Morgan v Eaton [2013] NTSC 64

PARTIES:	MORGAN, Dennis v EATON, Donald John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA/AS 7 of 2013 (21326475)
DELIVERED:	7 October 2013
HEARING DATES:	1 October 2013
JUDGMENT OF:	MILDREN AJ
APPEALED FROM:	G BORCHERS SM

CATCHWORDS:

CRIMINAL LAW – Sentencing – Appeal – Magistrate relied on material not in agreed facts – Natural justice – Principles of parity
APPEAL – Justices Appeal – Appeal against sentence – Magistrate relied on material not in agreed facts – Natural justice – Principles of parity

Criminal Code Act 2013 (NT) s 188(2), s 188A

Marika v Gordon [2011] NTSC 13, followed
Maynard v O'Brien (1991) 78 NTR 16, followed
Mielicki, Whitman & Poniewaz v R (1994) 73 A Crim R 72, followed
Postiglione v The Queen (1997) 189 CLR 295, followed
R v Duong [1998] 4 VR 68, applied
R v Lowe [2009] VSCA 269, applied
R v Tait and Bartley (1979) 46 FLR 386, applied
R v Wise [2000] 2 VR 387, applied
Sultan v Svikart and Pearce (1989) 42 A Crim R 15, followed

REPRESENTATION:

Counsel:

Appellant:	R Anderson
Respondent:	T Jackson

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
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 ALICE SPRINGS

Morgan v Eaton [2013] NTSC 64
No. JA/AS 7 of 2013 (21326475)

BETWEEN:

DENNIS MORGAN
Appellant

AND:

DONALD JOHN EATON
Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 7 October 2013)

[1] This is an appeal against sentence. The grounds set out in the amended notice of appeal are as follows:

1. The sentence is manifestly excessive.

2. The learned magistrate erred in sentencing the appellant not in accordance with the agreed facts.

3. The learned magistrate erred in not according the appellant natural justice.

4. The learned magistrate erred in applying the principle of parity.

[2] After hearing the submissions of counsel for the parties I allowed the appeal and set aside the sentence of the learned magistrate. I re-sentenced the appellant by ordering that he be convicted and sentenced to three months imprisonment on count 2 of the information with one month on file 21233381 to be served cumulatively, and I backdated the sentence to 19 June 2013. I said at the time that I would publish my reasons at a later time. These are my reasons.

The charges, maximum penalties and pleas

[3] Separate informations had been laid against the appellant and two other offenders Braedon Nelson and Jerry Campbell. Each of the defendants had been charged with two counts. Count 1 alleged that each offender unlawfully assaulted Wayne Dodkins in circumstances of aggravation that Wayne Dodkins suffered harm and Wayne Dodkins was threatened with an offensive weapon namely a bottle contrary to s 188(2) of the Criminal Code. The second count was that the defendants unlawfully assaulted Mr Dodkins who was in the performance of his work duties at the time of the assault contrary to s 188A of the Criminal Code.

[4] The maximum penalty for the aggravated assault was five years imprisonment. The maximum penalty for the unlawful assault in the performance of his work duties contrary to s 188A of the Criminal Code, if found guilty on indictment is imprisonment for five years, or if found guilty summarily three years if the victim does not suffer harm. It was not pleaded

in the information that the victim had suffered harm as a circumstance of aggravation.

[5] The maximum penalty for a breach of aggravated assault if found guilty summarily is imprisonment for two years. It is well established that the maximum penalties fixed for summary hearings of indictable offences are only jurisdictional limits. The maximum penalty is that fixed by the statute generally.[1]

[6] The first matter to come before the learned magistrate was the case against Jerry Campbell. He pleaded guilty to aggravated assault and the charge of unlawfully assaulting a person in the performance of his work duties was withdrawn. The learned magistrate heard submissions in that matter on 11 July 2013 and adjourned the matter for sentence until 18 July. The next matter to come before the learned magistrate was the matter of Braedon Nelson which his Honour heard on 17 July 2013. In that matter the defendant pleaded guilty in relation to count 2 on the indictment and count 1, the aggravated assault, was withdrawn. The appellant's matter came on for hearing also on 17 July 2013 and he also pleaded guilty to count 2 and count 1 was withdrawn.

[7] In each matter the facts which were led to the learned magistrate had some considerable differences. Before dealing with those differences it is

[1] *Sultan v Svikart and Pearce* (1989) 42 A Crim R 15 at 18; *Maynard v O'Brien* (1991) 78 NTR 16 at 21-22.

necessary to set out the agreed facts which form the basis of the appellant's plea.

The Agreed Facts

[8] On Wednesday 19 June 2013 the appellant and co-offenders Braedon Nelson and Jerry Campbell were seen together on vacant land on Hartley Street Alice Springs. This area is situated next to the Stuart Lodge Hostel. The appellant and co-offenders consumed alcohol and Jim Beam spirits to intoxication.

[9] The appellant and co-offenders lit a fire underneath a tree adjacent to the Lodge's fence. The appellant and co-offenders were approached by the victim who was employed as a security guard by the Stuart Lodge Hostel. The appellant and both co-offenders were asked by the victim to extinguish the fire as it was a hazard to the Lodge.

[10] Co-offender Nelson approached the victim and began to verbally abuse him before kicking him once to the left lower leg with his right foot causing the victim to buckle under the pain. The appellant witnessed the assault and upon seeing the victim pushing Nelson away, stood up and approached the victim himself and told him not to push his brother.

[11] The appellant then pushed the victim in the chest using both hands forcing the victim backwards. The appellant was then pushed away by the victim which caused him to fall to the ground.

[12] Another altercation occurred between the co-offender Campbell and the victim, whereby the victim was punched once to the left side of the face by the co-offender using his clenched right fist. The victim turned and ran towards the entrance to the Hostel with the appellant and his co-offenders giving chase.

[13] After seeing the victim take refuge inside the secure fence of the Lodge, the co-offenders began pushing and kicking the gate. At the time the victim was struck on the head by an empty Jim Beam bottle which was thrown by the co-offender Campbell as he was attempting to make a phone call to Police for assistance.

[14] The bottle shattered on impact. A short time later Police attended and apprehended the appellant and the co-offenders at the front entrance of Stuart Lodge. The appellant was then conveyed to the Alice Springs Watchhouse but he later declined to participate in an electronic record of interview as no interpreter was available. He was later charged and bail was refused.

The learned Magistrate's Sentences

[15] When the learned magistrate came to sentence the appellant and the co-offenders his Honour considered that as the allegation of harm was not included in the charge under s 188A the maximum was three years.

[16] It would appear that the learned magistrate had forgotten that Campbell had pleaded guilty to a different charge from either the appellant or Nelson. Campbell had pleaded guilty to the circumstances of aggravation that the assault caused harm and that the victim had been threatened with an offensive weapon, namely a bottle. His Honour proceeded to deal with the defendants on the basis of a combined summary of the facts alleged separately against each the appellant and the other defendants even though the facts alleged in each case were quite different. Further, his Honour convicted and sentenced each of the offenders for a breach of s 188A. This is not readily apparent from his Honour's sentencing remarks, but is confirmed by the warrant which his Honour signed in Campbell's case.

[17] In particular, in the case of the appellant it is to be noted that the appellant was not jointly charged with the other defendants, that the learned magistrate found that the appellant kicked the victim in the left leg whereas that was alleged against the defendant Nelson; that the appellant threw a second punch (whereas that was alleged against Nelson only) and that there was a finding that the three men acted with a common purpose to assault the victim. Common purpose had only been alleged against the defendant Nelson, although it would have been open to the learned magistrate to find that at least by the time the victim had run to the fence and the defendants all gave chase, that the appellant became an aider and abettor. Furthermore, it was found that the appellant at first verbally abused the victim when asked to extinguish the fire whereas the facts in the appellant's case stated that it

was the co-offender Nelson who began to abuse the victim. Finally his Honour said that he was not satisfied as to the identity of the defendant who actually threw the bottle which caused the injury to the victim's head and that accordingly he did not sentence any of these defendants on the basis that he alone was responsible for that act whereas in the facts alleged in the appellant's case, it was specifically stated that this bottle was thrown by the co-offender Campbell. In the case of Campbell it was specifically alleged that it was he who threw the glass bottle at the victim causing it to strike the victim on the top of his skull, and, as noted previously, he had pleaded guilty to the circumstances of aggravation which I have previously mentioned.

Grounds 2 and 3

[18] There are a number of authorities to the effect that a sentence should not be imposed if it is founded wholly or partly on material which has not come before the learned magistrate in open court and if any relevant material was obtained by the judicial officer from private sources or sources not available to the parties which is capable of being used adversely to the offender, unless that course is specifically agreed to by counsel for the offender, the sentence will ordinarily be set aside.[2] His Honour was bound not to take into account material which had not been alleged by the prosecution against the appellant and certainly could not take into account matters which had been alleged against the co-offenders but not against the appellant as to do

[2] *R v Tait and Bartley* (1979) 46 FLR 386; *R v Wise* [2000] 2 VR 387 at 294 at 81.

so was to clearly deny the appellant natural justice.[3] I therefore upheld the appeal on grounds 2 and 3.

Ground 4

[19] It was submitted on behalf of the appellant that it was not open to the learned magistrate to find that he could not be satisfied as to the true identity of the person who threw the bottle which caused the injury to the victim's head. It is clear that the principal offender was Mr Campbell who punched the victim, pursued the victim with two sticks and threw the glass bottle which caused the deep laceration to the victim's head. I accept that submission and I accept also the submission that his moral culpability would have been greater than the appellant's. It was submitted that greater disparity in their respective sentences was also called for given the differences in their ages and criminal history. At the time of the offending, Campbell was 34 years of age and had been sentenced to terms of imprisonment in 2012, 2008, 2007, 2006 and 2005, although Campbell had no prior convictions for offences of violence. Nelson was aged 30, had three prior convictions for assault recorded in 2004 and 2009, and had been sentenced to terms of imprisonment every year for the last 10 years with the exception of 2005 and 2006. The appellant was only 24 years of age and his criminal history was limited to traffic offences in 2008, two breaches of bail offences and one of property offending in 2012 for which he had received a

[3] *Mielicki Whitman & Poniewaz v R* (1994) 73 A Crim R 72 at 76-79; *Marika v Gordon* [2011] NTSC 13 at 6; *R v Duong* [1998] 4 VR 68; *R v Lowe* [2009] VSCA 268.

partially suspended sentence of three months. The current offending resulted in a breach. Yet in each case the appellant, Nelson and Campbell received the same sentence albeit that the appellant was also dealt with for the breach. The learned magistrate ordered that one month of that sentence be served cumulatively with the sentence which is appealed from.

[20] It is difficult to see how in all of the circumstances identical sentences of imprisonment for eight months with four to serve and the balance to be suspended is justified. The principles of parity required that there be a significant differentiation.[4] I allowed the appeal on that ground as well.

Re-sentence

[21] Having regard to the appellant's relative youth and his relatively minor role in the offending I considered that an appropriate head sentence was imprisonment for three months to be backdated to commence from the date he first went into custody. The learned magistrate's order in relation to the breach of the suspended sentence was not challenged. Accordingly I ordered that one month of that sentence be served cumulatively with the sentence imposed on the file number 21233381. In arriving at this sentence I took into account that the appellant had nearly served that part of the suspended sentences which had been imposed by the learned magistrate and ordered to be served.

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[4] *Postiglione v The Queen* (1997) 189 CLR 295.