CITATION:	*Gibson v Heath* [2017] NTSC 72
PARTIES:	GIBSON, Herman v HEATH, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from the YOUTH JUSTICE COURT exercising Territory jurisdiction
FILE NO:	LCA 13 of 2017 (21704424), LCA 14 of 2017 (21552681) and LCA 15 of 2017 (21701707)
DELIVERED ON:	13 September 2017
DELIVERED AT:	Alice Springs
HEARING DATE:	8 September 2017
JUDGMENT OF:	Kelly J

REPRESENTATION:

Counsel:

Appellant:	T Collins
Respondent:	S Tasneem

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Gibson v Heath [2017] NTSC 72
LCA 13 of 2017 (21704424), LCA 14 of 2017 (21552681)
and LCA 15 of 2017 (21701707)

BETWEEN:

HERMAN GIBSON
Appellant

AND:

ANDREW HEATH
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 13 September 2017)

[1] On 26 April 2017 the appellant pleaded guilty in the Youth Justice Court at Alice Springs to two counts of unlawful sexual intercourse with a child under the age of 16 years, two counts of aggravated assault against the same victim on file no 21701707; and one count of unlawful sexual intercourse with a child under the age of 16 years, one count of aggravated assault against the same victim, and three counts of contravening a Domestic Violence Order on file no 21704424. The victim was 13 years old at the time the offences were committed, and the appellant was 16 years old.

[2] The sentencing judge found each of the offences proved without proceeding to conviction. His Honour apparently initially planned to sentence the appellant to an aggregate sentence of eight months detention on file no 21701707 and an aggregate sentence of 10 months detention on file no 21704424 to be served concurrently. However, that is not permitted by s 125(3) of the *Youth Justice Act 2005* (NT) (‘*Youth Justice Act*’)[1] and on 3 May 2017 the sentencing judge sentenced the appellant to eight months detention on each offence on file no 21701707 and 10 months detention on each offence on file no 21704424 and ordered that each of the sentences run totally concurrently beginning on 17 January 2017, giving a total effective sentence of 10 months detention. He ordered that each of the sentences be suspended forthwith (that is to say after 15 weeks and two days) on the following conditions:

(a) the youth must not, during the period of the order in force, commit another offence (whether in or outside the Territory) punishable on conviction by imprisonment;

(b) the offender is under the ongoing supervision of a probation and parole officer, must obey all reasonable directions, in relation to reporting, residence, education and associates, from a probation and parole officer, and must report to a probation and parole

[1] Section 125(1) allows the Court to impose an aggregate sentence of imprisonment if it finds a youth guilty of two or more offences arising out of the same incident or course of conduct. Section 125(3) provides that s 125(1) does not apply if one of the offences is a violent offence or a sexual offence.

officer within two clear working days after the order comes into force;

(c) the offender must tell a probation and parole officer of any change of address or employment within two clear working days after the change;

(d) the offender must not leave the Territory except with the permission of a probation and parole officer;

(e) the offender will participate in assessment, counselling and/or treatment as directed by a probation and parole officer.

[3] The appellant has appealed against these sentences on the ground that the sentences imposed were manifestly excessive in all of the circumstances.

Circumstances of the offending

[4] The offending on file no 21701707 occurred on various dates between 25 December 2016 and 10 January 2017.

(a) The agreed facts in relation to the first aggravated assault are that one afternoon the appellant and the victim were together at ANZAC Oval. They had an argument during which the victim told the appellant she was “finished with him”. The appellant became upset and removed his necklace chain. He hit the victim with the necklace chain across the lower back which stung. Then he picked

up a tree branch about 30 cm long and 2 cm thick and hit her on the left shoulder with it. Friends of the appellant and the victim tried to stop the appellant from assaulting the victim. The victim started to cry from the assault.

(b) The agreed facts in relation to the second aggravated assault are that the appellant and the victim shared a mattress at a friend's house. The next morning they had a further disagreement and the appellant became upset. He hit the victim with a broom three times – once on the back of the neck, once on the left shoulder and once on the lower back.

(c) In relation to the two counts of unlawful sexual intercourse with a child under the age of 16, the agreed facts are that on two consecutive nights the appellant and the victim shared a mattress in the backyard of the home of a member of the appellant's family and that they removed their clothes and engaged in consensual penile vaginal intercourse on both nights.

(d) The agreed facts also recited that the victim told police that the appellant doesn't let her go with friends or return to her placement and threatens to hit her if she doesn't go with him, and that she was scared of him.

(e) The appellant later spoke to police. He described the victim as "my wife". When he was asked about assaulting the victim he said, "She don't listen. That's why I give her hiding."

[5] The offending on file no 21704424 occurred between Friday 20 and Sunday 22 January 2017.

(a) The first contravention of a Domestic Violence Order consisted of the appellant meeting up with the victim at the Alice Springs Town Library and walking around town with her for a time.

(b) The agreed facts in relation to the charge of unlawful sexual intercourse with a child under the age of 16 are that on the night of Friday 20 January 2017 the appellant sneaked the victim in via the back door of his residential care placement. He asked the victim for sex but she said she was tired. The appellant continued to annoy the victim for sex by pulling her shorts down. The victim acceded to the request and removed her shorts. The appellant removed his clothes and they had unprotected penile vaginal intercourse.

(c) The second contravention of the Domestic Violence Order occurred on the evening of 21 January 2017. The appellant and the victim met one another at the Alice Springs Youth Disco and then walked around together. At one point they saw police and ran from them.

(d) The agreed facts in relation to the aggravated assault are that on the night of 21 January 2017, the appellant and the victim were standing in the Todd River bed opposite the Todd Tavern. The appellant told the victim he wanted to go home and she should go with him. The victim she said she wanted to stay in town. The appellant became angry and punched the victim with his fist – twice on the left forearm, once on the right ear and twice on her left shoulder. The victim began to cry. The appellant hugged the victim and she was sore and scared. The victim said she thought the appellant might hit her some more if she did not go with him. They went to the appellant's residence together. It was after 1.30 am. A half hour later the appellant was arrested for breaching his bail curfew. The victim remained in the appellant's room. She was discovered there the next morning and the matter was reported to police.

(e) The third contravention of the Domestic Violence Order occurred on the afternoon of Sunday 22 January. The appellant and the victim met one another and went to the Alice Springs Aquatic Centre together.

[6] The principles governing appeals of this nature are well known.

> It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it

> is of the view that the sentence is insufficient or excessive. It interferes only if it is shown that the sentencing judge committed error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive.[2]

[7] In determining whether a sentence is manifestly excessive, an appeal court must consider the maximum penalty for the offence, the objective seriousness of the offence on the scale of seriousness for that particular offence, the standards of sentencing customarily imposed for the offence and the personal circumstances of the offender.[3]

The maximum penalties

[8] The maximum penalty for each of the charges of unlawful sexual intercourse with a child under the age of 16 is imprisonment for 16 years: it is a serious offence. The maximum penalty for each of the charges of aggravated assault is imprisonment for five years. The maximum period of detention which the Youth Justice Court can impose is two years, but it is well established that the appropriate approach to sentencing is to measure the circumstances of the

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[2] *Edmond and Moreen v The Queen* [2017] NTCCA 9 at [4] ("*Edmond*") and the cases cited therein

[3] Ibid at [30] quoting *Phan v Western Australia* [2014] WASCA 144 at [19].

offending against the statutory maximum penalties for the offences in question (16 years and five years) not the jurisdictional limit of the Court.[4]

The objective seriousness of the offences and the standards of sentencing customarily imposed for the offence

[9] In written submissions the appellant submitted that the objective seriousness of the offending as a whole did not warrant a sentence in the magnitude imposed by the learned sentencing judge. In addition to matters personal to the appellant (discussed below) the appellant made these contentions about the objective seriousness of the offences:

(a) The sexual offending was not characterised by a lack of consent, nor was it offending in which a predatory older male engaged in sexual intercourse with a vulnerable child. The offending occurred in the context of a mutual relationship between two vulnerable youths subject to permanent Protection Orders with an age difference of less than three years.

(b) There was no temporal connection between the violent offending and the sexual offending. The primary connection between each instance of offending was that it was the product of impulsive behaviours by a youthful offender with considerable immaturity and cognitive limitations.

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[4] *Markarian v R* (2005) 228 CLR 357 at 372 per Gleeson CJ, Gummow, Hayne and Callinan JJ; *Wheeler v Eaton* [2012] NTSC 80 at [17] citing to *Taylor v Malogorski* [2011] NTSC 98 at [24]

(c) The contraventions of the Domestic Violence Order were wholly child-like offending that occurred in the context of the appellant seeking to participate in the highly limited spaces available for youth recreation in a small town, such as attending the library, the disco and the pool.

[10] In written submissions, the appellant contended:

> It is clear that his Honour erred in determining his appropriate starting point for the first set of unlawful sexual intercourse [with a child under the age of 16] was detention. There is a line of authority adopted in the Youth Justice Court that first offender youths who have engaged in consensual boyfriend-girlfriend relationships are usually entitled to receive a good behaviour bond as the first starting point.

[11] I reject that contention. There is no such general principle or customary "entitlement". Each case must be judged on its own individual facts taking into account all of the relevant circumstances of the case. As the respondent pointed out, although the prosecution conceded during the plea that the first lot of sexual offending involved consensual sex in the context of a boyfriend/girlfriend relationship, it is not as simple as that. The sentencing judge was entitled to look at the entire course of conduct across both files in characterising the nature of the relationship. The sexual offending on the second file was of a different nature, not amounting to absence of consent but nevertheless a reluctant agreement in the face of pestering by the appellant. Moreover, each of the sexual offences occurred against the background of a

relationship characterised by violence, as reflected in the three aggravated assault charges.

[12] I agree with the respondent's contention that it would be artificial to conclude that there was no power imbalance or controlling behaviour simply because the assaults did not occur in immediate proximity to the sexual offences. The victim told police in connection with the first set of offences that the appellant doesn't let her go with friends or return to her placement and threatens to hit her if she doesn't go with him, and that she was scared of him. It should also be noted that, although the appellant hugged the victim after the assault when she was crying, it was her initial refusal to return to the appellant's residence that brought on the assault and after the assault she complied with his demand through fear.

[13] These matters raise the objective seriousness of the sexual offences above the characterisation of the offending by the appellant as consensual boyfriend/girlfriend sex and I do not agree with the appellant's contention that the objective seriousness of the offending did not warrant a sentence of the magnitude imposed by the sentencing judge. (On the hearing of the appeal counsel for the appellant effectively conceded that a head sentence of 10 months detention was not manifestly excessive for the second sexual offence.)

The personal circumstances of the offender

[14] The appellant contended that the following matters in the personal circumstances of the offender pointed to the magnitude of the sentence imposed on the appellant being excessive.

(a) The appellant's cognitive capacity was said to be considerably diminished by early childhood trauma, a reported head injury in his very young years brought on by a fall during a domestic violence episode, abuse of volatile substances and abuse and general neglect throughout his youth. It was submitted that this operated to diminish his culpability, the utility of specific deterrence, and the appropriateness of general deterrence.

(b) The appellant had a history of inappropriate sexualised behaviours and it was submitted that the manifestation of similar behaviours in the offending were connected to neglect in family placements, a matter which had been addressed by his removal from family placement in favour of a residential care arrangement. This step was taken by Territory Families, who had also undertaken to facilitate therapeutic interventions. This, it was argued, meant that there were considerable prospects for rehabilitation.

[15] The appellant conceded that the sentencing judge took into account the appellant's acceptance of responsibility, the onerous conditions of his remand and his general background but contended that his Honour had failed to give sufficient weight to the age and maturity of the youth [a consideration required to be taken into account by s 81(2)(d)] or to the

principle in s 4(c) that a youth should only be kept in custody as a last resort and for the shortest appropriate period of time.

[16] I agree that the appellant's history of childhood trauma and deprivation and his reduced cognitive capacity reduce the appellant's moral culpability for the offences he committed. However, there is no indication that the sentencing judge ignored these factors. Further, these same factors operate to a certain extent in the opposite direction, being indicative of a heightened risk of re-offending and highlighting the need for community protection.

[17] I do not agree that it was not appropriate for the sentencing judge to place some weight on both general and personal deterrence. Offences of this kind are reasonably prevalent in the Territory, especially by young men in the Centre and there is a need for general deterrence. Further, there is no suggestion that the appellant's cognitive capacity was so diminished that he was not aware that he was doing wrong or that he is incapable of understanding the link between his offending and the consequences of that offending visited upon him by the court.

[18] The sentencing judge gave reasons for the period of time ordered to be served and I see no support in the sentencing remarks for the further submission by the appellant that his Honour fixed the period of time to be served by reference to the time already served merely by way of "deference to convenience". Nor do I agree that his Honour's

preference for a supervision report under s 71 of the *Youth Justice Act* over a report from Territory Families under s 68 betokens error. It was a matter for his Honour what type of report he found most helpful. (This submission was not pressed on the hearing of the appeal. It should be noted that obtaining such a report would have entailed the appellant spending more time on remand.)

Principles applicable to the sentencing of youths

[19] In written submissions, the appellant relied on the principles applicable to the sentencing of youths set out in the *Youth Justice Act*, in particular s 4(c) which provides that a youth should only be kept in custody for an offence as a last resort and for the shortest appropriate period of time, and s 81(6) which provides that in sentencing a youth, a sentence of detention must only be imposed as a last resort, and cites the often quoted passage from the judgment of Mildren J in *P (a Minor) v Hill*:

> The approach of the courts when dealing with juveniles must be cautious, patient and caring, with the interests of the juvenile foremost in mind. Of course, there are some offences which warrant an immediate custodial sentence notwithstanding that the offender is a juvenile and notwithstanding, even, that the juvenile has no prior convictions. But these are for extremely serious crimes, usually, but not always, crimes of violence where it is right that the need to punish and deter is given particular emphasis. I do not say, of course, that in the case of a persistent offender, where the crimes are not in the extremely serious category, that it is not appropriate to order detention or imprisonment. But even in such cases, detention or imprisonment should only be used as a last resort, where all other options are inappropriate and the need for deterrence and

> to protect the community must be given special prominence.[5] *[citations omitted]*

[20] As Mildren AJ said in *SB v Andrew Heath,*[6] it is important not to take these remarks out of context. (They were made in connection with an appeal against a sentence nine months and 21 days detention which was only partially suspended imposed on a 13 year old boy for a series of property offences.) In this case the sentencing judge ordered the sentence to be suspended forthwith. The appellant had been detained on remand for almost 15 weeks and the sentencing judge ordered him to be released forthwith on conditions designed to facilitate his rehabilitation. I do not think that in all of the circumstances the total sentence of 10 months detention partially suspended imposed by the sentencing judge for the three sexual offences, three assaults and three breaches of the Domestic Violence Order was manifestly excessive.

Error in the structure of the sentences imposed

[21] In order to effect the original intention of an aggregate sentence of eight months detention on file no 21701707 and an aggregate sentence of 10 months detention on no 21704424, the sentencing judge imposed a sentence of eight months for each offence on the first file and a sentence of 10 months for each offence on the second file all to be served concurrently. That resulted in sentences of 10 months detention

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5 (1992) 110 FLR 42 at 48

6 [2017] NTSC 13 at [36] – [37]

for each breach of the Domestic Violence Order, the same sentence as that imposed for the much more serious sexual offences and aggravated assaults. As the respondent has conceded, that is an error.

[22] That does not mean that the appeal must necessarily be allowed. Section 177(2)(f) of the *Local Court (Criminal Procedure) Act* provides that notwithstanding that this Court may be of the opinion that the point raised in an appeal might be decided in favour of the appellant, the Court may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[23] Notwithstanding that the overall sentence imposed is not manifestly excessive and that adjusting the individual sentences will have no effect on the overall result as they are all to be served concurrently, I do not think this is an appropriate case in which to apply that proviso.

[24] Counsel for the appellant submitted that it would be misleading for the appellant's record to show that he received sentences of 10 months detention for his first three breaches of Domestic Violence Orders. It would be apt to mislead any future sentencing court into thinking that the breaches were far more serious than they are – perhaps even involving a serious assault – and make it difficult for such a future sentencing court to know how to deal with any future breaches. (I was informed that, unfortunately the appellant has recently been charged

with further breaches of a Domestic Violence Order.) Counsel for the respondent conceded the correctness of this submission.

[25] The appellant also submitted that the individual sentences imposed for the aggravated assaults on the first file were too high. Without conceding that the sentences were manifestly excessive, counsel for the respondent conceded that, if the sentences were to be adjusted to correct the obviously excessive sentences imposed in relation to the breaches of Domestic Violence Orders, justice may require some adjustment between the sentences for the aggravated assaults to reflect the escalation of offending.

[26] I agree that, while the appeal on the ground that the overall sentence is manifestly excessive should be dismissed, the appeal should be allowed on the ground that the sentences for each of the breaches of Domestic Violence Order are manifestly excessive.

[27] The appeal is allowed.

[28] The appellant will be resentenced as follows.

[29] File no 21701707:

General

I consider both aggravated assaults on this file are serious. They involve male on female violence and the use of a weapon each time. There seems to be an element of the appellant trying to control the

victim and to prevent her from leaving a relationship by the use of fear and violence. Further, in the first assault, it was necessary for third parties to intervene to prevent the assault from continuing. I take into account that the physical effects on the victim were not substantial or long-lasting.

Unlawful sexual intercourse charges

(a) On the first charge of unlawful sexual intercourse with a child under the age of 16 years, without recording a conviction, the appellant will be sentenced to a period of detention for five months.

(b) On the second charge of unlawful sexual intercourse with a child under the age of 16 years, without recording a conviction, the appellant will be sentenced to a period of detention for five months to be served concurrently with the sentence for the first charge.

Assault charges

(a) On the first aggravated assault charge, without recording a conviction, the appellant is sentenced to a period of detention for two months to be served concurrently with the sentences for unlawful sexual intercourse as to one month and two weeks and cumulatively for the balance of two weeks.

(b) On the second aggravated assault charge, without recording a conviction, the appellant is sentenced to a period of detention for two months to be served concurrently with the sentences for unlawful sexual intercourse as to one month and two weeks and cumulatively for the balance of two weeks.

The total sentence on file no 21701707 is a term of detention for six months beginning on 17 January 2017.

[30] File no 21704424:

General

I consider that the charges on this file are more serious. The unlawful sexual intercourse with a child under the age of 16 on this file is characterised by a degree of pressure and pestering and the level of violence has increased and is even more obviously directed towards controlling the victim.

Unlawful sexual intercourse

On the charge of unlawful sexual intercourse with a child under the age of 16 years, without recording a conviction, the appellant will be sentenced to a period of detention for seven months.

Aggravated assault

On the aggravated assault charge, without recording a conviction, the appellant is sentenced to a period of detention for three months to be served concurrently with the sentence for unlawful sexual intercourse as to two months and cumulatively as to one month.

Breaches of Domestic Violence Orders

In relation to each of the Domestic Violence Orders, without recording convictions, I find the offence proved and take no further action.

The total sentence on file no 21704424 is eight months detention.

[31] I direct that the sentences on file no 21704424 commence on 17 March 2017 (ie they are to be served cumulatively on the sentences on file no 21701707 as to two months and concurrently as to the balance).

[32] Accordingly, the total sentence over the two files is a term of detention for 10 months as ordered by the learned sentencing judge. I direct that the sentence be suspended from 3 May 2017 (the date the sentence was imposed by the sentencing judge) on the same terms and conditions imposed by the sentencing judge.
