Watson v Chambers [2013] NTSC 7

PARTIES:	WATSON, Carlos v CHAMBERS, Kim
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 73 of 2012 (21204578)
DELIVERED:	12 February 2013
HEARING DATES:	26 January 2013
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Court of Summary Jurisdiction

CATCHWORDS:

CRIMINAL LAW – Sentencing – Appeal against sentence – cumulative sentences – double jeopardy – totality principle – irrelevant factual consideration.

Appeal allowed in part. Appellant re-sentenced.

Criminal Code s 17, s 18
Domestic and Family Violence Act s 121,

Ashley v Marinov [2007] NTCA 01; *Idai v Malogorski* [2011] NTSC 102; applied

Attorney General v Tichy (1982) 30 SASR 84; *Carroll v The Queen* [2011] NTCCA 6; *Dinsdale v The Queen* (2000) 202 CLR 321; *Griffiths v Jayrow Helicopters Pty Ltd* (1998) 7 NTLR 172*; Haywood v Dodd (unreported, Thomas J, 24 October 1997; Knight v Litman* (2006) 17 NTLR 164; *Marika v Gordon* [2011] NTSC 13; *Reid v Rowbottam* [2005] NTSC 7; *R v Bara* (2005) 17 NTLR 220; *R v Hofschuster* (No. 4) (1994) 4 NTLR 179; *R v Nelson* (2007) 20 NTLR 1; *R v Wurramara* (1999) 105 A Crim R 512; referred

REPRESENTATION:

Counsel:

Appellant:	Ms Roussos
Respondent:	Ms Taylor

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	BLO1303
Number of pages:	17

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

Watson v Chambers [2013] NTSC 7
No. JA 73 of 2012 (21204589)

BETWEEN:

CARLOS WATSON
Appellant

AND:

KIM CHAMBERS
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 12 February 2013)

Introduction

[1] This is an appeal against sentences imposed by the learned sentencing Magistrate sitting in the Court of Summary Jurisdiction at Maningrida on 5 September 2012. Findings of guilt were made after the appellant entered pleas of guilty to the following offences:

"Count 2"

- engaged in conduct at Maningrida that resulted in a contravention of a Domestic Violence Order – date of offence 12 September 2011; contrary to s 120(1) *Domestic Violence Act* (NT).

"Count 4"

- engaged in conduct at Maningrida that resulted in the contravention of a Domestic Violence Order – date of offence 18 September 2011; contrary to s 120(1) *Domestic Violence Act* (NT).

"Count 6"

- unlawfully assaulted Patricia Gibson at Maningrida with the following circumstances of aggravation: that the victim suffered harm; she was female and the offender male; she was threatened with an offensive weapon, namely a steel mop handle, contrary to s 188(2) *Criminal Code* (NT), date of offence, 18 September 2011.[1]

[2] The sentences initially imposed by the learned sentencing Magistrate were 2 months imprisonment on Count 2 (breach DVO); 6 months imprisonment cumulative, on Count 6 (aggravated assault, cumulative on Count 2); 3 months imprisonment on Count 4, concurrent with Count 6. At that initial stage of the sentencing process, the total effective sentence was 8 months imprisonment to be suspended after the service 6 months imprisonment, subject to a condition the appellant complete the Indigenous Family Violence Offender Programme.

[3] As Her Honour was in the process of explaining the sentences, a prosecutor who overheard the proceedings, made a submission to the Court, informing the Court that the law required any term of imprisonment for a breach of a domestic violence order to be served cumulatively on any other term of

[1] The appellant pleaded guilty to a further count, "3" on information that was subsequently dismissed by Her Honour as the facts failed to make good the elements of the offence. T, 5 September 2012 at 4.

imprisonment. Her Honour then heard submissions from both counsel suggesting the totality principle may be applied effecting a reduction in the individual sentences,[2] even though as a matter of law accumulation was required with respect to the sentences of imprisonment for the offences of breach of a domestic violence order.

[4] The learned sentencing Magistrate re-sentenced the appellant, retaining the original individual sentences but changing the structure as follows: *Count 2* (breach DVO): 2 months imprisonment; *Count 6* (aggravated assault): 6 months imprisonment *cumulative* on Count 2; *Count 4* (breach domestic violence order): 3 months imprisonment, *cumulative* on count 6. The total effective term was therefore increased to 11 months however the order for the period of imprisonment to be actually served remained at 6 months, retaining the condition that the appellant attend the Indigenous Family Violence Offender Programme.

[5] The appellant has remained in custody since 5 September 2012, the date he was sentenced in the Court of Summary Jurisdiction.

Material before the Learned Magistrate

(i) Facts of the Offending

Count 2: On 3 July 2011 the appellant was served with a court confirmed domestic violence order. The protected person named was Patricia Gibson. The order restrained him from harassing, threatening or verbally abusing her or assaulting or threatening to assault her.

[2] T, 5 September 2012 at 14 and 15.

On 12 September 2011 the appellant and the protected person awoke at about 2:00pm at their residence in Maningrida. Ms Gibson informed the appellant she would obtain some money from her bank account and that she would return. He waited for her. When she returned the appellant became angry with her and demanded she stay at the residence rather than leave to play cards at a family residence. He verbally threatened Ms Gibson saying "Don't you move, I'm going to get a hammer and smash you in the arm".

Counts 4 and 6: On 18 September 2011 the appellant and Ms Gibson awoke at about 1:30pm at their residence. The appellant began accusing Ms Gibson of sleeping with another man. She denied this. He followed her into the backyard, and continued to accuse her, became angry and struck her to the arm with a metal cup. He then grabbed her by her hair and dragged her back into their room where he threw her on the ground and punched her twice in the face; he located a steel mop handle and struck her once to her right arm. Concerned residents contacted the police. The appellant ran into nearby bushland when the police attended. Police took Ms Gibson to the health clinic. The appellant was arrested on 4 February 2012. He declined to participate in an interview with police. He was charged and bailed. The victim was checked for soreness and had a sore right arm

(ii) Appellant's Criminal History

[6] Although the appellant had a limited history, he had two previous convictions for assaults on a female in 2004. In respect of one of those offences he was not dealt with the charge until 2010.

(iii) Summary of Submissions made on the appellant's behalf

The Court of Summary Jurisdiction was told the victim in the previous assaults was not Ms Gibson; the most recent of the previous matter dates from 2004, seven years ago when the appellant was 19. The appellant was described as ashamed and knowing that he faces imprisonment; card playing was a source of tension in the relationship; he missed Ms Gibson when she would go to play cards. He has two children from a previous relationship living with himself

and Ms Gibson. In relation to the 18 September incident there was jealousy; he had been told the victim was having an affair and he acted out those thoughts violently. The assault was not pre-meditated; he had not acted on those thoughts previously. The stages of the assault occurred in a short space of time. The force was limited; as were the effects on the victim including the level of pain. The cup and mop handle were weapons of opportunity. He acted out of frustration and humiliation, rather than any desire to be cruel or punitive. He and Ms Gibson have been married for the past three years. There had been no trouble of this kind previously. He is 27 years old; he has lived all of his life at Maningrida; he was educated to year 10 but had not been employed since leaving school. He is engaged in community activities and ceremonial life. The indication of the plea of guilty was early, although the case had been adjourned in the Maningrida list to settle the facts. There have been no further charges since the current charges, now a year old. They are still together. He has no prior convictions for breach a domestic violence order. He is aware he will be imprisoned but seeks a partially suspended sentence given he previously completed a suspended sentence.

General Sentencing Remarks[3]

[7] Aside particular matters isolated in the grounds of appeal and discussed below in these reasons Her Honour emphasised the seriousness of both incidents; both in terms of the maximum penalties of imprisonment that were available to the Court and the particular facts of each incident. General deterrence was emphasised as part of Her Honour's acknowledgement of the widespread offending of this type against women. The plea, remorse, and better prospects of rehabilitation as a younger person were also acknowledged, as was the availability of the Indigenous Family Violence programme. No complaint is made about Her Honour's general

3 T, 5 September 2012, 11-13.

approach. Nor could there be. This type of violence is widely acknowledged in the authorities.[4]

Grounds of Appeal

Ground One – The learned Magistrate erred in law by finding the Appellant guilty of count 4 on the same facts as the finding of guilt on count 6.

[8] It is common ground that counts 4 and 6, (committed on 18 September 2011), refer to the same incident.

[9] The substantially overlapping conduct constituting counts 4 and 6 was not identified as an issue by either counsel before the learned sentencing Magistrate. In the context of a busy circuit court list, the issue must have been overlooked. Nevertheless, the respondent agrees on appeal that the facts constituting counts 4 and 6 are substantially the same, to the extent that findings of guilt for both counts should not stand.

[10] Section 18(b) of the *Criminal Code* provides a person has a defence to a charge if they have already been found guilty of a "similar offence". This provision reflects the fundamental principles that a person cannot be prosecuted twice for the same criminal conduct – double jeopardy. "Similar offence" means "an offence in which the conduct therein impugned is substantially the same as or includes the conduct impugned in the offence to which it is said to be similar".[5] In *Ashley v Marinov*,[6] the Court of Appeal

---

4 The general approach is discussed in *Wurramara* (1999) 105 A Crim R 312; *Nelson* (2007) 20 NTLR 1; *Bara* (2005) 17 NTLR 220.

5 Section 17 *Criminal Code*.

found that in circumstances where the facts of the breach of the restraining order were the same or similar to the facts comprising an assault, the two findings cannot stand.[7] As cautioned by the Court of Appeal in *Ashley v Marinov*, much will depend on the precise terms of the order said to be breached and the facts relied upon to constitute the breach.

[11] Before the Court of Summary Jurisdiction the prosecution did not specify in the facts or otherwise particularise the conduct said to constitute the breach of the order as distinct from the aggravated assault. The original order restrained the appellant from "harassing, threatening or verbally abusing" the protected person. Although the accusations by the appellant that the protected person was having an affair may demonstrate controlling attitudes on the part of the appellant and were doubtless annoying and even upsetting to the protected person, that conduct, bound up as it was with the assault falls short of separate conduct constituting as "harassing, threatening or verbally abusing". The conduct was not particularised as a breach of the order. I agree this ground was properly conceded by the respondent. There will be an order quashing the conviction and sentence with respect to count 4.

[12] The respondent argues that there is no reason to find error or re-sentence on count 6 but that the mistake (dealt with below) in relation to the facts on

---

6 [2007] NTCA 01, citing the earlier authority of *Haywood v Dodd* (unreported, Thomas J, 24 October 1997.

7 Sections 17 and 18 *Criminal Code* have also been considered for a range of other offences for example: *Hofschuster* (No. 4) (1994) 4 NTLR 179; *Griffiths v Jayrow Helicopters Pty Ltd* (1998) 7 NTLR 172; *Knight v Litman* (2006) 17 NTLR 164.

count 2, gives rise to a basis for re-sentence on that count. The respondent submitted the re-sentence of the appellant should be confined to count 2 and that in approaching re-sentencing, the original sentence of two months should not be considered outside the available sentencing range on the facts as they were agreed. I do not agree that each individual sentence on appeal should effectively be dealt with in isolation. That would ignore the usual interconnectness of the sentencing process particularly given the process of setting the minimum term which is set in part by reference to the total effective term and considers the criminal conduct as a whole. In my view the sentencing as a whole has miscarried and the appellant stands to be re-sentenced. In any event other errors identified below persuade me that the appellant should be re-sentenced.

Ground 2 – The learned Magistrate erred in law in her application of the totality principle

[13] The respondent argues this ground only becomes relevant if the first ground fails. In my view I cannot approach this ground in the way argued on behalf of the respondent. To do so would be to engage in an artificial exercise. After the prosecutor alerted the learned sentencing Magistrate to the continued operation of the totality principle, Her Honour said she had overlooked the legislative requirement and needed to consider whether the previously imposed sentences were in totality appropriate. Her Honour determined that as each individual sentence was appropriate for each offence there was no reason to change any of the individual sentences, including the date of suspension. This lead to an increase in the sentence for the total

effective term from 8 months to 11 months. In viewing totality, the learned sentencing Magistrate did not think it appropriate to adjust individual sentences.[8]

[14] As is clear from the authorities, the question of totality requires a "last look" at the totality of the sentences when measured against the totality of the criminality. An offender is not to be sentenced simply and indiscriminately for each crime he is convicted of but for what can be characterised as his criminal conduct.[9]

[15] The sentences for the individual offences must still be proportionate to the offending. The totality principle simply seeks an overall just outcome.

[16] I have been persuaded that in considering the overall sentences, once alerted to the legislative provision, error occurred in setting the total effective term and the minimum to be served. Mandatory accumulation of sentences does not displace the principle of totality, nor its application. With respect I agree with His Honour Barr J's remarks to that effect in *Idai v Malogorski*.[10]

[17] The process of reaching the amended sentence discloses error. I appreciate count 2 was committed six days prior to counts 4 (to be quashed) and 6, however, there are underlying features of both incidents that call for some consideration of totality. Similar underlying relationship tensions were evident in both incidents; the appellant was on the same restraining order

---

8 T, 5 September 2012 at 15.

9 *Attorney General v Tichy* (1982) 30 SASR 84, Wells J at 92-93; *Carroll v The Queen* [2011] NTCCA 6.

10 [2011] NTSC 102,

throughout; all offending occurred at the home of the appellant and protected person at a similar time of day; the background to the offending and the features of the offender were the same throughout and less than one week separated the offending. The prosecutor described count 2 as "leading up to his offending on the other occasion".[11] Her Honour acknowledged the first incident as "really a continuation it seems of the same matter". It would be artificial to attempt to hazard a guess at how Her Honour would have dealt with the matter had there been only two offences to deal with. I have come to the conclusion this ground is made out. If the principle of totality had been applied, it would be expected in these slightly unusual circumstances there would be an adjustment as a result of the change to the indicated sentences leading to a reduction in the head sentence and the term to be actually served.

Ground 3 – The learned Magistrate Erred by raising and/or taking into account irrelevant prejudicial consideration in the sentencing process.

[18] This first aspect relevant to this ground refers to an exchange between counsel for the appellant and Her Honour:[12]

> **MR MCMASTER:** Your Honour this is the first time that there's been any trouble like this between them [ ]
>
> **HER HONOUR:** If there hasn't been any trouble, why was the domestic violence order---

[11] T, 5 September 2012 at 4.
[12] T, 5 September 2012 at 7-8.

MR MCMASTER: When I said trouble-when I meant trouble like this, I meant physical trouble.

HER HONOUR: But there's obviously been something sufficient that a court would make a domestic violence order.

[19] This exchange about the fact of the existence of a domestic violence order as signifying previous "trouble" is not contained in Her Honour's remarks. Defence counsel raised the issue of lack of previous "trouble". This was simply probed by Her Honour. I do not see this exchange as having or "possibly having" (in the sense determined by Riley CJ in *Marika v Gordon*[13]*)* influenced the sentences imposed. I would dismiss the first part of this ground.

[20] In my view the appellant has however shown a relevant error in the consideration of the facts relevant to count 2. Her Honour refers to circumstances that clearly were not part of the facts before the Court. In an exchange with counsel about the effect of the children being in the home at the time of the breach of the order, Her Honour said "That's aggravating that he is violent in the presence of the children and when the children are in the home".[14] Counsel submitted "Well I don't know – they were at home – while they were at home, but I don't know in the room". Her Honour replied "That being said, it doesn't matter whether it's in the room. Children 5 and 7 being exposed to a man, their father, threatening a woman with a hammer and saying 'don't you move' that's not mitigating, that's

---

13 [2011] NTSC 13.
14 T, 5 September 2012 at 11.

aggravating". In the reasons for sentence Her Honour stated "And it's a very awful thing, and a very dangerous thing for children to be aware of conflict between their parents, even arguing let alone actual threats".[15]

[21] The respondent agrees on appeal there were no facts before the court which allowed for the suggestion that the children were aware of or directly exposed to the offending behaviour. I am persuaded this erroneous view of the facts led to error with respect to the sentence for count 2. The factual error lead to an erroneous assessment of the gravity of the offending.

Ground 4 – The learned Magistrate Erred in Law by Fully Cumulating the Sentences Imposed on Counts 2, 4, 6 on the Appellant

[22] The mandatory imprisonment term of seven days provided by s 121(2) *Domestic and Family Violence Act* does not apply to the appellant and did not apply at the time of being sentenced. Section 121(2) applies only to persons who have "previously" been found guilty of a relevant domestic violence order offence. The appellant was being dealt with for both offences at the one appearance.[16] The appellant argues here that s 121(7) *Domestic and Family Violence Act* requiring the mandatory accumulation of sentences similarly does not apply to him.

[23] I do not agree with that submission. Section 121(7) is not confined to the accumulation of mandatory sentences imposed under s 121(2). If it were so confined the appellant would be correct. Section 121(7) applies whenever a

---

15 T, 5 September 2012 at 11.
16 Similar reasoning was applied in *Reid v Rowbottam* [2005] NTSC 7.

term of imprisonment is imposed for a relevant breach of a domestic violence order and the person is either serving a term of imprisonment for another offence or has been sentenced to serve a term for another offence. Terms of imprisonment order under s 121(1) *Domestic and Family Violence Act* may be up to the maximum of two years. The clear intention in my view is that whenever a term of imprisonment is ordered for a relevant domestic violence offence, (although dispositions other than imprisonment are available[17]), whether or not it is a "mandatory term", it must be served cumulatively on any other sentence. I agree with the approach taken by His Honour Barr J in *Idai v Malogorski*.[18]

[24] It would be straining the wording of s 121(6) and (7) too far to adopt the interpretation urged by the appellant. The appellant suggests that the term in s 121(6)(b) "has been sentenced" cannot refer to two sentences passed on the same day. Sections 121(6) and (7) are distinct from the question of the "trigger" offence necessitating the imposition of a mandatory term under s 121(2). Section 121(6) provides the criteria for the circumstances that engage mandatory accumulation. I agree the appellant was not at the time "serving a term of imprisonment",[19] but he "has been sentenced to serve a term of imprisonment for another offence".[20]

[25] I would dismiss this ground of appeal.

---

17 Section 121(1) and (3).
18 [2011] NTSC 102).
19 Section 121 (6)(a).
20 Section 121 (6)(a).

Re-sentencing

[26] I have not separately dealt with the ground 'manifestly excessive' as error sufficient to embark on the re-sentencing process has been established. In any event, it follows the sentence for count 2 is excessive given it was characterised as a more serious matter than the admitted facts allowed. I agree that six months imprisonment is well within the range for the aggravated assault, however given the sentencing process overall miscarried the appellant will be re-sentenced with some attention being paid to the minimum term.

[27] In relation to count 2 this was the first offence of a breach of a domestic violence order committed by the appellant; the mandatory period did not apply. He did however have older convictions for aggravated assault. It was still a threat, although the appellant did not wield the hammer, nor were there facts indicating the presence of a hammer. The indication of the plea was accepted as early.

[28] In relation to count 6, the head sentence of six months could not be cause for complaint. The overall accumulation of the sentences without appropriate recourse to totality appears to have affected the decision not to suspend a greater proportion of the total effective term. As is clear from *Dinsdale v The Queen*,[21] the exercise of the discretion to suspend a sentence of imprisonment is not limited by reference to subjective matters but includes considering all factors again in determining whether any and if so

[21] (2000) 202 CLR 321, especially Kirby J [84] – [85].

what part of the sentence should be suspended. Even though there could be no complaint about the head sentence, acceptable reasons exist for the suspension of a proportion of the overall sentence which necessarily means consideration being given to the suspension of a portion of the sentence to be served for the sentence for count 6. Once again it is somewhat artificial to attempt to second guess what would have been the case in the Court of Summary Jurisdiction were the appellant being sentenced for two and not three counts.

[29] In re-sentencing the appellant for counts 2 and 6 I have regard to the prevalence of this type of offending, both breaches of domestic violence orders and assaults on women generally and specifically in Aboriginal Communities. General deterrence has significant relevance. I bear in mind the appellant continues to be eligible for the Indigenous Family Violence Programme.[22] While serious, the particular offending does not have the attributes of the most serious examples of offending of this type. The plea was accepted as early. The appellant appears to have reasonable prospects of rehabilitation.

[30] The report obtained by this Court for re-sentencing purposes indicates the appellant has been participating in the prison family violence programme each Wednesday and Friday from 9:00am to midday. He has understood the programme and the author of the report considers it to be beneficial that he participate in the community based programme.

---

[22] Offender Suitability Report obtained for these proceedings.

[31] The appeal was filed out of time on 1 November 2012. The respondent does not take issue with the application to extend time in the circumstances. It does mean there has been a delay in hearing the appeal.

Orders:

1. The application for an extension of time in which to file the appeal is granted.

2. The appeal is allowed.

3. The finding of guilt, conviction and sentence imposed on Count 4 in the Court of Summary Jurisdiction on 5 September 2012 are quashed.

4. The sentences imposed in the Court of Summary Jurisdiction on 5 September 2012 on Counts 2 and 6 are quashed.

5. The appellant is re-sentenced as follows:

    Count 2, convicted and sentenced to 14 days imprisonment.

    Count 6, convicted and sentenced to 6 months imprisonment.

    Total term, 6 months and 14 days commencing on 5 September 2012, suspended after the service of five months and one week imprisonment.

    The operational period is for one year after release during which the appellant is not to commit another offence or he may be ordered to serve the balance of the term.

A condition of the suspended sentence is that he attend and complete the Indigenous Family Violent Offending Programme as directed by a Probation and Parole Officer.

_____