PARTIES:	GARY WILLIAM WATT v ROBERT BRUCE MATERNA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction
FILE NO:	JA9 of 1996
DELIVERED:	24 December 1996
HEARING DATES:	3 October 1996
JUDGMENT OF:	Kearney J

REPRESENTATION:

Counsel:

Appellant:	D.M. Elliott
Respondent:	M.J. Carey

Solicitors:

Appellant:	Waters James McCormack
Respondent:	Office of the Director of Public Prosecutions

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

No. JA9 of 1996

BETWEEN:

GARY WILLIAM WATT
Appellant

AND:

ROBERT BRUCE MATERNA
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 24 December 1996)

The appeal

This is an appeal pursuant to s163(1)(a) of the *Justices Act* against an effective sentence of 4 months imprisonment. The appellant was convicted in the Court of Summary Jurisdiction at Katherine on 1 March 1996 on 2 charges of aggravated assault to which he had pleaded guilty. On the first charge, an aggravated assault on AY on 6 August 1995, the learned sentencing Magistrate sentenced the appellant to one month imprisonment. On the second charge, an aggravated assault on RN on 16 September 1995, the appellant was sentenced

to 3 months imprisonment, cumulative upon the earlier term. Hence the total effective sentence was 4 months.

This appeal proceeded on 2 separate notices of appeal which, by consent, were heard together. The 8 grounds of appeal were that his Worship erred in :

1. failing to give due credit to the appellant for his many years of difficult security work without incident and for his lack of priors for assault; and in failing to give due weight to the character evidence submitted on his behalf;
2. failing to consider the option of home detention properly or at all, or to call for a report in that regard; and in failing to properly consider suspending service of the sentences of imprisonment imposed;
3. failing to pay due regard to the absence of any lasting or serious injury to RN;
4. taking into account a matter he should not have taken into account - that is, in relation to the second offence, that the appellant had 'abused his position in the hotel';
5. giving undue weight to the principle of general deterrence, in deciding not to suspend service of the sentences imposed;
6. failing to give sufficient weight to the evidence of the appellant's good character, adduced on his behalf;
7. considering the sentence imposed for the first offence in light of the second offence; and in not considering the first offence in relation both to its circumstances and the good character of the appellant; and

8. his reference to the time which elapsed between the offences - he considered it was three weeks, whereas in fact it was seven (sic, six) weeks.

The appeal was argued on 3 October 1996; I rule on it today.

The facts

The admitted facts relating to each assault were as follows. The appellant owned and operated a company called G&M Security. It provided security services to the Crossways Hotel at Katherine at the times each offence was committed. Located in the Crossways Hotel was the 'Wings nightclub', in which the appellant and his employees worked as security officers, or 'bouncers'.

The first offence

During the early hours of Sunday 6 August 1995 the appellant was on security duty at the Wings nightclub. At about 2.15 am, two patrons, MB and JC, were ejected from Wings by two security officers. Both patrons were heavily intoxicated and had been involved in trouble on the premises. One of them was released at the front doors of the nightclub; he walked away to the edge of the footpath in front of the premises. Being annoyed at what had taken place, in his frustration he proceeded to punch the tailgate of a Toyota utility parked at the roadside. The appellant, who was on duty at the doorway, told him to stop it. A fight developed between the two of them. A number of people gathered around. The patron grabbed some rope and pieces of cardboard from the rear of the utility and threw them toward the entrance of

the nightclub. MB and JC then took some lengths of timber from the rear of the utility and threw them towards the nightclub entrance; one struck a woman on her head and shoulders as she was entering the nightclub. MB continued shouting abuse at the bouncers. A struggle ensued involving the appellant, a bouncer, MB and JC.

AY was one of the bystanders watching what was going on. At one stage he said to the bouncers: "Stop it, you blokes; I think they've had enough". It appears, however, that the appellant did not hear this. The appellant then went to the counter area at the nightclub entrance and took hold of a wooden hockey stick which was kept there "for emergencies". He walked outside and ran after MB, who had run off across Katherine Terrace. He chased MB away. JC also departed the scene.

The appellant returned to the entrance of the nightclub. He replaced the hockey stick behind the counter area. He then walked outside again, and approached AY. He said to AY, "You saw that, didn't you?". AY replied that he had. Without warning, the appellant punched AY once with his clenched right fist to the left side of AY's nose, forcing his head backwards and making his nose bleed. The appellant was wearing large rings on the fingers of his right hand. He then walked off as Police arrived. AY did not give the appellant permission to strike him.

AY subsequently attended at Katherine Hospital. As a result of the assault, he had received a bloody nose, bruising beneath his eyes, and grazes

to his nose and cheek. His nose was not broken. His injuries were treated with ice, analgesia and by cleaning the wound with antiseptic. He was co-operative and fully orientated during this treatment.

The second offence

During the early hours of Saturday 16 September 1995 (some 6 weeks later), the appellant was at Wings nightclub. He was not there on duty as a security officer at the time. About 2.30 that morning, RN was drinking with a group of friends at the nightclub; he was not heavily intoxicated. They were near the bar area, within the nightclub. The nightclub was busy. RN was standing at the bar with one arm around his girlfriend. He was aware that the appellant, whom he knew, was standing close behind him. Some conversation then took place between the appellant and RN; its content is disputed. On RN's version, he said "I like to have a rum every now and then". On the appellant's version, the appellant approached RN and said words to the effect "How are you going, [RN]?" and RN replied "I'm feeling pretty tough; I'm on the rum". Clearly, little turns on these differing accounts of the conversation.

Following this exchange the appellant, without warning, threw a punch at RN with his clenched right fist. The punch struck the rear left of RN's head. The appellant then proceeded to punch RN with both fists to the rear of both sides of his head. RN attempted to protect himself from the attack. He wrestled with the appellant, forcing them both to the floor. RN landed on his back, striking his head on the floor. The appellant ended up sitting on top of RN with his left hand around RN's throat, choking him. RN managed to push

his hand into the appellant's face and alleviate the pressure on his throat. As this was happening the appellant used the fingers of his right hand to gouge RN's eyes.

The two continued to struggle on the floor. The appellant leaned forward and bit the left ear of RN. As RN struggled against the appellant, he managed to push the appellant's face away; the appellant maintained his bite on RN's ear. RN managed to get to his feet as the struggle continued. They fell to the floor again, this time with RN on top. At this point RN was grabbed by two of the bouncers on duty. They proceeded to pin RN's arms to his sides. The appellant followed behind the bouncers as they then ejected RN from the premises.

The incident took place within the nightclub in front of a large number of people. The assault was protracted, lasting some minutes. The appellant was wearing large rings on his hands at the time of the assault. RN was taken to the front doors of the premises by the bouncers, and released. After RN was ejected from the premises, he was very upset and made various threats. He was concerned that his girlfriend was still inside. The duty manager of the Crossways Hotel heard the threats but was not intimidated by them, as such threats are common in these circumstances.

RN attended the hospital for treatment. On examination his right ear was bleeding; there was bruising around the eye; there was blood inside the left ear; and there was a laceration of the pinna of the left ear, consistent with a

bite. There was tenderness, swelling and superficial lacerations of the head and around the left ear. His chest was tender. The wounds were cleaned and dressed and he was advised to stay in hospital for observation, which he declined. However, he did return later the same day for a check up. He was prescribed antibiotics to prevent the wounds from becoming infected. RN did not give the appellant permission to strike him.

The appellant was arrested on 9 October 1995. He declined to participate in a record of interview, or to make any comment in relation to either charge.

The circumstances of the appellant

In his plea in mitigation on 1 March, Mr Davies then of counsel for the appellant summarised his background and personal circumstances to his Worship. As the appellant's prior good character was "very heavily" relied upon, it is appropriate here to detail it. Mr Davies said:

> "Mr Watt's aged 33 and he was born in NSW and grew up there. He completed year 10 and left at age 16. He did an apprenticeship in bricklaying and, upon qualifying, became self-employed as a bricklayer and concreter. He did that for many years and, at the end of the 80's, at the time of recession, he started to work at the Office of Juvenile Justice in Wagga and he became a senior youth worker there. He was assisting adolescents who were off the rails and incarcerated. He did very well and in fact, at one stage, received a letter of commendation from the equivalent of the Minister for Corrections in NSW for one of his actions.
>
> Sir, he left there in 1992 and came back to the Territory. He had first been in the Territory in 1980 and he was here continuously from 1980 to 1985. At that time, he was involved in the building industry and, at nights, he was working security and indeed was employing others. He was community minded, Sir. He was the captain/coach of the Katherine Aussie Rules Team for 1984 and '85 seasons. …

In 1985, because of his sporting prowess, he played for the Canberra Raiders. He left town. He was mainly in the reserve grade but did achieve a couple of games for the first team. … in '84 he represented the Territory in Rugby League and in 1983 the Territory Aussie Rules team. And indeed what he regards, quite rightly I think, as his greatest sporting achievement; in 1979, he was in the NSW under 17's representative side in the Teal Cup and he won the best and fairest for that year. … After giving it a go with the Canberra Raiders, he came back to the Territory for one year in 1986. He was again actively involved in sports in Katherine, coaching the Bushrangers Rugby League side. He was again working in the building game as a bricklayer and concreter and he was also doing security work at nights for a business which was the precursor to one which you will hear a great deal more about. It was called G&L Security.

Now, in 1987, he returned South and he didn't in fact end up coming back to the Territory until 1992 and he has been here effectively constantly since that time and regards Katherine and Darwin as his 'home turf' now. He's presently in a de facto relationship. He has been for some 8 months and indeed his partner is in court. I have met with her on several occasions. She is totally supportive of her spouse.

Sir, when he came back in 1992, he has concentrated on security work; and indeed he was working as a subcontractor initially but, about one year ago, he set up his business at G&M Security and that has been a major success. He employs a number of staff and indeed I've got a company profile, Sir, which I'd seek to hand up which outlines the work of the organisation. …

Sir, it's a professional organisation. It employs four staff full-time as doormen - or 'bouncers' as they're referred to colloquially. He has 2 full-time patrol staff and one full-time … cleaner. And what the main activities of his business are is this - that he has between 30 and 40 businesses around town who are signed up with him and some of his work has involved installation of alarms or arranging that, by electrical contractors; and responding to those alarms as they go off, and also nightly patrols. For example, he's recently had a contract with Power and Water Authority for 12 months, to look after all of their facilities around town. …

Sir, he has contracts with licensed premises; Knotts Crossing for example, the Crossways Hotel, the Riverview Caravan Park. With essentially all of the leading places in town where he provides services through his employees and, Your Worship, it would appear, to a very high standard indeed. There is the cleaning aspect of the business as well.

> Sir, it has been going very well, the business. However, Mr Watt plans in due course to sell up and move to Darwin and that is his, sort of, medium to long-term goal. He's looking to start another business there. He's got some ideas. In fact, one is a teenage leisure centre. But he will see what happens. …
>
> Sir, he's a hard-working, self-motivated person. … He's usually had two jobs, working in the building industry and security. He's never collected dole in his life; doesn't believe in it. And he has obviously a big future. "

Character evidence was called on behalf of the appellant from four witnesses. The first witness, a past duty manager of the Crossways Hotel, testified as to the appellant's performance of his duties as a security officer, especially his ability to eject patrons peacefully. He stated that the appellant was employed to provide security as "he wasn't a violent character. He had the science and he's an intelligent man so he could talk most people around." This witness further testified as to the appellant's general reputation and his personal support of the witness at an earlier troubled time.

The second witness, the present manager of the Crossways Hotel, testified as to the appellant's good character and "excellent" performance in relation to security at the Crossways Hotel. This witness also testified as to the character of the victim of the second assault, RN. He stated that RN had been barred from the hotel about 6 times over the previous 5 years for being drunk, abusive and abusing bar staff and management. He classified RN as a "trouble maker once he has alcohol in him". I interpose here that there is no suggestion that the victim RN incited or provoked the assault on him with which the appellant was charged.

The 2 other witnesses gave evidence of their long friendships with the appellant, their favourable opinions of his character and their knowledge of and dealings with him in his professional capacity.

Evidence as to the appellant's professional character was also placed before his Worship in the form of certificates of completion of training courses from the New South Wales Office of Juvenile Justice, entitled "Aboriginal Issues I/II/III" and "Managing Conflict and Violent Behaviour", as well as a certificate of completion of the New South Wales Police-approved basic training course conducted by the Security Training Academy.

Mr Davies also informed his Worship of the appellant's informal wardship over a 13-year old youth who had come to live with and work for the appellant, after suffering physical abuse at his family home. Counsel relied upon this wardship as evidence of the appellant's good character.

The appellant had a short criminal history when he appeared before his Worship. As a juvenile, he had come before the Wagga Wagga Children's Court in 1979 on a charge of break enter and steal, for which he was convicted and fined. His Worship rightly disregarded this offence for the purposes of the present case. In 1987 the appellant had been convicted in the Katherine Court of Summary Jurisdiction for driving unlicensed.

The appellant appeared twice before courts in 1995. In June 1995 he was convicted in the Darwin Court of Summary Jurisdiction for possession of protected animals. He was fined $450 for that offence. In November 1995 he again appeared before that Court; he was convicted of possessing amphetamine and fined $500. According to Court records, both of these offences were committed on 4 May 1995.

Most seriously, on 16 February 1996, some 2 weeks prior to the present convictions, the appellant was convicted before the Supreme Court in Darwin of attempting to pervert the course of justice on 25 April 1995. For that offence he was sentenced to 6 weeks imprisonment, with a direction that he be released after serving 2 weeks, upon entering into a recognizance in the sum of $2000 to be of good behaviour for 2 years.

The submissions before his Worship

Submissions by the Crown

The learned prosecutor, Ms Trier, submitted that the assault upon AY on 6 August 1995 was rendered more serious, because the appellant was on duty as a security guard at the time. She submitted that the appellant owed a duty of care to the public by virtue of his position and that a certain responsibility went with that position. She emphasized that the attack on AY was entirely unprovoked. AY had not been involved in the earlier fracas involving MB and JC; he was an innocent bystander. Ms Trier submitted that this factual matrix gave rise to the need for both general and personal deterrence when sentencing.

Ms Trier submitted that the assault on RN on 16 September was very serious. It was committed in a busy nightclub, in front of a number of people, and it involved a prolonged assault on RN.

Ms Trier submitted that even though the appellant had no prior convictions for assault, the offences of 6 August and 16 September should attract a sentence of immediate imprisonment.

Submissions by the appellant

I have already indicated Mr Davies' submissions relating to the appellant's character and personal circumstances. In relation to the assault on AY, Mr Davies emphasized the difficulty in keeping the peace when ejecting trouble-making patrons from nightclubs. He submitted that in the heat of the dispute between the appellant and the two patrons MB and JC whom he had ejected from the nightclub, the appellant had wrongly thought that AY had been inciting the two and may even have struck a blow at the appellant when he had been on his hands and knees. The appellant had therefore struck AY "acting in the heat of the moment and with his blood up". Mr Davies emphasized the limited extent of the injuries suffered by AY.

Mr Davies also sought to have this assault seen in the context of a period of great abuse and pressure on security staff at the nightclub, including an incident on the previous night when four patrons, who had been locked out following a disturbance, had tried to come through the locked front doors and

had smashed the windows of those doors with a steel water pipe. He emphasized the very tough position in which security personnel find themselves due to the nature of the clientele in Katherine - predominantly heavy-drinking males, including cowboys, ringers, servicemen, miners and local drunks. Against that background, he emphasized the significance of the appellant having no prior convictions for assault during the past 16 years in which he had been performing this kind of work.

In relation to the assault on RN, Mr Davies placed before his Worship a history of conflict and tension between the appellant and RN. This tension had arisen when the appellant, on prior occasions, had turned RN away from the Crossways Hotel due to his state of intoxication. As to the events surrounding this assault on 16 September, Mr Davies counsel stated that although the appellant is not a "big drinker", he was in fact heavily intoxicated on that night. Counsel conceded that RN had neither invited nor provoked the appellant's assault on him, but suggested that in the subsequent scuffle, RN "gave as good as he got".

Mr Davies also stated that although the appellant officially was off duty that night and was there as a patron, by virtue of his position as the employer of the security staff at the premises, he was never really off duty.

Finally, Mr Davies submitted in mitigation that the appellant had pleaded guilty to the charges at the first opportunity. He relied heavily on the appellant's previous good character as evidenced by the absence of any assault

convictions in his prior record, the character evidence presented by the four witnesses, and the appellant's care for his ward.

In closing, Mr Davies submitted that his Worship should suspend the service of any sentence of imprisonment imposed; alternatively, the option of home detention should be considered.

The submissions in reply

In reply, Ms Trier submitted, correctly, that a plea of guilty in itself is not evidence of contrition. She referred to the fact that the appellant declined to participate in interviews with the Police, as pointing against contrition on his part.

Ms Trier stressed that both assaults were unprovoked attacks by the appellant on persons legitimately on or outside the premises of the Crossways Hotel. Whilst not denying the existence of the pressures on the appellant and other security staff on the night of the assault on AY, or the prior history between the appellant and RN, Ms Trier sought to minimize the significance of these matters to sentencing, on the basis that what was charged and to be dealt with here were isolated unprovoked assaults on innocent members of the public. She stressed the need for protection of the public, when sentencing for these offences.

His Worship's oral sentencing remarks of 1 March 1996

His Worship classified the assault on AY, in light of the "relatively slight" bodily harm he suffered, as clearly "at the lower end of the scale". However, his Worship considered the circumstances of that assault as "quite troubling", and reviewed them (see pp3,4). The appellant, in his capacity as a security officer on duty at the hotel, had been involved in a fight with the two patrons who had been ejected; AY was in truth a bystander, but "the [appellant] believed that AY was involved more than this, rightly or wrongly". His Worship gave no weight to the fact that the appellant was wearing rings on his right hand at the time he punched AY:

> "I don't know that that made any difference. … It's not as though he wore a knuckle duster. People do wear rings."

As to the appellant's assault on RN, his Worship took into account that RN had been drinking and was not heavily intoxicated, but slightly intoxicated, whilst the appellant admitted to having been heavily intoxicated. His Worship considered this assault much more serious than the assault on AY, both in its outcome and the way in which had occurred - in the small hours of the morning, in a busy, crowded nightclub.

His Worship also appears to have taken into account as regards the second offence the appellant's position as "boss of security" at the nightclub, and his experience as a security officer. He stated:

> "The [appellant] of course had the advantage that he was boss of security. And I don't know whether this [that is, the assault on RN] was allowed to go on because he was boss or because he was on top; but I think it's interesting that, as soon as [RN] got on top, he was removed by the

> bouncers. *In short, I can't get it out of my mind that Mr Watt abused his position in the hotel when he started this fight. This was a quite unnecessary fight. He's a man who knows perfectly well how to control drunks and situations in this hotel. We know that. I've received a great deal of evidence to that effect. And he chose to act this way.*" (emphasis mine)

His Worship considered the appellant's prior record, which he described as "a mixed bag". As to the break, enter and steal offence of 1979, his Worship stated "he really must be said to have lived [it] down". His Worship classified the 1987 driving unlicensed offence as "very minor" and the 2 offences of 1995, possessing protected animals and possessing amphetamine, as "perhaps low average". In relation to these priors his Worship concluded "they suggest to me that he's a person who doesn't bother all that much about the law of the land." His Worship also noted the conviction of the appellant by the Supreme Court, post-dating these offences, for attempting to pervert the course of justice.

His Worship noted the evidence of the appellant's character including his care for his ward in Katherine, his past work with the Office of Juvenile Justice in New South Wales, his success in business, and the evidence of the character witnesses. His Worship described their evidence thus: "They give him a very good character and they're not in any way demolished in cross-examination."

His Worship then turned to the appropriate disposition for the offences, stating:

> "if [the assault on AY] was by itself; dealt with expeditiously without making any bones about it; [the appellant] accepting that he might have

> been in the wrong; co-operating with Police" - I interpose that this was not the case - "I don't believe that I would send Mr Watt to gaol. Especially with all the character evidence I have got. I question whether I would have imposed a prison sentence and fully suspended it. It's possible. Just one punch. Still more or less in the heat of the moment. … But when 3 weeks later he does this to [RN], I have to say to myself that sort of leniency may well be misplaced on Mr Watt. I've got to look at personal deterrence and general deterrence. I don't think that general deterrence would be particularly well served by a suspended sentence …".

It can be seen that his Worship considered the need for both personal and general deterrence. It appears from his Worship's remarks immediately following that he specifically had in mind 'bouncers' as the subjects of general deterrence. He continued:

> "The more intelligent bouncers would see that they'll get prison sentences hanging over their heads. It'd be a warning to them. And I should think most bouncers have to be pretty intelligent."

His Worship concluded, after referring to "the great deal of support in this town" for the appellant, that:

> "by and large, [the appellant] is a good man. But I think the message has to go to him, and it has to go to everybody else, that this sort of behaviour will not be tolerated."

His Worship then imposed the sentences detailed at pp1-2.

The submissions on appeal

(1) *The appellant's submissions*

(a) General

Ms Elliott for the appellant referred to the well-accepted principle that each assault case must be considered individually, according to the circumstances of the particular offence and the particular offender; there is no

sentencing 'tariff' for this type of offence. She cited *Roe v Hill* (unreported, Supreme Court (NT), Martin CJ, 17 June 1993) for the proposition that not all assaults are so serious as necessarily to attract a gaol sentence; the need for protection of the public and all the circumstances of the offender must be considered. I accept that general proposition. There is no presumption in favour of imprisonment as the punishment for assault. The public is best protected by a punishment which fits the particular assault and the particular offender, bearing in mind the need for a sentence to deter any unprovoked violence - see *Yardley v Betts* (1979) 1 A Crim R 329 at 332-3 per King CJ, cited at p32. In *Roe v Hill* (supra) the defendant was a female juvenile aged 15 years; she assaulted 2 other girls, the second assault resulting in the breaking of the victim's jaw and 7 teeth. An effective sentence of 4 months detention was imposed by the Juvenile Court, with a direction for release after 2 months on a bond. On appeal, his Honour referred as "a sound starting point" in sentencing for assault, to what King CJ said in *Yardley v Betts* (supra) at 332-4, and to the 'essential difference between children and adults' when it came to sentencing; he quashed the sentence, substituting an order for probation for 1 years. It was a very different case to this.

(b) The assault on AY

As to the assault on AY, Ms Elliott made 4 submissions.

First, she submitted that his Worship had erred in failing to consider any factor other than the need for general deterrence (Ground 5), particularly the deterrence of 'bouncers'; and in failing to consider relevant circumstances of

the offence (Ground 7) - specifically, the facts that the appellant had believed that AY had assaulted him during his earlier dispute with MB and JC, (pp3,4) a belief which the appellant now accepted was mistaken, and that AY had suffered only minor injuries from his assault. I do not accept that his Worship failed to consider these 3 matters. At transcript p37 his Worship referred to the appellant's belief that AY was involved in his earlier conflict with MB and JC outside the nightclub; and at transcript pp37 and 38 his Worship specifically identified the minor nature of the injuries which AY sustained.

Second, Ms Elliott submitted that his Worship had erred in failing to consider the appellant's assault on AY in complete isolation from that on RN (Grounds 7 and 8). She made 3 submissions on his Worship's sentencing remarks at p17: first, that his Worship had erred in saying the second offence was "3 weeks later", when in fact it was 41 days later; second, that he had there "compared" the first offence to the second offence; and third, he had "punished [the appellant] for the first [assault] for something that happened the second time." As to the first of these submissions, I accept that his Worship erred in stating at that point in his oral judgment that 3 weeks had elapsed between the offences; however, I am not satisfied that this error resulted in any miscarriage of the sentencing discretion - at another point he referred to it as "a few weeks later. In the early hours of Saturday 16 September", having earlier noted that the offences occurred on 6 August and 16 September respectively. The error was a mere slip, and not material. As to the second and third submissions, I do not accept that his Worship did what is alleged, or wrongly assessed the significance of the second assault to

the sentencing for the first offence; his approach accords with the observations of King CJ in *The Queen v McInerney* (1986) 42 SASR 111 at 113 viz:

> "Offences committed prior to sentence for the offence under consideration may affect the sentence in two ways. They may diminish or abrogate any leniency by reason of good character. They may, moreover, lead to a greater sentence than would otherwise be imposed, although within the proper limits indicated by the facts of the immediate crime, for the purpose of personal deterrence; the prisoner's record may indicate that greater punishment is needed to protect the public by deterring him from future crime. ...
>
> *Where the other offences have been committed after the immediate offence [as occurred here], they are relevant only in special circumstances. The offender has not committed the immediate offence with his character already affected by the [later] offences nor after the experience of conviction. In circumstances, however, in which the offender might otherwise have been given credit [and thus gain a measure of leniency of sentence] for having lived a law abiding life in the period between crime and sentence, it is relevant [to the question of leniency] that he has not so lived but has committed an offence or offences in that period. In some circumstances, the nature of the subsequent offences may be such as to suggest a greater degree of personal deterrence [by the imposition of a greater sentence] than would otherwise have been contemplated, is required.*" (emphasis added)

Third, Ms Elliott noted that the appellant's prior criminal record disclosed that he had no priors for violence; she submitted that in the absence of a record of violence, and consistent with the approach in *Ferguson v Chute* (unreported, Supreme Court (NT) (Mildren J), 3 June 1992), a sentence of immediate imprisonment should not have been imposed for the assault on AY. In *Ferguson v Chute* (supra) the question was whether an effective sentence of 3 months imprisonment on a 17-year old defendant for assaulting (by biting) and resisting a Police officer in the execution of his duty, was manifestly excessive. This question was argued and addressed on the basis that there was a current 'tariff' for sentencing for that assault, the contention being that the

sentence imposed lay outside that tariff, and was accordingly manifestly excessive. His Honour was referred to a list of 47 prior sentences for assaulting and resisting Police in the 18 months. His Honour said (pp4-5):

> "A careful study of this material indicates that in all cases where there has been a sentence of actual imprisonment, and that sentence has not been suspended, there have either been prior convictions for violence or there has been some aggravating circumstance relating to the commission of the offence.
>
> In no case have I been able to find any occasion when the Court of Summary Jurisdiction has ordered immediate imprisonment, unless either one or both of those circumstances exist. By "aggravating circumstance" I do not mean that in the technical sense as that expression is used in the Code; but in the sense that there is an aggravating circumstance by the use or threatened use of an offensive weapon, such as a knife, or something of that kind. In all other cases where there have been no use or attempted use of an offensive weapon, or no recent priors for violence, the range [of sentence] appears to be between a fine and that of a suspended sentence."

His Honour concluded, "on the material" before him, that there was "a fairly wide range of sentence for this type of offence", ranging to "short custodial sentences in bad cases"; since custodial sentences were "reserved only for" "bad cases" - those involving use or attempted use of an offensive weapon, or recent priors for violence, neither of which obtained in the case before his Honour - he considered that the sentence was manifestly excessive. As there had been "a recent trend to gradually increase the level of sentences", his Honour imposed an effective sentence of 2 months imprisonment, but suspended its service.

As to this third submission, I note that the offences dealt with in *Ferguson v Chute* (supra) carried maximum penalties of a fine of $1000 or

imprisonment for 6 months, or both, whereas the present offences carry maximum penalties on summary conviction of 2 years imprisonment. This difference in maximum penalties is a significant distinguishing factor, rendering inutile the tariff referred to in *Ferguson v Chute* (supra). In any event, I do not consider that the "tariff" approach adopted in *Ferguson v Chute* (supra) is applicable here. A "tariff" approach is generally inappropriate when sentencing for assault; in *Yardley v Betts* (supra) at 334 King CJ (with whom Mitchell J concurred) concluded that "cases of assault require individual assessment and treatment".

Fourth, Ms Elliott submitted that his Worship erred in not suspending service of the term of imprisonment imposed, because a suspended sentence would have met the need for a measure of general deterrence. In support, she relied on *Brazier v Police* (1994) 75 A Crim R 404 at p408, per Debelle J:

> "It is true that the need for general deterrence is a factor to which regard should be had when determining whether it is appropriate to suspend a sentence, *(Sotirches v Bates* (1985) 123 LSJS 226) but it is not the only relevant factor and due regard must also be had to the question of whether the proper rehabilitation of the defendant requires that the sentence be suspended and whether, in all the circumstances, it is appropriate to send a first offender to prison when that person might be a person likely to benefit from an exercise of the Court's clemency."

Properly understood, this passage does not support the submission; it indicates that the need for general deterrence militates against suspension. When his Worship said (p17) "I doubt that general deterrence would be particularly well served by a suspended sentence", it was a statement in accordance with principle and common sense. It is clear that his Worship also had in mind the need for personal deterrence - "the message has to go to [the

appellant]" (p17). He clearly considered whether the appellant should be extended the "sort of leniency" involved in a suspended sentence, but concluded that such leniency "may well be misplaced" as regards the appellant, in light of what he did "3 weeks later" to RN. There was sufficient evidence, in the form of the appellant's prior criminal record and his subsequent assault on RN, to overcome the mitigating effect of much of the favourable character evidence, and to justify his Worship's conclusion; it was essentially a matter for judgment. Accordingly, I consider that his Worship did not err, in declining to suspend the sentence of imprisonment imposed (Ground 5).

(c) The assault on RN

Ms Elliott made 3 submissions similar to those she had earlier made.

First, she referred to *Brazier v Police* (supra), submitting that his Worship erred in sentencing by considering only the need for general deterrence (Ground 5), and in not balancing that need against other relevant sentencing factors, in deciding whether or not to suspend the sentence. She identified those factors; they included the appellant's good character (Grounds 1 and 6) and the fact that RN sustained no longlasting injuries (Ground 3). As to these matters, I note his Worship's remarks in 3 respects, viz:

(a) At transcript p39 he noted the extent of the injuries suffered by RN:

> "… a variety of bleeding, bruising around the eye, blood inside the left ear, laceration of the pinna of the left ear consistent with a bit - apparently, it didn't need stitching - tenderness and swelling, superficial

lacerations of the head and around the left ear, chest tender."

(b) At transcript p40 his Worship noted the evidence to the discredit of RN, viz:

> "I've heard a lot to the discredit of [RN]. I don't have to make any findings about that. He hasn't had a chance to defend himself in Court against character assassination. [His Worship then discussed RN's various short periods of suspension from the hotel and concluded:] it seems to me that [RN] getting a 1 week ban or a 3 week ban can't be much of a problem at all."

(c) At transcript pp40 and 41 his Worship commented on the appellant's character:

> 40. "[The appellant] comes before me with a record which is a mixed bag. [His Worship referred to the dishonesty offence in 1979, which he considered the appellant "must be said to have lived down"; an offence of driving unlicensed in 1987 - "very minor"; and in 1995, offences of possessing protected animals and a dangerous drug (amphetamine), for which he had received "low average" fines of $450 and $500; and continued:] they suggest to me a person who doesn't bother all that much about the law of the land. [His Worship then referred to the later offence of attempting to pervert the course of justice, by "offering money to somebody to give evidence in a certain way", for which the appellant had been sentenced to 6 weeks imprisonment, of which service of 4 weeks had been suspended. His Worship continued:]
>
> I'm told that he's been very good with at least one youngster in this town - given him a start in life. I'm told that he's been - that he was successful in what he was doing in the Office of Juvenile Justice in NSW. He completed the NSW police approved Basic Training Course for security training in December '93. He seems to run a business which is needed in Katherine and which is by and large well run. He's produced several people, some of whom are themselves of impeccable reputation, and they give him a very good character and they're not in any way demolished in cross-examination. I suppose that means that Mr Watt is, like many of us, multifaceted."
>
> 41. "I have to admit I'm troubled by this because there is a great deal of support in this town for Mr Watt - support which has been willing to come forward; people prepared to take time off their daily avocations to

> give this man a character. And I recognise that, by and large, he is a good man. But I think the message has to go to him and it has to go to everybody else that this sort of behaviour will not be tolerated."

I do not consider, in the light of what his Worship there said, that he failed to balance countervailing sentencing factors against the need for both personal and general deterrence, when concluding that the sentence should be of immediate imprisonment.

Second, Ms Elliott submitted that when the appellant assaulted RN he did so as "a private citizen in the night club … just a patron himself". Accordingly, his Worship erred in considering the need for the sentence to embrace a need for the general deterrence of 'bouncers', since the appellant was not acting as a 'bouncer' at that time. This submission also relates to Ground 4, dealt with in the next submission. It is contrary to the 'never really off duty' approach which the appellant's then counsel took before his Worship (p13). His Worship considered that the appellant was "not on duty, he's simply there" at the time. Having described what occurred and the injuries sustained by RN, his Worship said (transcript p39):

> "So its rather more serious in its outcome than the blood nose and it's much more serious, I believe, in the way it happened. This was in a crowded nightclub - more relatively crowded - in the small hours of the morning. The nightclub was busy. It lasted for some time. When policemen are set upon in nightclubs and licensed premises, the fear is always that drunks will step in and take sides. It seems to me that the fear should be real enough in a situation like this to - there's always a fear I think that people will come in and take sides.
>
> The defendant of course had the advantage that he was the boss of security. And I don't know whether this was allowed to go on because he was the boss or because he was on top but I think it is interesting that, as soon as [RN] got on top, he was removed by the bouncers. In short, I can't get it out of my mind that [the appellant] abused his position in the

> hotel when he started this fight. This was a quite unnecessary fight. He's a man who knows perfectly well how to control drunks in situations in this hotel. We know that. I've received a great deal of evidence to that effect. And he chose to act in this way."

It is clear in my opinion that since his Worship rightly regarded the appellant as "the boss of security", he rightly took into account as a sentencing factor the need for the general deterrence of 'bouncers'.

Third, Ms Elliott submitted that his Worship erred in finding in the passage at pp25-6 that the appellant 'abused his position in the hotel', in starting the fight with RN (Ground 4). It is clear that in that passage his Worship was addressing 2 concerns. First, that the defendant "had the advantage" in the fight with RN by virtue of his position as 'boss of security', since this may have led to the failure of his own security staff on duty to intervene at an appropriately early moment in the fight. Second, that the appellant 'abused his position' in the sense that his action in starting the fight was directly contrary to his professional responsibilities as 'boss of security', his training in security, and the proper interests of the hotel (which he was employed to protect). Ms Elliott submitted there was no evidence that the appellant 'gained any advantage' in the fight as a 'bouncer', since he was not there in that capacity.

As to the first concern it is clear (as his Worship found) that the appellant gained an advantage by virtue of his position as 'boss of security'. That is clear from the fact that although the appellant was heavily intoxicated, was the aggressor, and had started the fight with RN, it was RN and not the appellant who was ejected from the hotel as a result by the appellant's employees. As to

the second concern, the inference which his Worship drew was clearly open to him to draw on the facts of the case, particularly in light of the large amount of evidence he had as to the appellant's standard of performance of security work. Accordingly, his Worship did not err in finding that the appellant 'abused his position in the hotel' in starting the fight.

(d) Both assaults and sentences

Ms Elliott made 2 submissions relating to both sentences of imprisonment.

First, she submitted that his Worship erred in failing to consider the option of home detention, as urged upon him by the then counsel for the appellant (Ground 2). Whilst it is true that his Worship did not refer to home detention in his sentencing remarks, it is clear from a long line of authority - see *Napper v Samuels* (1972) 4 SASR 63 at 74 per Mitchell J, and most recently *Blacksmith v Materna* (unreported, Supreme Court (NT), Mildren J, 30 August 1996) - that the mere fact that a sentencer has not mentioned a sentencing option which was urged upon him does not mean that he did not consider it. Here the very experienced Magistrate heard submissions in the morning, and sentenced in the afternoon with the submissions fresh to his mind. It is clear from the sentences which his Worship imposed that he considered that home detention fell outside the range of appropriate sentencing dispositions for these offences.

Second, Ms Elliott submitted that the appellant was not given due credit for the fact that he had worked for 16 years as a 'bouncer' and had never before been charged for assault arising from that work (Ground 1). It was stressed before his Worship that the appellant's clean record for assault should be given particular weight, because the nature of security work was such that such charges might well be expected. It is clear that his Worship took the appellant's background into account. This submission 'holds water' only if this Court concludes that the sentencing was manifestly excessive, bearing in mind this sentencing factor as well as those referred to in other grounds of appeal, especially Grounds 3, 5 and 6. In the event that the sentencing is considered to be manifestly excessive, it stands as one of the reasons which possibly account for such a sentence.

(2) *The respondent's submissions*

Mr Carey of counsel for the respondent directed his submissions to the grounds of appeal, seriatim.

As to the first ground of appeal (p3) Mr Carey referred in detail to his Worship's sentencing remarks, in particular to the remarks dealing with character evidence and the appellant's prior convictions. He submitted that it was "quite clear that character was taken into account when sentencing this man". I accept this submission; however, the question raised by Ground 1 is whether *due* weight was given to character. At transcript p41 his Worship said:

> "I have to admit I'm troubled by this [that is, whether the need for personal and general deterrence outweighed other factors, so as to require

> a sentence of immediate imprisonment] because there is a great deal of support in this town for Mr Watt - support which has been willing to come forward; people prepared to take time off their daily avocations, to give this man a character. I recognise, that by and large, he is a good man"

As with the submission that due weight had not been given to the appellant's assault - free record (p28), the question whether due weight was given to the evidence of good character really arises only if this Court considers the sentencing manifestly excessive; if so, it stands as a possible reason such a sentence came to be imposed.

As to the second ground of appeal (p2), Mr Carey submitted that the Magistrate had considered and correctly rejected the sentencing option of home detention, and had not erred by refusing to suspend the sentence of imprisonment imposed. He referred to *Aoina v O'Brien* (unreported, Supreme Court (NT) (Mildren J), 13 January 1994), in which his Honour said at p9:

> "… [in a list of cases his Honour examined, involving stealing by a person in a position of trust] there are usually factors of some significance stressed by the sentencer to justify a wholly suspended sentence."

Mr Carey submitted that the learned Magistrate was justified, in addressing the question whether service of the sentences he imposed should be suspended, in "not coming to the conclusion that a suspended sentence was required in the particular circumstances". I dealt with the question of home detention at p27, and with the refusal to suspend service of the sentences of imprisonment, at pp22-5.

As to the third ground of appeal (p2), Mr Carey described both assaults as "gratuitous, unwarranted, without warning, unprovoked." He submitted that the lack of any serious or lasting injury to RN was not a significant factor in the sentencing, in light of the other objective circumstances of that offence. I accept that submission. As King CJ said in *Yardley v Betts* (supra) at 334, in stressing the need for individual assessment and treatment of cases of assault:

> "It is worth pointing out that the degree of injury suffered by the victim is not in every case a satisfactory measure of the gravity of the offence or the culpability of the offender."

It is not "a satisfactory measure" here. In his sentencing remarks (pp23-4), his Worship carefully detailed the injuries suffered by RN. His Worship took account of the seriousness of those injuries in formulating the sentence he imposed. I am not satisfied that his Worship failed to pay due regard to the nature of those injuries.

As to ground 4 of the appeal (p2), Mr Carey referred to the undisputed evidence, which detailed how the appellant's employees had only intervened in the fight between the appellant and RN *after* RN had fought his way to the top. Mr Carey submitted that his Worship's description of the appellant's conduct as an 'abuse of his position' was not an unreasonable characterization, given the undisputed facts. At pp26-7 I indicated that I considered that the conclusion drawn by the Magistrate that the appellant's conduct was an 'abuse of his position', was reasonably open to be drawn. Ground 4 (p2) appears to contend that this abuse by the appellant of his position should not have been taken into account by the Magistrate. There would be no substance in that proposition; an abuse of his position by the appellant involves an element of

breach of trust, and is clearly relevant to the exercise of the sentencing discretion. However, Ms Elliott's submission (pp25-6) indicated that the real basis of attack in Ground 4 is that the finding of abuse of position was not open on the evidence; as I indicated at p27, I consider that it was.

As to ground 5 of the appeal (p2), Mr Carey submitted first that his Worship had not given excessive weight to the need for general deterrence; and, second, that Courts of Summary Jurisdiction are in a better position than this Court to deal with offences of this type and, accordingly, are in a better position to assess the need for general deterrence in sentencing for such offences. In support, he referred to the assault case of *Najpurki v Luker* (unreported, Supreme Court (NT) (Martin CJ), 6 August 1993). That case involved 2 slashes with a knife. His Honour said at pp8 and 11:

> 8. "It is plain that his Worship approached the sentence which he felt obliged to impose upon the basis that the need for general deterrence outweighed the many other factors of significance affording mitigation to the appellant. That is not to say that a sentence imposed under those circumstances should be more severe than the nature of the offence and the circumstances of its commission calls for, but rather, that it is appropriate to give less weight to mitigating factors which may be found going to the circumstances of the offender. …
>
> 11. There can be no doubt that his Worship was, as well, aware of the frequency of offences of this general type when considering the sentence to be imposed on this appellant. It is undoubtedly the case that the Courts of Summary Jurisdiction are called upon to deal with offences of this nature more often than in this jurisdiction."

Mr Carey also cited in support *Yardley v Betts* (supra) per King CJ at 332-3:

> "The aspect of deterrence of the particular offender and of others must not be overlooked. … *Deterrence possesses particular significance in cases of unprovoked violence*. The observations of Bray CJ in *Birch v Fitzgerald* (1975) 11 SASR 114 at pp116-117 are in point:
>
> > "Nevertheless there are offences in which, as it seems to me, the deterrent purpose of punishment must take priority. When people act under the influence of liquor, pasdion, anger or the like so as to constitute themselves a physical danger or potential physical danger to other citizens, it may well be that a sentence of imprisonment will be appropriate, even in the case of a first offender of good character, in order to impress on the community at large that such behaviour will not be tolerated. … *A Court will often, in my view, be justified in treating unprovoked violence in the same way in the absence of mitigating circumstances*. As I said in *Sellen v Chambers* (1974) 7 SASR 103 at p106:
> >
> > > 'Violence has increased, is increasing, and ought to be diminished, particularly violence by young men towards each other.'
> >
> > It may be that the incidence of such violence will be reduced if it is brought home to those likely to resort to it that if they do they may very well be punching, striking, butting or kicking themselves into gaol. …"" (emphasis added)

In the present case, given the unprovoked and violent nature of the two assaults by the appellant (albeit, as to AY, in his mistaken belief as to what AY had done), I consider his Worship was clearly entitled to give significant weight to the need for both personal and general deterrence, and less weight to other factors which would mitigate the punishment to be imposed. I accept Mr Carey's submission on this aspect.

Ground 6 (p2) is in near identical terms to the last part of ground 1; it was not further addressed by Mr Carey. I dealt with it at pp23-5.

As to ground 7 (pp2,3) Mr Carey submitted that his Worship could properly take a different view of the appellant in light of his later assault on RN, when exercising his sentencing discretion for the assault on AY. He submitted that had his Worship been faced only with the first offence, he may have considered it completely out of character for the appellant as a man with no known propensity for violence, and treated him as a man not likely to offend again in that way. However, in light of the commission of the second offence, Mr Carey submitted that his Worship could no longer take such a view of the appellant on his first offence because, clearly, it could now be seen that he had some predisposition to "gratuitous violence in unprovoked situations". As noted above (pp19-20), I consider that his Worship was entitled to have regard to the later assault on RN when assessing all the circumstances of the assault on AY, including the character evidence. To this extent I accept Mr Carey's submission.

Mr Carey cited *Lade v Mamarika* (1986) 83 FLR 312 where Nader J stressed that the overriding requirement for the sentencing of an accused person for a number of offences is that the aggregate sentence should fairly and justly reflect the total criminality of the offender's conduct. Mr Carey submitted that it was necessary to assess the total criminality of the appellant's conduct against the effective sentence of 4 months imprisonment imposed. He submitted that his Worship had correctly sentenced in the manner set out at pp1, 2. I accept that general approach.

As to ground 8 of the appeal (p3), Mr Carey conceded that the time between the offences was in fact some 6 weeks, rather than 3 as stated by the Magistrate (p17); however, he submitted that it was in either case a very short period of time, and that the defendant would not have benefited had the Magistrate correctly identified the amount of time elapsed. I accept this submission, and note in any event what I said at p19 on this aspect.

Mr Carey submitted that unless the learned Magistrate's sentencing discretion has been shown to have clearly miscarried, this Court should not interfere with the sentences imposed. It is not sufficient that this Court may have imposed a different sentence at first instance. I accept that is an accurate statement of the law; see *Seears v McNulty* (unreported, Supreme Court (NT) (O'Leary CJ), 29 July 1987).

In conclusion, Mr Carey submitted that none of the grounds of appeal (pp2,3) disclosed that the exercise of his Worship's sentencing discretion had miscarried. He also noted that no submission had been made to his Worship by Mr Davies that the appellant would suffer any extraordinary prejudice by serving a term of actual imprisonment.

(3) *The appellant's submissions in reply*

Ms Elliott made 3 submissions in reply. First, she reiterated her submission (pp18-19) that the appellant assaulted AY under a false belief that he had not been an innocent bystander in the fracas outside Wings nightclub, immediately prior to the appellant's assault upon him. Second, she noted that

his Worship had classified the assault on AY as "at the lower end of the scale" (p15), not merely "at the lower end of the scale in comparison to the assault on RN". Third, she submitted that his Worship could have drawn inferences other than that the appellant 'abused his position' at the hotel. She suggested that the late intervention by the other bouncers in the appellant's assault on RN could be explained innocently by facts not placed before the Court, such as their having been occupied elsewhere when the fight between the appellant and RN broke out.

Conclusions on the appeal

As is clear from my various remarks when discussing the individual submissions of the appellant and the respondent, I am not satisfied that any ground of appeal has been made out. I consider that it has not been established that the sentences on each of the two charges, and their accumulation, were not imposed in a proper exercise of the learned Magistrate's sentencing discretion. I do not consider that either sentence, or their accumulation, is manifestly excessive.

Accordingly, I dismiss the appeal and affirm the sentences imposed by his Worship (pp1, 2). In accordance with his recognizance on appeal, the appellant is required to surrender himself within 14 days and to submit to that sentencing.

Orders accordingly.

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