PARTIES:	CRAIG WILLIAM WILLIAMS v ROBIN LAURENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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Criminal Law and Procedure – Appeal and new trial, pardon and inquiry subsequent to conviction – Appeal and new trial – Justices – Appeal against sentence – Severity - Error in principle – Risk that sentencing proceeded on a serious factual misapprehension –

R v Tait and Bartley (1979) 24 ALR 473, applied.
Halden (1983) 9 A. Crim. R. 30, approved.
Lester (1975) 63 Cr. App. R. 144, referred to.
Cranssen v The King (1936) 55 CLR 509, applied.
Taylor (1985) 18 A Crim R 14, approved.

Justices Act (NT), s177(2)(c)

REPRESENTATION:

Counsel:

Appellant:	J.A.C. Tippett
Respondent:	R.P. Noble

Solicitors:

Appellant:	Dalrymple & Associates
Respondent:	Office of the Director of Public Prosecutions

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

No. JA52 of 1997

IN THE MATTER OF the Justices Act

AND IN THE MATTER OF an appeal against a sentence imposed by the Court of Summary Jurisdiction in Darwin

BETWEEN:

CRAIG WILLIAM WILLIAMS
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 18 November 1997)

The appeal

This is an appeal against the severity of a sentence of 18 months imprisonment (service suspended after 4 months) imposed on 15 May 1997 by the Court of Summary Jurisdiction in Darwin, following the appellant's plea of guilty to a charge of aggravated assault. The appeal was argued on 20 October;

it was allowed, and the appellant re-sentenced on 12 November. I publish today the reasons for that decision.

The admitted facts

On 15 May the appellant pleaded guilty and acknowledged as correct the following facts read out by the prosecutor:

> "…at about 2am on Sunday 1 December 1996, the defendant met the victim David Harris, at Darby's nightclub. He proceeded to socialise with Harris during the night. At about 4.15am the defendant offered the victim a lift home. The victim and several other people then got into the defendant's blue Cortina and drove out of town towards Fishermen's Wharf."

Stopping here, I note that this recital of facts is *not* followed by any explanation as to what happened in the course of the "lift home", a vital matter since the assault occurred during that journey. The statement said nothing about what the Magistrate later clearly accepted as having occurred on the way, although that something *did* happen on that journey was vital to understanding what the facts were, and to the appellant's plea in mitigation. The statement of facts omitted all of this, and proceeded directly to the assault, viz:

> "The defendant stopped the car in Steele Street, Winnellie, and said to the victim "Get out of the car, David", twice. The victim then got out of the car. The defendant then punched the victim several times in the face causing him to fall to the ground in the middle of the roadway. The defendant then drove [sic, dragged] the victim to the side of the road and began to verbally abuse the victim whilst holding the victim by the front of his shirt, and shaking him."

I interpose to note that because of the failure to refer to what happened on the way, this is an account of an assault committed without any apparent rhyme or reason. As will be seen, it was left to the appellant's counsel in his plea in mitigation to indicate what had happened on the "lift home". Significantly, the statement conveys an impression that nothing happened between the victim getting out of the car, and the appellant punching him; what, if anything, happened at that time was a crucial matter of fact, which eventually passed sub silentio in his Worship's oral remarks on sentence. The statement continued:

> "The defendant and another, Tolios, then got back into the blue Cortina and left the area. At no time did the victim give the defendant permission to assault him. The offence occurred in an area of Winnellie which was desolate at the time of the offence. A second person, Gavin Nicols, who was assaulted by Tolios, ran to the RAAF base to obtain help. At no time did the defendant offer medical assistance to the victim.
>
> The victim, David Harris, was admitted to hospital where he was placed in surgery to his face as a result of a multiple fractured jaw. This resulted in a steel plate being inserted into the victim's jaw. The victim also suffered from 2 black eyes and has lost his sense of taste due to the assault."
>
> On Wednesday, 4 December 1996, the defendant voluntarily attended at Berrimah Police Station and handed … himself in to police. He was arrested and later took part in a record of interview where he made full admissions. He was later charged and bailed."

It may be noted that the reference to the assault occurring after a car drive to a "desolate" place, read with the preceding part of the statement, carries an irresistible inference that the assault was premeditated, the victim being driven there for that purpose. His Worship had this statement of facts handed up in writing to him, and took it with him when he retired to consider his decision, together, no doubt, with his note of the submissions later made.

The facts as asserted in the plea in mitigation

It is against this background that Mr Dalrymple, in his plea in mitigation, referred to the "teasing and harassment" of the appellant at school some years before, by the victim and others, as a result of which "[the appellant] almost committed suicide"; in turn, this experience lent unusual force to the victim's precipitating remark - also introduced by Mr Dalrymple - on the drive home: "And by the way, Bill, you still stink". He submitted that the fact was that, while this may have been said "in a joking way", it "immediately brought back [to the appellant] in a flood" the feelings he had had at school. He submitted that, as a result, instead of proceeding to the Stuart Highway turnoff, the appellant turned into Winnellie with the intention, as he told the Police in his interview, of telling the victim, in a place where he could not easily catch a taxi:

> "well, this is my idea of fun, you've had your fun with me with what you said in the car, this is my idea of fun, you can walk home."

Mr Dalrymple submitted that when the victim got out as the appellant directed him to, they argued at the side of the car and the appellant, in an emotional state, "basically lost his temper *at that point* and the assault took place" (emphasis added). The introduction of this fact, combined with the account of what the victim said in the car, and why it had particular significance for the appellant, changes very sharply the thrust of the admitted facts, which otherwise suggest considerable though unexplained premeditation.

Mr Dalrymple concluded by asserting that as the appellant had told the Police, he did not realize that the victim "was as badly damaged as he was, before [the appellant] left."

It can be seen that the plea in mitigation alleged the existence of facts which gave flesh and body to the barebones account in the prosecutor's statement of facts, facts which if accepted went to the culpability of the appellant.

The Magistrate's sentencing remarks

The learned Magistrate considered the admitted facts and the submissions over the luncheon adjournment; in his sentencing remarks he set out first the facts as he understood them:

> "… in the early hours of Sunday morning, 1 December [1996], after meeting [the victim] at a nightclub, and having a convivial evening with him, you offered to give him a lift home and eventually several people [including Tolios and Nicols] got into your car. You drove."

His Worship then turned to the history of the appellant and the victim, viz:

> "Apparently there'd been some history about 5 or 6 years previously where the victim and a few other young school boys had teased and harassed you [at Dripstone High School], and had bullied you, and that's not to their credit, but for all that, it was several years ago."

It can be seen that the contents of the last paragraph above were *not* derived from the precis of facts which the appellant had admitted to be correct; their source was the plea in mitigation, where the appellant's then counsel Mr Dalrymple had submitted on this aspect:

> "[The appellant] was friends [at school] for a period of time with a number of people, but a particular group of 3, one of whom was the victim in this matter. At that stage Mr Williams was far from being a large person, he was smaller than the other people in his age group, and skinny. It was only some years later that he shot up and developed the height and musculature that he's got now.
>
> …particularly towards the end of 1991 and into '92, this group of friends turned against him and *he was the subject, for an extended period of time, of teasing and harassment*; this involved both physical harassment, including incidents that caused some physical injury to him, and also mental harassment involving food being thrown at him *and him being told that he smelled.*
>
> This course of behaviour continued for a period of time and resulted in him eventually seeking assistance from the school counsellor. First he stopped going to school; he started wagging school. He summoned up the courage to attend and speak to the school counsellor at Dripstone High; a meeting was arranged between him and one of the other boys involved - not the victim, one of the other 3 - and there was a promise at that stage that this behaviour wouldn't continue. But I am instructed that very same afternoon it did continue again; and that was basically the last day that my client attended Dripstone High for the next 10 to 15 weeks. He didn't attend school at all. His behaviour as reported by his sister, changed altogether." (emphasis added)

At another point Mr Dalrymple submitted that as a result of this harassment the appellant "almost committed suicide", a statement given some 'spin' by Mr Tippett on appeal as "he made one attempt to commit suicide".

Mr Dalrymple continued with his submission:

> "… [The appellant] eventually changed schools to Nightcliff High and he attended school for the last 5 weeks of 1992 at Nightcliff High.
>
> … Then he completed the rest of his high school career at Nightcliff; things went much better there although he continued to suffer from, I suppose the academic damage of having missed that last part of the '92 year. He ended up having to repeat year 11 and he abandoned year 12 in '96 after only doing about 5 to 8 weeks, and then he went into the workforce.

> By this stage both his self esteem and confidence had largely been restored, and also he'd grown into a much bigger bloke." (emphasis added)

It can be seen that his Worship's reference to "teased and harassed" (p5) came straight from Mr Dalrymple's submission (p6). On appeal, Mr Tippett stressed that *none* of the factual matters asserted by Mr Dalrymple were challenged at the time by the prosecutor. That is both correct and important, when considering the appeal. His Worship continued in his sentencing remarks:

> "… as you were taking the victim home there was a comment that reminded you of those earlier times when you were teased. [It will be recalled that according to Mr Dalrymple the victim had said "not long before [the appellant] stopped the car", words to the effect: "And by the way, Bill, you still stink"]. Your counsel accepts that the comment may well have been said in jest but for all of that you stopped the car in Winnellie in a desolate area of that industrial part of Darwin, given the time of night I infer it was dark, and you ordered [the victim] out of the car. *It is said [by Mr Dalrymple in his submission (p4)] that you were only going to make him walk home; however after he got out of the car, there being no further conduct from the victim that could be said to deserve what happened, you* got out of the car - you, a much bigger person than him - and *punched him, which must only have been with severe force* not once, not twice, not 3 times but *4 times, in the face*." (emphasis added)

It will be recalled (see p4) that in his address Mr Dalrymple had submitted that when the victim made his remark that "you still stink" this "immediately brought back in a flood" to the appellant his feelings from years before, and

> "… instead of going to the Stuart Highway turnoff… [the appellant] turned into Winnellie [because] he was going to drop [the victim] off there … as he says quite candidly in his record of interview, the reason for that was that he was going to put him off in an area [where] he'd have to walk a bit before he got a taxi … the intention was … "well, this is my idea of fun, you've had your fun with what you said in the car, this is my idea of fun, you can walk home".

So this was the appellant's important explanation for going to a "desolate area"; not to assault, but to strand. Mr Dalrymple had continued:

> "… the victim [got out], and *there was some* conversation took place in the turn of on - *argument at the side of the car there*, and my client basically lost his temper *at that point*, and the assault took place." (emphasis added)

As noted at pp4-5 this is another vital fact raised in the submission, since a later incident - the argument beside the car after it stopped - is being introduced between the initial intention to stop in a "desolate" place merely to make the victim walk home, and the assault. His Worship made no reference in his sentencing remarks to the "argument at the side of the car" referred to by Mr Dalrymple. From his remarks (p7) he may have treated the appellant as having stopped the car there with the intention of assaulting the victim, since he said "there [was] no further conduct from the victim that could be said to deserve what happened"; in other words, possibly by overlooking the reference by Mr Dalrymple to a *subsequent* argument after the car stopped, his Worship may have considered that the submission that "[the appellant was] only going to make [the victim] walk home" lacked credibility because the appellant had immediately assaulted the victim on his getting out of the car, a fact which indicated that he had driven it to the "desolate area" for precisely that purpose. His Worship had no transcript at the time; he had the written precis of facts admitted, and his notes. There is a very considerable difference in culpability between deliberately driving to a desolate area so as to carry out an assault, and driving there intending to strand the victim in such an area, but, on

arrival, being inflamed by an argument *at that time*, and committing an assault. The former shows a degree of premeditation and planning, the latter indicates a more impulsive act; the driving to a "desolate area" has a different significance, in each case. His Worship went on to assess the appellant's conduct:

> "I don't sentence you on the severity of the injuries [sustained by the victim] because of course I take your counsel's point that in terms of the culpability sometimes it's misleading to assess culpability on the injuries because (inaudible) [quaere, nobody] said you meant to cause these specific injuries that occurred. But what is obvious, and *I hold against you, is that you hit him not once but 4 times with severe force, to the face*, that cause him to fall to the ground in the middle of the roadway.
>
> *You* continued on with your conduct, your culpable terrifying conduct, and *dragged the victim to the side of the road, hoisted him to his feet and [were] shaking him* by the front of his shirt whilst you verbally abused him. By this time of course he must have suffered the multiple fractures to his jaw that are indicated in the facts and in the medical reports.
>
> *You then left him in that desolate area, with those injuries,* and decamped.
>
> What has not been mentioned by your counsel, but *what does also aggravate this conduct, is you did what you did in company with another mate [Tolios] who apparently saw fit to assault someone else [Nicols] in the car*. Your thuggery that night is of serious proportions and *it resulted in serious injury* to someone who didn't deserve it, who had drunk with you, socialised with you, been friendly to you during the course of the evening, and *someone who was smaller than you*.
>
> It took the victim of the second assault [Nicols] to run to the RAAF base to obtain help as *you had left, leaving this injured Mr Harris by the side of the road*. He was subsequently admitted to hospital as an inpatient and had a steel plate put in his jaw, black eyes, no doubt attendant pain, and he's lost his sense of taste since the assault.
>
> It took your mate Tolios to be apprehended by the police, and it was [the] thought that maybe he was going to have to wear the consequences of this assault [on Mr Harris] that saw you go to the police and you handed yourself in, and you made admissions.

> Whatever those admissions were, as I've said, *you don't get full credit for contrition because it's taken you some months to finally admit you're wrong, in this court.*
>
> I accept by your plea of guilty that you are contrite. It wasn't actually put to me but I assume - not assume - *I take it to be implicit in the plea that you are dreadfully sorry for what you did. It's not put to me that you turned around and tried to apologise to the victim, he's been here all morning,* although of course you couldn't have [apologised to him] over lunch because you were in custody.
>
> You're only 18, you are a first offender. There are some references, albeit not of a weighty kind given that it's not apparent at all that these referees knew that you were facing court on the serious assault charge that you've pleaded guilty to, but which attest to a person who has grown up in this town, hasn't been known by the police before, and is seen as a rather helpful and cheerful young fellow with a fairly honest disposition." (emphasis added)

His Worship then turned to characterize the nature of the appellant's assault on the victim, viz:

> "But *what you did was not impulsive; what you did may not have been planned as such but it was not impulsive and restricted to one punch* as occurred in the case of [*Eley v Walter*] a justices appeal decision handed down by Angel J on 20 August 1993." (emphasis added)

On the question of whether the assault was "impulsive", I have already referred (p8) to his Worship's omission to refer to Mr Dalrymple's submission that there had been an argument outside the car when it stopped, leading to the assault. What his Worship meant by his reference to "what you did may not have planned as such but it was not impulsive" is not entirely clear, in light of that omission. The reference to "what you did" may be a general reference to the appellant's assault, or a more specific reference to what he actually did in

the course of it. The reference to "may not have been planned as such" may indicate that his Worship *did* have in contemplation Mr Dalrymple's submission as to the argument outside the car when it stopped; if so, however, the following words "it was not impulsive" are not entirely clear. Possibly the words "it was not impulsive and restricted to one punch" should be read together, because in *Eley v Walter* (supra) which his Worship immediately cited (p10) it was held on appeal that the assault "consisted of one blow; it was an impulsive action in the heat of the moment". If so, his Worship may have had in mind that the assault was not impulsive, though its nature - the delivery of 4 punches, the dragging, and the shaking - "may not have been planned as such". The meaning of this important observation remains obscure. His Worship continued:

> "I've already indicated why it's not just restricted to the one punch; *it went on for 4 severe and forceful punches,* the dragging of you [sic, the victim] across the road, *the* dragging of you [sic, the victim] to your [sic, his] feet, the shaking of the victim - who I've been referring to of course - with the attendant verbal abuse.
>
> Your conduct was atrocious. Your conduct would have been terrifying to the victim.
>
> True it is that, in terms of sentencing, your rehabilitation as an 18 year old is important, and I don't lose sight of that. Your age, your prospects, your prior good record, and all the other matters put to me by Mr Dalrymple I've carefully considered over lunch. I bear in mind the sentiments of King CJ in Yardley v Betts [(1979) 1 A Crim R 329 at 334] …, and that is to say assaults vary in greatness and seriousness.
>
> I have not started off with the presumption that you must go to gaol, at all; but *this was a cowardly attack, in company with a mate who was apparently attacking someone else,* in a lonely and desolate part of the industrial area of Darwin where there wouldn't be people about, in the

> early morning hours of darkness, and it's not to be tolerated by this court or the community." (emphasis added)

The reference to the assault being made "in a lonely and desolate part of Darwin where there wouldn't be people about" possibly carries a connotation that his Worship considered that the appellant drove to that place for the express purpose of assaulting the victim, and failed to take into account the submission that there had been an argument outside the car *after* it stopped, and that it was this which led to the (impulsive) assault. His Worship continued:

> "I note the sentencing guidelines, section 5 of the Sentencing Act. I will, in the order I'm about to hand down, provide conditions that will help you to be rehabilitated. I apprehend it necessary, in view of the seriousness of this assault, to make it clear that the community acting through this court does not approve of the sort of conduct in which you were involved, at all. I also want to discourage you and other persons from committing the same or similar offences.
>
> *School boy slights from 5 or 6 years ago do not provide a particularly sympathetic basis for what you did*. Perhaps leaving him by the side of the road to walk home (inaudible), [quaere, would have been understandable], but you went much, much, much further than that." (emphasis added)

Here, the last sentence does not suggest that his Worship considered that the appellant had driven to the "lonely and desolate part" intending to assault the victim, and not simply to strand him there; but it makes no mention of the submission that an intervening fact, the cause of the assault, was the argument outside the car after it stopped. His Worship continued:

> "I take into account that the maximum sentence for this offence is 5 years imprisonment, that's in the Supreme Court of course. Upon summary

conviction it's 2 years, but that shows what the community thinks, and what the legislature thinks of the seriousness of what you've done.

I have regard to the maximum sentence of 5 years, although I also of course have regard to the fact that my [sentencing] powers don't extend past 2 years. Having taken into account all the matters that I'm required to take into account under the Sentencing Act, … and the matters that I've already mentioned, I am of the opinion that you must be sentenced to 18 months … imprisonment.

Given your age and the matters that subjectively mitigate in your favour, because not much mitigates objectively I can tell you that, I order that you be released after serving 4 months on the basis that you do not, thereafter, commit any offences in the Northern Territory punishable by imprisonment, for a period of 2 years. That is to say, you'll have 14 months imprisonment hanging over your head. If you commit any other offences during that period you can expect to go back and serve that."

The grounds of appeal

The Notice of Appeal of 15 May 1997 detailed seven grounds of appeal. At the hearing on 20 October 1997 three further grounds were added, without objection, and one ground was abandoned. In the result, the nine grounds of appeal ultimately relied on were:

1. The learned Magistrate erred in sentencing the appellant on the basis that after knocking the victim to the ground and dragging him to the kerb of the street, the appellant then held the victim upright and shook him (rather than shaking the victim while he was lying on the ground);

2. The learned Magistrate erred in sentencing the appellant on the basis that the appellant's behaviour in assaulting the victim was not "impulsive";

3. The learned Magistrate erred in failing to give sufficient weight to the appellant's age, lack of previous convictions, and current employment;

4. The learned Magistrate erred in failing to give sufficient weight to the principle of rehabilitation;

5. The learned Magistrate erred in failing to give sufficient weight to the mental and emotional harm caused to the appellant by the victim in the past;

6. The sentence was crushing and manifestly excessive;

7. The learned Magistrate erred in law in sentencing the appellant upon the basis that the assault was aggravated by the following factors:

   i) took place in company with a mate;
   ii) was a "cowardly attack";

8. The learned Magistrate erred in law in taking into account the following irrelevant sentencing factors:

   i) the appellant had not tried to apologise to the victim during the Court proceedings:
   ii) that the 3 or 4 blows he inflicted on the victim "must only have been with severe force";
   iii) the victim had to be brought to Court, as a trial was anticipated;
   iv) the appellant left the victim by the roadside, without assistance; and
   v) the victim was smaller than the appellant;

9. The learned Magistrate erred in law in failing to give sufficient weight to the appellant's co-operation with the Police.

The submissions on appeal

I turn to the submissions in relation to each of the nine grounds of appeal. The respondent conceded that Mr Tippett's submissions should be treated as being within the perimeter of the particular grounds to which they purported to relate, without any specific amendments to those grounds being required.

Ground 1 (p13)

Mr Tippett submitted that the Magistrate erred in apparently treating the appellant's dragging the victim to the kerb and subsequently shaking him, as almost an aggravating factor in the assault, a matter increasing the seriousness with which the Court viewed the appellant's conduct. He submitted that the dragging of the victim from the roadway to the kerb may have been for the benefit of the victim, in that it removed him from the path of any traffic to a place of safety. He submitted that the Magistrate was incorrect in concluding that shaking the victim involved a prior raising of the victim to his feet; he may have been shaken while lying prone.

Mr Noble submitted that the Magistrate's finding that the victim had been raised to his feet and shaken was consistent with the admitted facts. He submitted that even if that finding involved factual error, it did not affect the gravamen of the offence. He conceded that removing the victim from the roadway may have been an act of care; I consider that his Worship also eventually accepted Mr Dalrymple's submission to that effect.

I consider that while there is no evidence to support the finding that the injured victim was held upright when being shaken, his Worship's finding to that effect had no effect on the sentence he imposed.

Ground 2 (p13)

The basic thrust of Mr Tippett's submission on this ground was that the Magistrate improperly rejected the appellant's explanation through his counsel Mr Dalrymple, of the events leading up to the assault, especially his explanation why the assault was an 'impulsive act'. He submitted that as the appellant's explanation to that effect had been placed before his Worship, and was in effect accepted by the prosecutor, his Worship was *bound either* to accept it and give it appropriate weight, *or* if he decided not to accept the factual explanation offered from the Bar table, without more, he should have indicated that to Mr Dalrymple before sentencing, and afforded the appellant the opportunity of testifying about it. His Worship had pursued neither course, and this error led to the sentencing proceeding on a factually incorrect basis.

Mr Tippett pointed in support to what he submitted was an inherent contradiction in the sentencing remarks of the Magistrate (p10):

> "But what you did was not impulsive, what you did may not have been planned as such but it was not impulsive …"

I discussed this aspect earlier (pp10-11).

Mr Noble submitted that his Worship's finding that the assault was "not impulsive", was open on the evidence before him. He submitted that Mr Dalrymple had been alerted to the Magistrate's view of the offence, and

that it was then incumbent on Mr Dalrymple to have the appellant give evidence as to the matters he sought to rely upon.

I consider that this is the major ground of appeal. It is common for mitigating facts to be put forward by counsel when addressing in mitigation, as Mr Dalrymple did here. It is common for the magistrate or judge hearing the plea to accept such statements of fact by defence counsel. If either counsel alleges facts, and they are disputed, the facts can only be proved by the calling of evidence by the party on whom the evidentiary onus rests; see *R v Tait and Bartley* (1979) 24 ALR 473 at 483. I consider that it is clear in this case that the factual matters alleged by Mr Dalrymple were accepted by the prosecutor; I note that the victim was present in court, and the prosecutor never sought at any time to controvert any of those matters. Nevertheless, a judge or magistrate is not obliged to inform counsel that he or she does not propose to accept facts alleged to exist by counsel at the Bar table, unless they are established by evidence; see *Halden* (1983) 9 A. Crim. R. 30 at 42 per Murphy J, though cf. *Lester* (1975) 63 Cr. App. R. 144 at 146. In this particular case, however, in light of the prosecutor's attitude, if his Worship was minded not to accept some parts of the facts which Mr Dalrymple was alleging - his Worship clearly accepted some parts but made no reference to the argument outside the car and its significance - I consider that the proper course was to inform Mr Dalrymple of that view, and to afford him the opportunity, if he wished, to call the appellant to testify about the matter.

This was not done. *In this case,* I consider that this omission was an error in principle, if this was indeed his Worship's approach. To my mind the outcome is a grave risk, apparent from what is said and what is not said in his Worship's sentencing remarks, that the sentencing proceeded on a serious factual misapprehension. This risk is not dissipated by the observation that "what you did may not have been planned as such, but it was not impulsive …".

The root cause of this risk was that the facts read out by the prosecution, and accepted by the appellant as correct, and therefore rightly relied on by his Worship, were very sparse, cast no light whatsoever on the appellant's motivation in assaulting the victim, and were misleading as to the circumstances immediately preceding the assault.

Ground 3 (p13)

Mr Tippett submitted that although his Worship had referred to the appellant's youth and lack of prior convictions, he had not given appropriate weight to those factors, when sentencing. He also submitted that the Magistrate did not take any account of the appellant's employment.

Mr Noble submitted there was no imbalance in the Court's sentencing discretion, in this regard.

I note that although his Worship did not refer to the fact that the appellant was currently employed, that does not mean that he took no account of that fact when sentencing. As to all these factors, whether they were given sufficient weight really depends on whether the sentence can be said to be manifestly excessive (Ground 6): if it is, they may amount to reasons why that is so.

Grounds 4-5 (pp13-14)

Similarly, these grounds are really of a secondary nature; they are possible reasons for supporting the submission that the sentencing was manifestly excessive (Ground 6).

Ground 6 (p14)

Messrs Tippett and Noble relied on their written submissions, on this ground. Mr Tippett cited *Cranssen v The King* (1936) 55 CLR 509 at 520:

> "The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the sentencing discretion has been unsound."

Mr Noble submitted that the sentence was proportionate to the offence and the offender. He also submitted that it is not enough that the appellate court, if sentencing, may have imposed a different sentence; for an appeal to succeed the sentence must be "out of all proportion to any view of the seriousness of the offence which could reasonably be taken", as it was put in *Cranssen v The*

King (supra) at 520; see also *House v The King* (1936) 55 CLR 499 at 504-5, where the test is expressed in terms of a sentence "unreasonable and plainly unjust", on the facts. See also *Raggett* (1990) 50 A Crim R 41 at 44-47.

These propositions may be accepted. As Young CJ put it in *Taylor* (1985) 18 A Crim R 14 at 17, the question in issue is "something that is not capable of sustained argument". The determination whether a sentence is manifestly excessive, is largely based upon the appellant Court's own accumulated knowledge and experience of the same or similar offences. In this case, the real matter in question on appeal is an *earlier* question: in terms of *Cranssen* (supra) what were "the circumstances of the case" in relation to which the sentence imposed was to be assessed? That is the subject of Ground 2 (pp16-18). If there was error in principle, or a substantial risk that the circumstances of the case were seriously misapprehended, the whole basis of the sentencing is cut away, and it becomes unnecessary to consider Ground 6.

Ground 7 (p14)

As to Ground 7(i), Mr Tippett noted that his Worship had stated (p9):

> "What has not been mentioned by your counsel, but what does also aggravate this conduct, is you did what you did in company with another mate [Tolios] who apparently saw fit to assault someone else [Nicols] in the car."

Mr Tippett submitted that this was a sentencing error; there never had been any suggestion that there was some sort of joint assault on the victim and

Nicols by the appellant and Tolios, or any common purpose between them, any form of criminal complicity. I consider that it is correct that a separate assault by Tolios on Nicols , about which his Worship was given no information, cannot aggravate the appellant's culpability for assaulting the victim.

As to Ground 7(ii), Mr Tippett submitted that his Worship's characterization of the attack as "cowardly", meant that he wrongly treated that fact as an aggravating feature in the sentencing process. I think his Worship was justified in his epithet, and his approach, in light of Ground 8(v) at p22.

Ground 8 (p14)

As to Ground 8(i), Mr Tippett submitted there was no evidence that the appellant had not apologised to the victim, or that he did not want to do so. He submitted that offering an apology, particularly during the proceeding, was irrelevant in the circumstances. I consider that it was wrong for his Worship (p10) apparently to take the non-apology into account. Had his Worship observed an apology being made in court, he could have given that fact such weight as he thought fit, in mitigation.

As to Ground 8(ii), Mr Tippett submitted there was nothing to suggest that the four punches were delivered with severe force. He submitted it was

equally open on the facts that only one punch was of severe force. I consider that his Worship was entitled to draw the inference he did.

As to Ground 8(iii), Mr Tippett submitted that the fact that the victim was required to attend Court was irrelevant to the sentencing process, even though he had attended to give evidence. This matter bears upon the significance of the lateness of the plea; I consider that his Worship was justified in taking the approach he took to that (p10).

As to Ground 8(iv), Mr Tippett submitted that it was irrelevant to the offence, and the sentencing for it, that the appellant left the victim without assisting him. I accept that the circumstance of not providing assistance is not an aggravating factor in terms of the charge under s188, but it remains a circumstance which his Worship was entitled to take into account.

As to Ground 8(v), Mr Tippett submitted that the relative sizes of the victim and the appellant was irrelevant. He noted the Magistrate's comment in his sentencing remarks (p7):

> "… you got out of the car - you, a much bigger person than him - and punched him, …"

Mr Tippett submitted that relative size might be relevant to the issue of a justification or excuse for an assault, but was not relevant to the present

offence. I consider that his Worship rightly linked this circumstance to his assessment which is the subject of Ground 7(ii) (p21).

Ground 9 (p14)

As to Ground 9, Mr Tippett submitted that the appellant had voluntarily attended the Berrimah Police Station and made incriminating admissions. He submitted that his Worship undervalued this mitigating factor, and had implied (p10) that the appellant was likely to have remained silent about his conduct, and was only prompted to surrender himself because his friend, Jordan Tolios, had been arrested for assaulting the victim. I do not consider that his Worship's remarks point to an undervaluing of the mitigating effect of the appellant's voluntary surrender to the Police.

Conclusions

This appeal succeeds on Ground 2 because of the error in sentencing principle (pp17-18), and a real risk that the sentencing proceeded on a basis of a serious misapprehension as to the circumstances in which the aggravated assault was committed; see the remarks on Ground 2 at pp16-18.

The next question is whether the case should be sent back, for resentencing. Upon reflection, I do not consider that that is necessary or desirable. It is clear that the prosecutor did not seek to controvert *any* of Mr Dalrymple's allegations of fact. In these circumstances, I proceed to re-

sentence the appellant, pursuant to s177(2)(c) of the *Justices Act*, taking account of those facts. I bear in mind the circumstances in which the assault was committed and the authorities which bear on sentencing in cases like this, such as *Birch v Fitzgerald* (1975) 11 SAASR 114 at 116-7, and *Yardley v Betts* (supra).

The appeal is allowed. The sentence of 18 months imprisonment (to be suspended after service of 4 months), is quashed and set aside. In lieu thereof, I consider a sentence of the order of, but not more than, 12 months imprisonment, would be apposite. Applying s58(1) of the *Sentencing Act* to such a sentence - it seems fairly applicable in these circumstances - I impose a sentence of 8 months imprisonment. I bear in mind that the sentence of actual imprisonment which his Worship imposed, 4 months, was short in relation to the head sentence of 18 months; I consider there should be a corresponding reduction in the period of actual imprisonment to reflect the reduction in the length of the head sentence from 18 months to an effective 8 months. Accordingly, I direct that the appellant be released after serving 2 months of his sentence, service of the remaining 6 months of his sentence being suspended for a period of 2 years, that being the period fixed for the purposes of s40(6) of the *Sentencing Act*.

These are the reasons for the orders made in those terms on 12 November.

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