PARTIES:	ALEX JOHN ALEXIOU v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA10 of 1995
DELIVERED:	4 April 1997
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JUDGMENT OF:	Kearney, Angel and Priestley JJ

CATCHWORDS:

Criminal law - Appeal and new trial - Appeal against sentence - General principles - Appeal against sentence dismissed

Criminal law - Appeal and new trial - Fresh evidence - Reoccurence of medical condition - Application to adduce fresh evidence refused

Northern Territory Criminal Code ss186, 196, 213

Dorning (1981) 27 SASR 481, applied
Eliasen (1991) 53 A Crim R 391, applied
Jones (1993) 70 A Crim R 449, applied
McIntee (1985) 38 SASR 432, applied
Smith (1985) 44 SASR 587, applied

REPRESENTATION:

Counsel:

Appellant:	C R McDonald
Respondent:	J W Adams

Solicitors:

Appellant:	Withnall Cavanagh Maley
Respondent:	Director of Public Prosecutions

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

No. CA10 of 1995

BETWEEN:

ALEX JOHN ALEXIOU
Appellant

AND:

THE QUEEN
Respondent

CORAM: Kearney, Angel and Priestley JJ

REASONS FOR JUDGMENT

(Delivered 4 April 1997)

THE COURT:

This is an application for leave to appeal against sentence pursuant to s410 of the *Northern Territory Criminal Code*.

On 12 April 1995 the applicant was found guilty by a jury of the crimes of deprivation of liberty, contrary to s196(1) of the *Criminal Code,* aggravated unlawful entry, contrary to s213(1), (4), (5) and (6) of the *Criminal Code*, and

one count of aggravated assault, contrary to s188(1) and (2)(m) of the *Criminal Code*. Each crime was found to have been committed on or about 19 August 1993.

On 10 May 1995 the applicant appealed against his convictions. That appeal was heard on 19 July 1995. It was dismissed on 18 September 1995. The applicant maintains he is innocent to this day. The applicant was sentenced on 18 May 1995. The application for leave to appeal against sentence was made on 14 June 1995.

The *Criminal Code* prescribed maximum penalties of seven years imprisonment with respect to the deprivation of liberty count, life imprisonment with respect to the aggravated unlawful entry count and five years imprisonment with respect to the aggravated assault count. The learned sentencing judge, Gray AJ, imposed a sentence of three years imprisonment with respect to the deprivation of liberty count, seven years imprisonment with respect of the aggravated unlawful entry count and two years imprisonment with respect of the count of aggravated assault. He directed that these sentences be served concurrently making an effective term of seven years imprisonment. He fixed a non-parole period of three years and six months.

The learned sentencing judge, with admirable brevity, described the offences, in the following terms:

> "The evidence led by the Crown at the trial concerned the unlawful activities of three men, acting in combination, of which one man was the obvious

leader. The evidence implicated the accused as the leading man. The identity of the other two men was never established. At the trial the sole live issue was whether the accused was the leading man.

The accused gave evidence denying his involvement and called alibi evidence. The jury, by its verdicts, clearly rejected the alibi defence and accepted the version put forward by the Crown witnesses.

The Crown evidence was that the accused's co-offenders were strongly built men who, in the words of one Crown witness 'Looked like bouncers'. They were doubtless recruited to add to the fear sought to be instilled in the victims.

The first phase of the transaction occurred at 7 Phineaus Court, Gray, Palmerston. This was the home of Stella Rickard. At about 11.30pm she was in a group, standing around a fire in the backyard of the premises. The accused, followed by the other two men, came around the side of the house and the accused approached the group. The accused singled out Stella Rickard and made an aggressive inquiry about some cannabis which was said to have gone missing at Daly River.

Stella Rickard said she knew nothing about it. The accused then demanded that she accompany him and the other two men to the home of one Susie Desousa. Stella Rickard refused but eventually agreed to go to Desousa's home in the car of another member of the group around the fire, namely Shirlene MacLannan.

The three men had arrived in a white Sigma sedan. The two vehicles then travelled to Unit 8, 31 Cornwallis Circuit, Gray. Upon arrival, the accused and of the men escorted Stella Rickard up some stairs to Ms Desousa's flat. They were admitted to the flat by Shane Dunning, who was then living with Susie Desousa.

The accused questioned Dunning about the whereabouts of the missing cannabis and whether Stella Rickard was involved. Dunning's answers did not satisfy the accused and he slapped Dunning

violently on the side of the face. Eventually the accused allowed Stella Rickard to leave and she did so. As she and Shirlene MacLannan drove away, they noted the registration number of the white Sigma, which was recorded in Shirlene MacLannan's diary. The number proved to be that of a white Sigma registered in the name of the accused's parents.

Meanwhile, back in the Desousa flat, Dunning continued to deny any knowledge of the Daly River cannabis. However, it did emerge that Dunning had obtained a small amount of cannabis from one Les Collins who lived in a nearby flat. The result was that Dunning was taken, forcibly, to the vicinity of Collins' flat by the accused and one of the other men.

Dunning was ordered by the accused to call out and ask Collins if he had any 'dope'. Collins came out to his front gate, said he had no dope and turned to return to his flat. The accused and one of the men jumped over Collins' fence, leaving Dunning in the hands of the third man. The accused got hold of Collins and Dunning was told to jump the fence.

He did as he was told, quickly followed by the third man. Collins was dragged inside his flat. Dunning was told to sit down. The accused and one of the men forced Collins to the floor and a pillow was pushed to his head. One of the men had his knees on Collins' shoulders. Collins was asked questions about the whereabouts of the cannabis.

The accused pulled a pistol from his jeans, checked it and pushed the barrel into Collins' mouth and again questioned Collins about the cannabis. Soon after, voices were heard outside the flat, and the accused and his two companions made a hurried exit. They ran to the white Sigma and drove away before police arrived.

On the following day the police arrested and charged the accused. He made no admissions and refused to participate in the identification parade. On the following day a photograph of the accused was identified from a folder of photographs by three of the Crown witnesses.

> The foregoing bare narrative of the night's events amply demonstrates the serious criminality of the accused's conduct. Dunning was subjected to substantial violence and then forcibly removed from his home. Collins, a middle-aged man, was very violently handled and put in justifiable fear of his life. Each of these outrages was preceded by an unlawful entry into the victim's home at the dead of night.
>
> Crimes involving serious personal violence and the violation of the security of a person's home must be sternly punished. Furthermore, such crimes are prevalent, and the question of general and specific deterrence must be given prominence. In this case there is no evidence of remorse or co-operation with the police to enable the co-offenders to be identified.".

Having said he was prepared to disregard the accused's criminal record for sentencing purposes and that counsel for the applicant was forced to rely entirely on matters personal to the accused in mitigation, the learned sentencing judge said:

> "It appears that the accused was born in Darwin and is presently thirty five years. He has lived in Darwin all his life. His parents are Greek-born but emigrated to Darwin many years ago. The accused enjoyed a good education. He matriculated in 1976. He then undertook an electrician's apprenticeship and obtained an A-grade electrician's licence. In 1980 he was diagnosed as having cancer of the liver. He underwent a successful operation but took eighteen months to recover his health. He returned to electrical contracting for a while but began to get involved in security.
>
> He started his own business, J & A Security Company, and conducted it for eight years. It became a substantial business which, at one stage, had forty five employees. Eventually the business became unmanageable and it was discontinued. In recent times the accused has not been in regular employment but

> does odd electrical jobs. It was said that his health does not permit full-scale work as an electrical contractor. The accused has not married but he supports a four year old daughter who is the product of a former relationship, and who lives with her mother. The accused is also said to provide some support to his parents.
>
> The court was provided with some thirty three testimonials, mainly deriving from members of the Greek community. There are some testimonials from proprietors of establishments which used the accused's security service and some from relations of the woman with whom the accused is currently living, and one from the woman herself. The authors of these testimonials each speak well of the accused. Mr Tippett submitted that the good opinion of the accused held by so many people suggests that his prospects of rehabilitation are good.
>
> The difficulty with this proposition is that very little is known about what motivated the accused to engage in the callous and violent conduct I have earlier described. The evidence in the trial supports the inference that the accused was engaged in commercial dealings in cannabis and was bent on tracking down some person who had done him wrong in this connection. If this explanation is put aside, the commission of the crimes is inexplicable, or at least unexplained.
>
> In either event there appears to be no basis for any affirmative belief in the likelihood of the accused's rehabilitation. His likely attitude to future offending is quite unknown. I take into account in the accused's favour his relatively good previous record and the good opinion held of him by at least some sections of the community. I am prepared to give some weight to the fact that the accused's need for periodic medical attention may make his time in prison more difficult than it might otherwise have been."

Counsel for the applicant argued that the sentence was manifestly excessive in all the circumstances. We do not think there is any substance in

this submission. We agree with the learned sentencing judge that the gravity of these crimes demanded a substantial penalty. Although not a "worst case", this was serious offending and the head sentence and non-parole period properly reflect this. The applicant was the leader, the entry was planned, the occupier was lured outside by trick, the entry was forceful, the occupier was dragged into his own flat against his will, the entry was by a group of strong men and the older occupier was alone. So far as count one is concerned the victim was forced to engage in the tricking of Mr Collins and to view the serious assault on him. So far as count three is concerned, the checking and insertion of a pistol into the victim's mouth during the assault emphasises the severity of the assault. We are of the view that the learned sentencing judge's sentence was well within his discretion and adequately reflected both the serious nature of the offending and the subjective matters relevant to the applicant, including both his then known state of health and the fact that his prior record lacked any criminal violence. It is in our view impossible to say the net sentence was manifestly excessive, or that the learned judge acted on a wrong principle, or took into account anything he ought not to have taken into account or failed to take into account anything which he should have taken into account or wrongly evaluated the seriousness of the conduct by which the law as expressed in the *Criminal Code* had been violated.

The applicant sought to adduce fresh evidence before this Court in the form of a medical report and information set out in the affidavit dated 10 December 1996 of Dr Wake, the visiting medical officer to Darwin Prison.

The applicant had had a cancerous growth removed from his liver in 1980. The applicant had apparently physically recovered but there was nothing about the possibility of a recurrence of cancer in the medical reports before the learned sentencing judge. The fresh evidence sought to be adduced deals with the issue of recurrence of cancer, the stress of the prison environment and its relationship with the possible recurrence of cancer and the effects of prison on the applicant's mental health and condition. As visiting medical officer, Dr Wake has been responsible for the applicant's health since his imprisonment and has had access to his many medical records.

Appellate courts should accede sparingly to applications of this kind. See *Eliasen* (1991) 53 A Crim R 391 at 394. This Court will receive fresh evidence if it can be clearly shown that the failure to receive fresh evidence might have the result that an unjust sentence be permitted to stand. *McIntee* (1985) 38 SASR 432 at 435. When the Court comes to consider the reception of fresh evidence, three conditions usually need to be satisfied; first, that the evidence could not have been obtained with reasonable diligence for use before the sentencing judge, secondly, that the fresh evidence is such that it would probably have an important influence on the result of the sentence, even if it is not decisive and, thirdly, that the evidence is apparently credible. *Dorning* (1981) 27 SASR 481 at 485-6; *Smith* (1985) 44 SASR 587 at 588. In an appropriate case this Court will permit evidence of matters or events that have occurred since passing sentence with a view to this Court reconsidering the matter in light of the additional evidence. *Eliasen* supra at 495; *McIntee*

supra at 435. In a case such as this where evidence is, inter alia, sought to be introduced of subsequent matters, the first question is whether independently of the fresh evidence sought to be adduced, the sentences imposed were within the sentencing discretion available and secondly if the effective sentence is appropriate, whether the additional evidence (once admitted) should lead to the imposition of a different sentence. *Jones* (1993) 70 A Crim R 449 at 455-56.

For the reasons already given we think the sentences imposed were within the sentencing discretion.

Since the applicant was gaoled both his mother and girl friend have died. The applicant's father's health has also deteriorated. However we agree with the submissions of the respondent that this is not fresh or new evidence. These matters are incidents of custody; the fact of their occurrence does not affect the validity of the sentencing process; *Smith* supra at 588; *Jones* supra at 456. The upper quadrant pain of the applicant that has persisted since his 1980 operation, the possibility of cancer recurring and his stress whilst incarcerated, particularly that consequent upon him from time to time passing blood, were all matters that were raised before the learned sentencing judge.

We have come to the conclusion that the additional medical evidence would not lead this Court to conclude that the Court's intervention is called for. It is the responsibility of the Department of Correctional Services to

provide appropriate medical treatment and care for the applicant whilst incarcerated. This case falls far short of the Court being requested to free the prisoner from the rigours of incarceration on plain and clear humanitarian grounds, even assuming we had jurisdiction to take such a course. The applicant was found by the learned sentencing judge to have no apparent prospects of rehabilitation and we agree. This, of itself, militates against any earlier release than that contemplated by the learned judge's orders.

We are not persuaded that this Court could or in any event should intervene in this case and disturb what is otherwise an appropriate sentence.

The application to adduce fresh evidence is refused and the application for leave to appeal against sentence is dismissed.
