius v DIXON, Garnet Alan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 68/2002
DELIVERED:	30 May 2003
HEARING DATES:	7 May 2003
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL

Justices appeal – appeal against sentence – manifestly excessive – totality principle – insufficient weight to pleas of guilty – insufficient weight to appellant's prospects of rehabilitation – offences committed during operational period of suspended sentence.

JUSTICES APPEAL

Jurisdictional limit – totality.

Criminal Code 1999 (NT), s 188(2); *Domestic Violence Act* 1997 (NT), s 10; *Liquor Act* 1994 (NT), s75(1)(a)&(b); *Traffic Act* 1999 (NT), s 32(1)(a)(i); *Sentencing Act* 1995 (NT), s 122, s 5(2) and s 50; *Justices Act* 1999 (NT), s 131A and s 122A

Veen v The Queen (No 2) (1988) 164 CLR 465; *The Attorney-General v Tichy* (1982) 30 SASR 84; *Mill v The Queen* (1988) 166 CLR 59; *Clinch* (1994) 72 A Crim R 301, considered.
Doyle (1987) 30 A Crim R 1 at 3; *Sultan v Svikart; Sultan v Pearce* (1989) 42 A Crim R 15; *Maynard v O'Brien* (1991) 52 A Crim R 1; *Hansford v His Honour Judge Neesham & Ors* (1995) 2 VR 233; *Kelly v The Queen* (2000) 10 NTLR 39; *Everett* (1994) 73 A Crim R 550; *Munungurr v R* (1994) 4 NTLR 63, referred.

REPRESENTATION:

Counsel:	
Applicant:	M O'Reilly
Respondent:	C Roberts
Solicitors:	
Applicant:	CAALAS
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	mar0321
Number of pages:	25

Mar0321

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

Jack v Dixon [2003] NTSC 58
No. 68 OF 2002

BETWEEN:

ZACHIUS JACK
Applicant

AND:

GARNET ALAN DIXON
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 30 May 2003)

[1] Appeal against sentence. On 28 November 2002 the appellant was convicted by the Court of Summary Jurisdiction sitting at Alice Springs upon his pleas of guilty to the following charges:

1. That on 11 October 2001 he brought liquor into a restricted area, did control liquor within a restricted area, possessed liquor in a restricted area and drove a motor vehicle whilst not being the holder of a licence to do so.

2. On 12 October 2002 at Alice Springs he unlawfully assaulted Caroline Corby with circumstances of aggravation in that she

suffered bodily harm and she was a female and he a male (s 188(2) of the Criminal Code 1999 (NT).

3. On 6 November 2002 he unlawfully assaulted Caroline Corby with circumstances of aggravation being that she suffered bodily harm, she was a female and he a male and she was threatened with an offensive weapon, namely a broken beer bottle, and, on the same day, that he failed to comply with a restraining order under the Domestic Violence Act 1997 (NT).

4. On 20 November 2002 he unlawfully assaulted Caroline Corby, the circumstance of aggravation being that she suffered bodily harm, she was a female and, further, that he failed to comply with the restraining order. The information in respect of the assault charge relating to this occasion was amended by deleting an additional circumstance of aggravation, namely that Caroline Corby was unable to effectually defend herself due to infirmity.

[2] The circumstances of the offending, of the offender and the sentence imposed by the learned Magistrate sufficiently appear from his Worship's remarks set out hereunder (paragraph numbers 3 - 32 have been inserted for ease of reference)

[3] "The defendant was apprehended on 11 October 2002 by police at one o'clock in the morning within the Papunya alcohol restricted area. He was caught bringing in two five litre casks of wine. This was, according to the defendant, to have a drink on the way to Kintore. He pleaded guilty to bringing liquor into a restricted area on 22 May 2003 and to driving without a licence, a thing that he has never had.

[4] He was sentenced by his Worship to imprisonment for one month, suspended forthwith with an operative period of two years during which he was required to be of good behaviour. It is admitted that he has breached the suspended sentence by committing a series of offences recently on four different occasions as follows:

[5] On 12 October of this year at 10 o'clock in the morning the defendant and his wife were drinking at Araluen. They drank all day until six o'clock at night. The defendant became aggressive and advised the victim, "I will punch you." The victim then ran away. The defendant chased her.

[6] The victim fell to the ground and while she was lying on the ground the defendant punched her twice. The first punch broke skin on her face and so did the second punch. She required five stitches all together, mostly at the top of her left eyebrow.

[7] When interviewed the defendant claimed he did it because she had drunk all the grog. It appears there was a group of drinkers there together and perhaps she was the last person who had a sip of the drink. She, that is, the victim was six months pregnant at the time.

[8] On 16 October, four days later, the victim took out a restraining order on the defendant. It was served. He was warned by the magistrate of the contents of the restraining order. It was a full non-contact order. And the defendant was warned that he could go to gaol if he breached it.

[9] On 6 November 2002 the defendant saw the victim in town and ran towards her. He had a broken beer bottle in his hand at the time and he stabbed her with it, piercing the right hand of the victim. He stabbed her again with the broken bottle, again piercing her right hand. And a bystander intervened and prevented any further assaults.

[10] The victim had to be taken to hospital to be treated for the injuries to her hand and she was, by this time, seven months pregnant. She was in hospital for three days altogether. Then on 12 November, six days after that, the defendant was driving a Ford Falcon sedan on Larapinta Drive. He ran into a random breath test.

[11] The test was positive. Again he had no driver's licence. He was asked why he was driving when he was affected by liquor and he said that he was trying to get back home. On two occasions at the police station he failed to supply a sufficient sample of his breath and said this, it has never been properly explained, that "I wasn't drinking before I drove."

[12] But it was noticed about him that his eyes were bloodshot, his speech was slurred, he was incoherent, he was slightly unsteady on his feet and his breath smelt of intoxicating liquor.

[13] The next and final group of offendings occurred on 20 November 2002. The restraining order served upon the defendant on 16 October was still in force. In breach of the restraining order the defendant was with the victim and sitting in a car at a football oval. Again, they were both drinking.

[14] The defendant drove the victim to a house, leaving her in the car. He went inside the house. It was his sister's house. He noticed that the victim got into the driver's side of the motor vehicle and it is said by him that she started the car. He raced to the motor vehicle, punched the victim in the face with his fist on two occasions and she fell to the ground.

[15] While she was lying on the ground he kicked her in the face three times. She was almost eight months pregnant by this stage. Her face was so severely swollen as a result of the kicks that she could not open her eye for three days after the event.

[16] The submissions for leniency were as follows. That the defendant and the victim were in a relationship for about two months. The conduct, all of the defendant's conduct took place over a five week period. It was agreed that the victim was pregnant, as his Worship stated. The defendant is not the father of the child, but that was not the issue. And it was pointed out that alcohol was a problem with the defendant, and certainly it is.

[17] Mr Woodroffe elaborated upon the fourth incident by stating that not only did the victim get into the car, but that she had in fact made the car go forward and had broken the headlights on it and smashed the windscreen. He became enraged because of this.

[18] Both the defendant and the victim come from Papunya. The defendant is a Luritja person. His father died some time ago. He grew up at Haasts Bluff. He had been in a relationship before and had three children by that relationship, but he does not have anything or much to do with the children now. They are aged about eight, seven and six and the mother brings them up.

[19] With respect to the first and the second assaults that were explained on each occasion, firstly the one at Araluen, the defendant got angry because there was no grog left. He was also a bit jealous because of other male persons in the drinking group paying attention to his wife.

[20] On the second occasion when the victim was stabbed the defendant again became jealous because they were walking along the street and other men were taking notice of her.

[21] The defendant is aged 32. He has an extensive criminal record with 26 convictions including three for aggravated assault, the last two of which were male on female. He is a person who, apparently, believes that violence is an appropriate response when confronted with a situation which upsets him. This is particularly so when he is affected by alcohol.

[22] In the first and third assaults with which his Worship was dealing, the defendant picked on a helpless very pregnant woman who was lying on the ground in each case. In the second assault he attacked the victim for no valid reason. Jealousy, with all due respect, seems farfetched and even if he was justified in feeling jealous the response is in no way justifiable.

[23] No plan of rehabilitation was articulated. No express determination to do something about his obvious problems emerged. It would appear that unless prevented from doing so by incarceration he will go on his way assaulting his wife until he maims or kills her.

[24] It is an exacerbating factor that the second, third and fourth groups of offences occurred while he was at large, pending the disposition of the first assault. The fourth and most serious offending took place while he was at large, having absconded on his bail from the first three groups of offences.

[25] The defendant must and will be given credit for the early plea of guilty in all matters. Quite frankly, particularly with respect to the fourth matter, I have some difficulty bringing it within the jurisdiction of this court. However, since all the parties consented to summary disposal I will elect to hear and deal with the matters, summarily. But I can only do so by applying a discount for the early plea of guilty.

[26] There is something particularly repelling about attacks such as this on a pregnant woman. In the case of two of the attacks towards the end, the attacks by continuing to kick or hit her while she was lying helpless on the ground are cowardly, I think would be a one word way of describing it.

[27] Since the group of offences occurred on distinctly different days cumulative sentences are appropriate. Where the offences occur on the same date the penalties will be aggregated.

[28] With respect to the drink driving I note that it is the defendant's fifth drink driving matter. Ordinarily it would be dealt with by the imposition of a fine, but his offending in this direction is approaching imprisonment. Bearing in mind the totality of his other offending I will not raise the bar on that matter, but impose no further penalty other than a conviction and a licence disqualification.

[29] I do not regard the totality of the sentence that I am imposing is disproportionate to the totality of the defendant's offending. There is no point in suspending the whole or any part of the defendant's sentence because he is here before the court on a breach of a suspended sentence and seems to have no plan or determination or capacity to stay out of trouble.

[30] On the first matter, that is the breach of the suspended sentence, the suspension will be revoked and he will be sentenced to one months imprisonment. On the first assault on 12 October 2002, file 6499, he will be convicted and sentenced to twelve months imprisonment, cumulative on the first one months imprisonment.

[31] On file 6843, the offence of 6 November 2002, he will be convicted. The penalties will be aggregated and he will be sentenced to 15 months imprisonment, cumulative on the other sentences. On the offence of 12 November 2002, the drink driving matter, file 6814, he will be convicted on counts 2 and 3. The penalties will be aggregated. No further penalty will be imposed, save a victims assistance levy of $40 with a one day default period fixed for non-payment of that and his licence will be disqualified for a period of two years, which will not matter because he will be in gaol for more than that.

[32] On file 7718 the aggravated assault on 20 November 2002, he will be convicted. The penalties aggregated and sentence to 20 months imprisonment, cumulative on the other sentences. That is a total of four years imprisonment and I fix a non-parole period of 26 months."

[33] The amended grounds of appeal are:

1. that the sentence imposed by the learned Stipendiary Magistrate was in all the circumstances manifestly excessive;

2. that his Worship failed to properly consider and apply the principle of totality;

3. that his Worship gave weight to a circumstance of aggravation not charged against the appellant;

4. that his Worship did not give proper weight to the appellant's pleas of guilty;

5. that his Worship imposed a sentence which was preventative in nature, and

6. that his Worship did not give weight to the appellant's prospects of rehabilitation.

[34] The objective circumstances of each of the assaults, taken in isolation, are of varying degrees of seriousness. The first assault involved two punches to the victim while she was lying on the ground, requiring five stitches. On the second occasion the appellant assaulted the victim with a broken beer bottle, a particularly nasty example of this type of offence, and she required treatment for her injuries, although it does not appear that any permanent harm was suffered. The second offence was made worse by the fact that he was at the time on bail for the first assault and the victim had obtained a restraining order which he breached.

[35] The third assault involved the appellant kicking the victim in the face on three occasions while she was lying on the ground, resulting in a severely

swollen face. Again, this offence was worse than it might be when standing alone because the appellant was on bail and breached the restraining order. It will also be noted that all of these offences were committed during an operational period which was fixed in May 2002. The appellant put forward nothing in relation to his aggressive behaviour which could operate in mitigation.

[36] These series of relatively closely related acts of violence can not be regarded as an aberration. The appellant's record of prior convictions started in 1991 when he was convicted, amongst other things, for aggravated assault resulting in a sentence of three months imprisonment, which was suspended. In 1993 he was convicted of having liquor in a restricted area, in 1995 for firearms offences, including discharging a firearm to endanger another person, in 1999 two convictions for aggravated assault, both upon a female, one involving the use of a weapon and the other whilst under restraint pursuant to a domestic violence order. Moving to 2000, there were a series of motor vehicle offences, some of which involved abuse of alcohol and having liquor in a restricted area. The sentences for the assaults in 1999 resulted in a term of imprisonment which, on the records available, appears to have been for a period of two years. The record further suggests that he breached the conditions of his parole by the offending in 2000, as a result of which he was ordered to serve the unexpired portion of the sentence. The length of time to be served pursuant to that order is not disclosed, but it can

be safely inferred that he had only been at liberty for a period of months before he embarked upon the present offending.

[37] Suspended sentences to imprisonment, sentences to actual imprisonment, breach of parole upon release and committal to serve the balance of the term clearly had no deterrent effect upon the appellant. I am reminded of what was said by Mason CJ, Brennan, Dawson and Toohey JJ in *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477:

> "The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind."

I am not persuaded that the gap between the 1999 convictions and the present offending is of any mitigatory significance.

[38] The assaults committed by the appellant, when coupled with the circumstance or circumstances of aggravation, amount to a crime and a person charged with a crime cannot, unless otherwise stated, be prosecuted or found guilty except upon indictment (Criminal Code s 3(2)). Section 131A of the Justices Act 1999 (NT) confers jurisdiction on a Magistrate to hear and determine such a charge in a summary manner, but may decline that jurisdiction if of the opinion that the charge should be prosecuted on

indictment. There are no prescribed circumstances which a Magistrate must take into account in coming to that opinion. One obvious circumstance is that the maximum penalty prescribed for the offence is imprisonment for five years, but upon an offender being found guilty summarily, the offender is liable to imprisonment for a maximum of two years. A Magistrate, having heard sufficient of the circumstances of the case, may well come to the view that he or she should not proceed to determine the charge in a summary manner because the likely sentence would exceed two years imprisonment. (I note that it has not been suggested that the later enactment of s 122 of the Sentencing Act 1995 (NT) empowering a Court of Summary Jurisdiction to impose a sentence of imprisonment of not more than five years prevails over the limitation in s 188(2) of the Criminal Code).

[39] Although each of the sentences to imprisonment imposed by his Worship was less than a period of two years, the total was four years. It will also be noted that at par [25] his Worship, when dealing with the last assault, said he had difficulty in bringing it within the jurisdiction of the court, referring to the two year limit, and indicated that he could only bring the sentence within jurisdiction by applying a discount for the early plea of guilty. The inference is that his Worship had in mind a sentence in excess of two years in respect of that count, but the jurisdictional limit would not be exceeded once the indicated allowance was made. The appellant submits that is not permissible. It was put that his Worship should have first decided whether or not to accept the jurisdiction to sentence up to a maximum of two years

imprisonment and having done so to proceed without considering a sentence exceeding the two year limit as part of the process.

[40] I accept that in appropriate cases it is necessary for a sentencing Magistrate to consider whether to hear and determine the charge in a summary manner or not. Obviously, the Magistrate must know something about the case before forming the required opinion and it seems to me that the conjunction of the words "hear and determine" enables a Magistrate to proceed so far as he or she thinks fit with the hearing, however conducted, before coming to the opinion as to whether the charge should not be determined in that jurisdiction.

[41] Ordinarily, a charge of assault, with a circumstance of aggravation of causing bodily harm or of being perpetrated by a male on a female, could be expected to fall within the range of sentencing options which has two years imprisonment as the upper limit. But it may not only be the issue of appropriate sentence which may cause a Magistrate to be of the opinion in a particular case that the matter should be dealt with upon indictment. It may be, for example, that although s 121A of the Justices Act does not apply to an assault charge, circumstances such as those referred to in s 122A may arise causing the Magistrate to decide not to exercise the jurisdiction and revert to a procedure such as a preliminary examination under the Justices Act.

[42] The maximum penalty prescribed for the offence of assault with circumstance of aggravation of which a court is to have regard pursuant to s 5(2) of the Sentencing Act is five years. The period of two years is not to be regarded as reserved for the worst category of such offending when dealt with before the Court of Summary Jurisdiction. Section 5(2) prescribes a large number of circumstances and considerations to which a court is to have regard in coming to its discretionary decision as to the appropriate sentence in a particular case. In coming to the opinion as to whether to accept jurisdiction and proceed to determine a charge by way of imposing a sentence which falls within the court's jurisdictional limit, a Magistrate is entitled to take into account all appropriate sentencing principles and have regard to all relevant matters. There is an accepted line of authority supporting that view commencing with *Doyle* (1987) 30 A Crim R 1 per Stephenson J at p 3, adopted and applied in this Court by Kearney J in *Sultan v Svikart; Sultan v Pearce* (1989) 42 A Crim R 15 at 18 and by Angel J in *Maynard v O'Brien* (1991) 57 A Crim R 1 at p 6. All of those cases were referred to with approval by the Appeal Division of the Supreme Court of Victoria in *Hansford v His Honour Judge Neesham & Ors* (1995) 2 VR 233 at p 240.

[43] His Worship did not err if his commencing point was a sentence in excess of two years imprisonment, but reduced by mitigatory circumstances to two years imprisonment or less.

[44] I now turn to the ground of appeal suggesting that his Worship gave weight to a circumstance of aggravation not charged. It will be noted that his Worship referred to the fact that the victim was pregnant. The specific circumstance of aggravation contained in s 188(2) of the Criminal Code that the victim was unable to defend herself because of infirmity (d) was withdrawn. There is nothing in his Worship's remarks which would convey to me that he regarded the pregnancy of the victim as being an infirmity which deprived her of the ability to defend herself. There was no good reason, however, why his Worship should not regard the victim's pregnancy, along with the fact that she was on the ground when attacked on occasion, as being circumstances which aggravated the seriousness of the crime. The potential for serious consequences to an unborn child resulting from an assault upon the mother are well recognised. It is not necessary to deal with the submissions made on behalf of the appellant that his Worship erred by contravening the law in *R v De Simoni* (1981) 147 CLR 383.

[45] As to the weight given to the appellant's pleas of guilty, it will be noted that his Worship adverted to not only the plea but also the appellant's cooperation with police and acknowledged that he was entitled to a discount, *Kelly v The Queen* (2000) 10 NTLR 39. It is unfortunate that notwithstanding that the Court of Appeal in that case considered it desirable that a sentencer should indicate the extent to which, and the manner in which, a plea of guilty has been given weight as a mitigating factor, it was not done in this case. That indication is important, because, as the Court

there observed, the weight to be given to the plea will vary according to circumstances and without it an appellate court is unable to come to a view as to the sentence arrived at before the discount was made. In this case, given the cooperation with authorities and pleas of guilty entered at the earliest practicable opportunity and, in circumstances where courts are aware that often female victims of assault may be intimidated against giving evidence regarding the offence, a discount of the order of one quarter of the sentence which might otherwise have been imposed should have been contemplated by his Worship.

[46] The next ground of appeal suggests that his Worship erred in determining to impose the sentence of imprisonment as a means of preventive detention which, on the authority of *Veen (No 2)* (1988) 164 CLR 465 at p 473 is impermissible. But the passage upon which that submission is based must be considered in full:

> "It is one thing to say that the principle of proportionality precludes the imposition of a sentence extended beyond what is appropriate to the crime merely to protect society; it is another thing to say that the protection of society is not a material factor in fixing an appropriate sentence. The distinction in principle is clear between an extension merely by way of preventive detention, which is impermissible, and an exercise of the sentencing discretion having regard to the protection of society among other factors, which is permissible."

[47] His Worship remarked at par [23]:

> "It would appear that unless prevented from doing so by incarceration he will go on his way assaulting his wife until he maims or kills her."

[48] I do not regard those remarks as disclosing an impermissible application of the sentencing principle. I regard his Worship to have been conveying a clear message to the appellant that he was to be imprisoned as a means of deterring him for continuing his violent behaviour towards the victim and protecting her in the meantime.

[49] It is reasonable to assert, as does the appellant, that his Worship failed to overtly refer to the appellant's prospects of rehabilitation. The question of rehabilitation, it is said, arose from the fact that the offences were committed over a relatively short period of time, were all alcohol related and there was thus a discernible issue for which treatment may have been available. It is said that his Worship was under a duty to explore that issue and that he should have called for reports directed to whether appropriate rehabilitative options were available for the appellant.

[50] A court may before passing sentence receive such information as it thinks fit to enable it to impose the proper sentence (s 104(1)) and to that end may order a pre-sentence report (s 105). Such a report is to set out all or any of the matters referred to in s 106(1) which appear to the author of the report to be relevant to the sentencing of the offender and are readily ascertainable by him or her. That author is also obliged to include in any such report any other relevant matter which the court has directed to be included.

[51] There was nothing put to his Worship by counsel appearing for the appellant before him, by way of submission, that such a report should be sought, but it

is now submitted, notwithstanding that, his Worship should have ordered the report of his own motion.

[52] I do not accept that his Worship did not advert to the question of rehabilitation. At par [23] he said, "No plan of rehabilitation was articulated. No express determination to do something about his obvious problems emerged". See also par [29]. It is not uncommon for an offender to present to the sentencer a report which he or she has voluntarily obtained by consultation with appropriate rehabilitative organisations, with particular reference to those who are addicted to alcohol and drugs. The seeking of such a report and, occasionally, a further report as to progress by the offender, who may have already entered into the recommended programme, is relevant and may indicate to the court that the offender is doing something about trying to overcome the problem which has led to the offending. This appellant has done no such thing, notwithstanding his frequent convictions in the past for alcohol related offences including assaults.

[53] His Worship had taken time to consider the sentencing disposition and, in my view, having been of the opinion that a substantial term of imprisonment must be imposed, which would bring with it the fixing of a non-parole period, the question of rehabilitative treatment for the appellant could be undertaken within the prison and in conditions which might be fixed by the Parole Board, if the appellant was released prior to the expiration of the term of the sentence.

[54] This is not a case where his Worship refused to order a pre-sentence report when requested, such as in *Manning v Police* (1992) 59 SASR 427. There may be cases when a person appears before a court to be sentenced and either because of lack of legal representation, or poor legal representation, the court is left with a real concern that it does not know enough about the offender so as to take into account his or her circumstances in the sentencing process. After all, the court is to have regard to the offender's character, age and intellectual capacity pursuant to s 5(2)(e) of the Sentencing Act, but absent circumstances such as that, I do not think it is incumbent upon a court to call for a pre-sentence report. There may be circumstances in which such a duty falls upon the court, but I do not consider this case presents as one of them.

[55] Although it was not raised before his Worship and, nor before this Court, I note that it appears that the appellant is an offender who has been found guilty of offences against s 188 of the Criminal Code in respect of a person who, on the information available to his Worship, was in a domestic relationship with the victim. If that be so, then the provisions in Div 8 of Pt 3 of the Sentencing Act – "Perpetrators' Program Orders" would apply, providing of course the Minister had declared a program to be one for the purposes of that division and the court has received the report required under s78K(2) from the Director.

[56] As to the complaint that his Worship did not pay sufficient regard to rehabilitation, I refer again to *Veen (No2)* at p 476 where their Honours said:

> "However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. There are guideposts to the appropriate sentence but sometimes they point in different directions"

I am not prepared to find that his Worship erred on this account.

[57] That leaves consideration of grounds of appeal which arise from his Worship's alleged failure to pay regard to the principles of totality, in imposing a sentence which was "crushing" and imposing a manifestly excessive sentence. His Worship ordered that the sentences be served cumulatively. Such an order is required since concurrency of sentences in these circumstances is the statutory rule, s 50 Sentencing Act. It is plain from his Worship's remarks that he arrived at his decisions in regard to sentencing for the assault charges first, because in par [28] he had in mind the sentences to be imposed for the assaults, prior to considering what he was to do about the drink driving offence, and decided that he would not impose a sentence of imprisonment for that as a separate matter.

[58] In that, for reasons which will appear, I think his Worship erred. An appropriate sentence should have been imposed and had it been to a term of imprisonment, then it would have been taken into account with the others when considering totality. The Crown does not appeal against that aspect of

the sentencing and thus it is not open to this Court to undo what has been done.

[59] It is plain that his Worship came to his decision to accumulate the various sentences because they occurred on different days (see par [27] above). Furthermore, he considered that where offences occurred on the same day, "the penalties will be aggregated". I think his Worship there had in mind the offences of assault coupled with breach of the domestic violence order which occurred on each of two occasions. It is questionable whether the imposition of an aggregate sentence is open in those circumstances, bearing in mind the provisions of s 10(1)A and (1)B of the Domestic Violence Act and s52(3) of the Sentencing Act, each of the assaults amounting to "a violent offence". That was not an issue agitated upon the appeal.

[60] The difficulties facing a sentencer in deciding whether to depart from the statutory rule of concurrency has been described in the oft referred to words of Wells J in *The Attorney General v Tichy* (1982) 30 SASR 84 at 92-93:

> "It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether sentences should be ordered to be served concurrently or consecutively. According to an inflexible Draconian logic, all sentences should be consecutive, because every offence, as a separate case of criminal liability, would justify the exaction of a separate penalty. But such a logic could never hold. When an accused is on trial it is part of the procedural privilege to which he is entitled that he should be made aware of precisely what charges he is to meet. But the practice and principles of sentencing owe little to such procedure; what is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the

> circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterised, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with the technical offences or they may not. Sometimes, the process of characterisation rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice. The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time."

[61] That offences of the same kind may be committed at different times, may not always justify departure from the concurrency rule, but in my opinion his Worship did not err in the exercise of his discretion to accumulate the sentences in this case because of that factor. These were three separate and distinct assaults brought about in different circumstances. The nature of the assaults in each case was not the same. There were distinguishing features. In the first assault, the victim was punched twice to the face, on the second, she was attacked with a broken beer bottle which injured her hand and on the third occasion she was kicked in the face three times. I do not consider, as was submitted by the appellant, that these three incidents constituted a "continuing episode" or "one transaction" or a "course of conduct". There are clear reasons why departure from concurrency was justified.

[62] Notwithstanding that this was an appropriate case in which a discretion to impose cumulative sentences was open, there are limits. The combination of sentences may produce a result that is seen as crushing any hope in the

offender of reformation and to return to a desirable life in a free community (per Pidgeon J in *Everett* (1994) 73 A Crim R 550 at 559). Whether or not a sentence is or is not crushing is not something capable of being resolved by evidence and can probably only be taken into account by way of impression or, indeed, speculation. But it is a factor which should be taken into account and, by weighing in favour of the offender, it gives mitigatory effect, except in cases in which the offender has by his criminal acts forfeited any right to have his sentence reduced on that account. Given the appellant's age and the length of time he must spend in custody before being eligible to parole, I do not consider that sentence should be disturbed upon the basis that it is "crushing".

[63] The issues of whether or not a sentence is "crushing" or offends against the totality principle can properly be considered as separate, but they become intertwined. As to totality, the well known authority is *Mill v The Queen* (1988) 166 CLR 59 where at p 63 the court noted the formulation of the principle set in Thomas, Principles of Sentencing, 2nd ed, (1979) at p56 and p 57 and noted that it had been recognised in Australia. One expression of the principle as noted in Thomas is that when a number of offences are being dealt with and specific punishments in respect of them are being totalled up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong. It has been applied in this Court, for example, in *Munungurr v R* (1994) 4 NTLR 63 at p 77. A sentence may offend the totality principle because the outcome is "crushing"

and not hold out measures of hope for, and encouragement to, rehabilitation and reform. See *Postiglione v R* (1997) 189 CLR 295 per McHugh J at p 308 and Kirby J at p 341, but the sentence does not have to be perceived as being crushing to demonstrate that there has been a breach of the totality principle. That can stand alone where it can be seen that the effective sentence is not proportionate to the conduct of the criminality of the offender.

[64] When looking at the issue of totality, it is well to bear in mind the remarks of Malcolm CJ in *Clinch* (1994) 72 A Crim R 301 at p 306 where his Honour spoke of the fact that the severity of a term of imprisonment increases exponentially, as it increases in length (authority cited):

> "In other words, the severity of a sentence increases at a greater rate than any increase in the length of the sentence. Thus, a sentence of five years is more than five times as severe as a sentence of one year. Similarly, while a sentence of seven years may be appropriate for one set of offences and a sentence of eight years may be appropriate for another set of offences, each looked at in isolation, where both sets were committed by the one offender a sentence of 15 years may be out of proportion to the degree of criminality involved because of the compounding effect on the severity of the total sentence of simply aggregating the two sets of sentences.".

See also the more extensive treatment on the subject by Seaman J at p 327.

[65] As already pointed out his Worship expressly referred to totality. At par [29] above, "I do not regard the totality of the sentence that I am imposing is disproportionate to the totality of the appellant's offending." Although considering that there was no point in suspending the whole or any

part of the appellant's sentence, his Worship allowed for the appellant's release from custody on parole before the expiry of the term of the sentence which he imposed.

[66] His Worship revoked the order suspending sentence which was breached by the present offences and committed the appellant to one month's imprisonment. For the first assault he was convicted and sentenced to 12 months imprisonment, for the second, convicted and sentenced to 15 months imprisonment and for the third, convicted and sentenced to 20 months imprisonment, all ordered to be served cumulatively. I do not consider that any specific error has been assigned to any of those separate dispositions, nor in his Worship's decision to depart from the concurrency rule.

[67] However, I am of the view that the sentence to four years imprisonment is disproportionate to the appellant's criminality taking into account all the circumstances. It just strikes me as being too much. I have every sympathy for his Worship in endeavouring to arrive at an appropriate sentence in what was a difficult case where he was clearly and rightly directing his mind especially to specific and general deterrence. He left the question of rehabilitation to be dealt with within the Correctional Services system both whilst the offender was in gaol and on parole.

[68] I consider that his Worship erred in not reducing the overall sentence in the application of the totality principle. Counsel for the respondent has reminded the court of the law in regard to review of sentences on appeal, the

onus on the appellant to show that the discretion was improperly exercised has been met in this case. The overall sentence was disproportionate to the offending. I am convinced that the sentencing discretion has miscarried. If the question is whether the sentence was manifestly excessive, then I would hold that it was unreasonable. A substantial wrong has occurred. Counsel for the respondent conceded that the sentences imposed were severe, but submitted that they were entirely justified. I do not agree. In deciding that the overall sentence must be reduced I do not consider that the assaults beyond the first could be committed with relative immunity.

[69] Doing the best I can, I would not disturb the committal to prison for one month for breach of the suspended sentence, nor the aggregate sentence of 12 months for the first assault (though I doubt that that course was open) accumulated on the committal. I confirm the sentence of 15 months for the second assault, but order that it be served as to five months concurrently with the sentence of 13 months, bringing the total effective sentence at this stage to 23 months. I would not disturb the sentence of 20 months on the third assault, but order it to be served concurrently as to seven months, leaving a balance of 13 months to accumulate on the previous sentence, an effective sentence of 36 months. It was not a ground of appeal that the non-parole period fixed by his Worship exceeded the minimum of 50 percent of the head sentence, and in any event I think the circumstances call for such a course and therefore fix the period during which the appellant will not be eligible to be released on parole at 20 months.

[70] I will hear counsel as to the date upon which the sentence should take effect.