PARTIES:	GRAHAM DAVID STEELE
	v
	ROBIN LAURENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction
FILE NO:	JA26/1997 (9519889)
DELIVERED:	8 August 1997
HEARING DATES:	28 July 1997
JUDGMENT OF:	Bailey J

REPRESENTATION:

Counsel:

Appellant:	Mr J Lawrence
Respondent:	Ms A Fraser

Solicitors:

Appellant:	Waters James McCormack
Respondent:	DPP

Judgment category classification:	C
Judgment ID Number:	BAI97018
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BAI97018

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

No. JA26/1997

BETWEEN:

GRAHAM DAVID STEELE
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 8 August 1997)

On 24 February 1997, the Appellant was convicted in the Court of Summary Jurisdiction of one charge of aggravated unlawful assault. The circumstance of aggravation was that the victim, Terence Heywood, suffered bodily harm. The Appellant was sentenced by the learned Magistrate, Mr Gillies, to imprisonment for six months. This sentence of imprisonment was suspended fully upon the Appellant entering into a home detention order for a period of six months. Mr Gillies imposed a further condition that the

Appellant undergo alcohol counselling and anger management counselling if such was considered appropriate by the Director of Correctional Services.

By notice of 6 March 1997, the Appellant appealed both his conviction and sentence. At the hearing of the appeal before this Court on 28 July 1997, Mr Lawrence on behalf of the Appellant sought, and was granted, leave to abandon the appeal against conviction. After hearing submissions on the appeal against sentence from Mr Lawrence and Ms Fraser on behalf of the Director of Public Prosecutions, I dismissed the appeal and indicated that I would publish my reasons at a later date. I now set out my reasons for dismissing the Appellant's appeal against sentence.

Background

A co-offender, John Bent Rorvik, was charged in similar terms to the Appellant in respect of the same assault of Mr Heywood. Rorvik was convicted and sentenced to eight months imprisonment, suspended on similar terms to those afforded to the Appellant. Rorvik instituted an appeal against both his conviction and sentence. However both were abandoned, with leave of the Court, on the oral application of Mr Lawrence.

The charge against the Appellant and Rorvik was that each on 11 October 1995 at Dundee Downs unlawfully assaulted Terence Heywood and that the unlawful assault was aggravated by reason that Mr Heywood suffered bodily harm.

The learned magistrate found the following facts proved:

"(1) Late at night, just before midnight on 11 October 1995 the defendant Mr Rorvik went onto land occupied by Terence Harold Heywood and Janette Pride at Lot 2971 Barramundi Drive. Mr Rorvik entered the land coming from the defendant Steele's land at 2970 Barramundi Drive.

(2) When Mr Rorvik came onto the land he was holding a tomahawk.

(3) Mr Heywood and Ms Pride were asleep in a caravan on their land. Outside the caravan Mr Rorvik called out words to the effect of "Terry, Terry, get out here". Mr Heywood rose from his bed, stepped outside and saw Mr Rorvik standing in front of a double garage adjacent to the caravan. Mr Heywood queried why Mr Rorvik was on the property. He said words to the effect of, "What the hell are you doing here?" or "What the heck are you doing on the property?". He said words to the effect of "Get off the property".

(4) Mr Rorvik said words to the effect of he had come to teach Mr Heywood a lesson. Mr Rorvik said words to the effect of "I want to sort out this problem you have with us". Mr Rorvik mentioned something about Mr Steele teaching Mr Heywood a lesson.
Mr Rorvik said words to the effect of "Have a go, you mug".
Mr Rorvik made mention of previous requests by Mr Heywood of

Mr Steele that Mr Steele not use Mr Steele's bore pump on numerous occasions.

(5) During the initial confrontation and specifically during that part of the confrontation where Mr Rorvik was saying words to the effect of "Have a go, you mug", he was moving the tomahawk from hand to hand. Mr Heywood tried to calm Mr Rorvik down, he asked Mr Rorvik his age and said words to the effect of "I'm old enough to be your father". Mr Rorvik then dropped the tomahawk at his feet.

(6) Ms Pride, shortly after the tomahawk was dropped, moved behind Mr Rorvik, took hold of the tomahawk and threw it into the bush. She did this before contact was made between Mr Rorvik and Mr Heywood.

(7) After dropping the tomahawk Mr Rorvik said "I'm unarmed now. Have a go, you mug".

(8) Mr Heywood moved away by moving back one pace. Mr Rorvik advanced towards Mr Heywood, struck him once to the left arm and once to his right shoulder. Mr Rorvik then lunged at Mr Heywood and grappled with him. Just prior to the lunge, Mr Heywood heard a male voice coming from the direction of the fence that borders his property with Mr Steele's property. I am satisfied that that voice was Mr Steele's voice.

(9) Mr Heywood and Mr Rorvik fell to the ground; Mr Rorvik punched Mr Heywood twice to the head. The two men then wrestled on the ground. Mr Heywood's purpose in wrestling was to try to hold Mr Rorvik off.

(10) During the wrestling, and whilst Mr Heywood was on the bottom of the two men, Mr Steele appeared. He kicked Mr Heywood in the head once and once in the body. Mr Heywood then stopped moving.

(11) Mr Rorvik rolled off Mr Heywood; Mr Steele then straddled Mr Heywood, bent over from his waist, that is Mr Steele's waist, and hit Mr Heywood repeatedly on both sides of his chest.

(12) When the assault had finished, Mr Heywood was lying face down in the dirt.

(13) Mr Heywood suffered bodily harm. He suffered broken ribs, although I cannot find how many ribs were broken. This interfered with his health for he was immobile due to pain for four to five days after the assault. He said in evidence just a cough would be painful. He sustained other injuries, cuts, rashes, bruising, a gash above his right-hand eyebrow and a split in his left ear. In other words, he suffered a bad beating. He was not capable of driving to the police station next morning.

(14) I cannot find whether it was the actions of Mr Rorvik or Mr Steele which caused the broken ribs. Whether they were caused by Mr Steele's second kick or blows delivered by either Mr Steele or Mr Rorvik I cannot say. I suspect it was Mr Steele's second kick which broke the ribs, but in Mr Rorvik's record of conversation with police he used the expression "I'd just drive him, you know". Obviously Mr Rorvik is a man who considers that he can deliver a punch with force so it is not beyond the realms of possibility that Mr Rorvik caused the broken ribs by delivering a punch. However, whether it was Mr Rorvik or Mr Steele who broke the ribs, I cannot say.

(15) Neither Mr Heywood or Ms Pride were affected by liquor at the time of the incident. They had consumed an unknown amount of home brew some time before retiring at about 9.00 p.m. The effect of that home brew, if it had not worn off, was negligible at about midnight.

(16) I am satisfied Mr Steele was wearing shoes at the time of the assault. As to the composition of the shoes I cannot be certain. They had the appearance of a type of runner, so I suspect they were soft and not hard.

(17) I am satisfied that Mr Heywood did not give permission to be assaulted. In this case the prosecution have ruled out the justification

of self defence and the excuse of provocation. There is no self defence in this case. Mr Rorvik was the initial aggressor. At no stage was Mr Heywood aggressive. There is no stage when in response to Mr Rorvik's aggression Mr Heywood became aggressive so that Mr Rorvik then felt he had the need to defend himself from such aggression for there was no initial aggression from Mr Heywood. Mr Steele's actions in kicking Mr Heywood cannot be justified because the force he applied in kicking is unnecessary. If his purpose was to intervene, his intervention could have taken a milder form such as placing his hands on each man or calling out for them to stop or throwing water over them. The kicking was unnecessary."

Grounds of Appeal

The Appellant appealed upon the ground that the sentence imposed by the learned magistrate was "manifestly excessive". At the opening of submissions before this Court, Mr Lawrence sought, and was granted, leave to add an additional ground of appeal: "that in all the circumstances the learned magistrate erred in failing to give sufficient weight to the disparate personal circumstances of the Appellant and his role in the offence with the co-accused."

During the course of Mr Lawrence's submissions, it became apparent that the additional ground of appeal (i.e. disparity with the sentence imposed upon

the co-offender Rorvik) was central to the Appellant's submissions.
Mr Lawrence accepted that the Appellant's offence amounted to a serious example of aggravated assault and that a sentence of imprisonment was within the range of a sound exercise of sentencing discretion. In my view, there can be no doubt as to the correctness of Mr Lawrence's concessions in this regard. As the learned magistrate observed in his sentencing remarks:

> "This is a nasty assault. It is a nasty assault because it occurred on somebody (else's, sic) land. In the case of Mr Steele (i.e. the Appellant) it involved kicking. The victim suffered a bad beating including broken ribs and he was immobile for a period of five days."

I add that aside from the broken ribs, a series of photographs (Exhibit P2 at trial) provides graphic evidence of other injuries inflicted to Mr Heywood's face, left ear, head, left arm and left leg. Upon any view, this was as the learned magistrate found, a "bad beating" and, I add, such that an actual custodial sentence would be appropriate, subject to subjective factors relevant to a particular offender.

I consider that there is no merit in the general ground of appeal that the sentence imposed on the Appellant was "manifestly excessive".

The applicable principles under the additional ground of appeal are set out in the High Court case of *R v Lowe* (1984) 154 CLR 606. Gibbs CJ at p609 held:

> "The true position in my opinion may be briefly stated as follows. It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account. The fact that one co-offender has received a sentence which is more severe than that imposed on a co-offender whose circumstances are comparable would provide no reason in logic for reducing the former sentence, if the only question were whether that sentence, viewed in isolation, was manifestly excessive. However, the Court of Criminal Appeal in Queensland, on an appeal against a sentence, may quash the sentence imposed and substitute another "if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed": s668E of the *Criminal Code* (Q.). The same or similar words appear in the statutes of the other Australian States, and they are wide enough to empower the court in its discretion to reduce a sentence not in itself manifestly excessive in order to avoid a marked disparity with a sentence imposed on a co-offender. It may be said that the very existence of the disparity reveals that an error must have been committed, but I would prefer frankly to acknowledge that the reason why the court interferes in such a case is that it considers that the disparity is such as to give rise to a justifiable sense of grievance, or in other words to give the appearance that justice has not been done. The decision whether the existence of a disparity calls for intervention is a matter which lies very much within the discretion of the Court of Criminal Appeal."

More recently, the principles stated in *Lowe* have been confirmed and reapplied by the High Court in *Postiglione v R*, unreported High Court decision of 24 July 1997.

The issue in the present appeal is whether, in the light of distinctions between the Appellant and his co-offender, Rorvik, the difference in their treatment is such as to give rise to a "justifiable sense of grievance". The

present case is, perhaps, unusual in that the Appellant's case is not that he has been treated too harshly having regard to the circumstances of the offence but rather that, having regard to the somewhat generous treatment of Rorvik, the Appellant should have received even greater leniency.

In support of the Appellant, Mr Lawrence focussed upon three areas where he sought to distinguish the Appellant's position from that of his co-offender. These were:

(a) the respective roles of the Appellant and Rorvik in the offence;
(b) the Appellant's actions in disposing of his block of land at Dundee Downs after the offence; and
(c) the respective previous criminal records of the Appellant and Rorvik.

As to the respective roles of the Appellant and Rorvik, Mr Lawrence stressed that it was Rorvik who had initiated the assaults by going uninvited and armed with a tomahawk to Mr Heywood's residence. He had struck the first blow and, as Mr Lawrence put it, without Rorvik's actions in seeking to resolve a dispute to which he was not a party, the offences would never have occurred. All this may be true, but in terms of criminality, I consider that there is little to choose between the Appellant and Rorvik. The learned magistrate found there was no plan by the co-offenders to attack Mr Heywood. He also accepted that the Appellant was entitled to a degree of leniency as he played no part in Rorvik's decision to invade Mr Heywood's property armed with a tomahawk. However, the degree of leniency afforded to the Appellant when

compared with Rorvik in the light of such factors must necessarily be small having regard to the Appellant's conduct when he arrived on the scene. The Appellant kicked his victim in the head and body at a time when he was on the ground and effectively in no position to defend himself. The Appellant followed this up with repeated blows to his victim's chest after Mr Heywood had stopped moving. Such behaviour was cowardly and totally unnecessary.

Mr Lawrence did not press the respective roles of the Appellant and Rorvik in attacking the victim as a particularly strong point. For my part, I consider that any small difference in the co-offenders' relative criminality was recognised fully in the different sentences imposed upon the Appellant and Rorvik.

Mr Lawrence submitted that it was a substantial mitigating factor, relevant only to the Appellant rather than both offenders, that the Appellant had sold his property at Dundee Downs after and as a result of the incident with his neighbour, Mr Heywood. In submissions before the learned magistrate, the Appellant's counsel commented that: "He's had enough commonsense to move away". In my view, the Appellant's sale of the property may indeed demonstrate a degree of 'commonsense' – but I do not consider that it can amount to substantial mitigation in comparing his sentence to that of his co-offender. The Appellant has put himself in a position where he will have less, or no, reason to bother Mr Heywood in the future. His action in selling the property does nothing to mitigate his criminal assault on Mr Heywood in the past.

Mr Lawrence laid a good deal of emphasis on the respective criminal records of the co-offenders as a reason for a greater difference in treatment in the Appellant's favour.

The Appellant was a 33 year old man with no relevant prior convictions. His only previous conviction was for speeding. In practical terms, the learned magistrate treated the Appellant as a man of clear record. On the other hand, Rorvik, who was 25 years old at the date of the offence had not only a long list of traffic convictions but also previous convictions for dishonesty, use of cannabis in a public place, unlawful use of a motor vehicle, breach of bonds and, significantly, an assault. However, traffic convictions and use of cannabis in a public place aside, all of Rorvik's convictions occurred when he was a juvenile – including the one for assault. Many of his more serious offences were also dealt with on the same occasion that he was convicted as a juvenile of that earlier assault.

The learned magistrate was faced with sentencing a man of effectively clear record and another who had in very large part managed to rehabilitate himself and stay out of trouble since a series of juvenile transgressions of the law. The learned magistrate, correctly in my view, focussed upon Rorvik's failure to learn from his previous assault conviction, but doubtless he would also have felt compelled to give Rorvik considerable credit for substantially leading a law-abiding life for some years after his juvenile offences.

In all the circumstances, I consider that there were grounds to distinguish between the Appellant and his co-offender in terms of sentence based on their respective roles in assaulting Mr Heywood and their previous criminal records. The learned magistrate adopted this approach in his reasons for sentence and sentenced the Appellant to a term of imprisonment (suspended on his entering a home detention order) twenty-five percent less than that imposed on Rorvik.

In the light of the distinctions between the Appellant and his co-offender, I am unable to agree with Mr Lawrence that the difference in their treatment is such as to give rise to a justifiable sense of grievance. It may be that Rorvik has been treated relatively more generously than the Appellant. It is also clear having regard to the circumstances of the offence that both were treated with a high degree of mercy. Another Court may have imposed sentences with a greater difference of treatment but I am of the firm view that the sentences imposed by the learned magistrate are such as to recognise appropriately the individual circumstances of the offenders and are within the limits of a sound exercise of sentencing discretion.

Accordingly, for the reasons I have sought to express, I dismissed the appeal.