Tickner v Eaton [2009] NTSC 56

PARTIES:	RONNIE EVAN TICKNER v DONALD EATON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No 1 of 2009 (20833536)
DELIVERED:	29 October 2009
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JUDGMENT OF:	MILDREN J
APPEAL FROM:	YOUTH JUSTICE COURT

CATCHWORDS:

Interpretation Act, s 38DA
Justices Act, s 22A, s 55
Penalty Units Act 1999, s 3(1)
Penalty Units Act 2009, s 9(1)
Summary Offences Act, s 47AA, s 47AA(1), s 47AA(2)(b), s 47AA(4)
Youth Justice Act 2005, s 53(1), s 144

R v De Simoni (1981) 147 CLR 383; followed

Reedy v O'Sullivan [1953] SASR 114; referred to

REPRESENTATION:

Counsel:

Appellant:	T Collins
Respondent:	C Roberts

Solicitors:

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

Judgment category classification:	C
Number of pages:	15

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

Tickner v Eaton [2009] NTSC 56
No 1 of 2009 (20833536)

BETWEEN:

RONNIE EVAN TICKNER
Appellant

AND:

DONALD EATON
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 29 October 2009)

[1] This is an appeal against sentence pursuant to s 144 of the *Youth Justice Act 2005*.

[2] The appellant and four other juveniles were each charged with various offences arising out of a melee that occurred on Friday 14 November 2008 in a park situated between Plumbago Crescent and Beefwood Court, Alice Springs. The appellant pleaded guilty to an offence against s 47AA(1) of the *Summary Offences Act*. The statement of the offence contained in the charge originally provided that (deleting formal parts) the accused:

> Did engage in conduct involving a violent act, namely in company committed assault and threw projectiles with intent to cause harm,

and such conduct caused other persons in the vicinity to be fearful for their safety contrary to s 47AA(1) of the *Summary Offences Act*.

[3] Prior to the plea, the prosecution accepted an amendment to the charge which then read:

> Did engage in conduct involving a violent act, namely the throwing of projectiles whilst being reckless as to whether the conduct involves a violent act and would have that result and that such conduct caused other persons in the vicinity to be fearful for their safety.

[4] The charge as originally formulated and as reformulated does not comply with ordinary criminal pleading rules.

[5] Section 53(1) of the *Youth Justice Act* provides that unless the Act makes specific provision in relation to proceedings, orders or convictions, the *Justices Act* applies as if the Youth Justice Court were the Court of Summary Jurisdiction established by that Act.

[6] Section 55 of the *Justices Act* provides:

> In any complaint and in any proceedings thereon the description of any offence in the words of the Special Act or other document creating the offence, or in similar words, shall be sufficient in law.

[7] Section 47AA of the *Summary Offences Act* provides as follows:

> **47AA Violent disorder**
>
> (1) A person is guilty of an offence if:
>
> (a) the person is one of 2 or more people engaging in conduct that involves a violent act; and

(b) the conduct would result in anyone who is in the vicinity and of reasonable firmness fearing for his or her safety; and

(c) the person:

(i) intends or knows that the conduct involves a violent act and would have the result mentioned in paragraph (b); or

(ii) is reckless as to whether the conduct involves a violent act and would have that result.

[8] Section 47AA(4) provides:

conduct that involves a violent act includes:

(a) conduct capable of causing injury to a person or damage to property (whether or not it actually causes such injury or damage); and

(b) a threat to engage in such conduct.

[9] The statement of offence as originally framed alleged "with intent to cause harm". That is not the intent required by the section. The statement of the offence as amended was badly pleaded because it did not allege that the accused was one of two or more people engaged in conduct that involved a violent act. Both the original charge and the amended charge alleged that the conduct caused other persons in the vicinity to be fearful of their safety rather than alleging that the conduct would result in anyone who was in the vicinity and of reasonable firmness fearing for his or her safety. There is a significant difference. In the first place, it is not necessary to prove any

person actually feared for his or her safety. Secondly, a person who feared for his safety may or may not be a person of "reasonable firmness". Thirdly, s 47AA(2)(b) specifically provides that "no person of reasonable firmness need actually be, or be likely to be, present in the vicinity for the offence to be committed. The test is therefore an objective one not a subjective one.

[10] No point is taken on the appeal that the charge as amended is defective and I merely mention this in order to point out that notwithstanding s 22A of the *Justices Act* it is necessary for those involved in the preparation of a charge to be careful in drafting the charge because a failure to properly charge the defendant may result in a conviction being overturned.[1] In the present case, there was no injustice to the appellant, who was represented by counsel, and the only matter to be determined is whether the appeal should be allowed in relation to the sentence actually imposed.

[11] The following table sets out the offences and sentences which were imposed against the appellant as well as against the co offenders:

Name	Offence	Sentence	Priors
M C 20831793 PA080272	Aggravated assault s 188(1) & (2)(a) & (m) Aggravated assault s 188(1)&(s)(a)	On 24 July 2009 – 2 months detention 2 months detention (1 month cumulative) Total 3 months from 24 May 2009	On 24 July 2008 dealt with without proceeding to conviction on 3 counts of aggravated assault On 14 August 2008 dealt with without proceeding to a conviction on 6 counts of property offences

[1] See for example *Reedy v O'Sullivan* [1953] SASR 114 at 127-130 per Napier CJ.

ECF 20835478 PA090020	Aggravated assault s 188(1) & (2)(a)	On 2 July 2009 – GBB 2 years with conditions	No priors
CF 20833482 PA080300	Engage in violent act s 47AA(1) Summary Offences Act	On 2 July – No conviction recorded GBB of $500 for 12 months with conditions	No priors
BT 20833480 PA080302	Engage in violent act s 47AA(1) Summary Offences Act	On 14 July 2009 – No conviction recorded GBB of $500 for 12 months with conditions	No priors
Appellant 20833536	Engage in violent act s 47AA(1) Summary Offences Act	On 2 July 2009 – Convicted and sentenced to 3 months detention suspended upon conditions including supervision	26 prior property offences 5 prior motor vehicle offences 11 breaches of bonds etc 2 additional property offences proved with proceeding to conviction

[12] The grounds of appeal as set out in the Notice of Appeal are as follows:

1. That the sentence imposed by the learned Stipendiary Magistrate was in all the circumstances manifestly excessive.

2. The learned Magistrate erred by failing to consider sentencing options other than a period of detention.

3. That the learned Stipendiary Magistrate failed to have due regard to the general principles of the Youth Justice act as outlined in PART 1-Preliminary Matters, Division1- General Matters; point 4 Principles and the sentencing principles and considerations to be applied to youth offenders as outlined in Section 81 of the Youth Justice Act.

4. That the learned Stipendiary Magistrate erred in characterising the appellant as one of the principal offenders in this matter.

5. That the learned Stipendiary Magistrate erred in not giving sufficient weight to the appropriate application of parity.

6. That the learned Stipendiary Magistrate gave too much weight to the issue of general deterrence when sentencing the appellant.

The Crown Facts

[13] The facts as alleged by the Crown at the sentencing hearing before the learned Magistrate were as follows:

> ECF is a 15 year old Aboriginal male who resides in Alice Springs with his mother. He is currently attending school in the Alice Springs area.
>
> MC is a 14 year old Aboriginal male who resides in Alice Springs with his parents. He is currently attending school in the Alice Springs area.
>
> [The appellant] is a 15 year old Aboriginal male who resides in Alice Springs with his parents. He is currently unemployed and no longer attends school.
>
> CF is a 15 year old Aboriginal male who resides in Alice Springs with his parent. He is currently attending school in the Alice Springs area.
>
> The facts of the matter are that on Friday 14 November 2008 the offenders and numerous other alleged co-offenders were in a park that is situated between Plumbago Crescent and Beefwood Court, Alice Springs. Some witnesses have estimated that 20 and 30 people were in the vicinity, but it is not known how many offenders took part in the incident.
>
> The following facts relate to offenders that are known to the Crown and were arrested in relation to these offences. The Crown does not know the identity of a considerable number of alleged co-offenders who took part in this incident.
>
> At around 11pm ECF approached Victim 1 and started swearing at him, and saying "Come on, come on". ECF then took up a fighting stance and attempted to punch [Victim 1] twice but missed. ECF was then punched by [Victim 1], knocking him to the ground.
>
> ECF then followed [Victim 1] who had walked away into Beefwood Park. CF continued to swear at [Victim 1]. ECF struck [Victim 1]

with a clenched fist to the right side of the face which caused instant pain. He again attempted to fight him by swinging a number of punches, but failed to connect.

[Vitim 1] walked off towards his residence and a short time later ECF and numerous co-offenders commenced running at him. [Victim 1] ran into his residence and picked up a metal pole for protection.

The sequence of events that followed is not entirely clear but it is alleged that as part of the melee that Co-offenders MC, BT, and [the appellant] caught up with [Victim 1] and MC then struck [Victim 1] three times to the left side of the face with a clenched fist. It is alleged that a co-offender BT punched [Victim 1] with a closed fist to the face.

Co-offenders (CF, BT, MC, [the appellant], and numerous unidentified offenders) all picked up rocks, bricks, sticks and garbage bins that were located in the area and commenced throwing them towards [Victim 1] and MC then threw a wheelie bin at [Victim 1].

Victim 2 had heard the commotion from inside his resident and exited onto Beefwood Court. He was then struck to the back of his head with a cement block which caused him to fall to the ground. [Victim 2] was then kicked to the face by an unknown offender, causing his head to jolt back. [Victim 2] got up and chased after the offenders, and caught up with ECF getting him in a headlock and falling to the ground. The alleged co-offender HM [who is a person currently going through diversion] ran over towards [Victim 2]. It is alleged that co-offender HM and two other alleged offenders ran at and kicked [Victim 2] to the left side of the face whilst he was on the ground and not in a position to defend himself.

MC at a later stage kicked [Victim 2] to the body with a number of other unidentified co-offenders joining in.

ECF then left the area with co-offenders when police and ambulance arrived. Both victims had to be conveyed to the Alice Springs Hospital by ambulance due to injuries received by the assaults.

On Thursday 18 December 2008 ECF was arrested and conveyed to the Alice Springs Police Station. ECF participated in an electronic record of interview where he stated that he had a fight with [Victim 1] and chased him with other youths but denied throwing any items. ECF was later charged with his involvement in the matter.

On Wednesday 19 November 2008 MC was arrested and conveyed to Alice Springs Police Station. He participated in an electronic record of interview where he made 'no comment'. He was later charged with involvement in the matter.

On Wednesday 3 December 2008 [the appellant] attended the Alice Springs Police Station with his father and surrendered himself to police. He was arrested and participated in an electronic record of interview. He stated he was in the area and saw kids throwing rocks and bins at [Victim 1] but he didn't get involved. He then exercised his right to silence and made no further comment. He was later charged with involvement in this matter.

On Tuesday 2 December 2008 CF was arrested and conveyed to the Alice Springs Police Station. He participated in an electronic record of interview where he stated 'no comment' for all questions. He was later charged with his involvement in this matter.

As a result of the assault [Victim 1] was flown to Darwin as he had suffered the following injuries:

- Fractured left side of his skull requiring surgery 11 x screws placed in his forehead)
- Fractured left eye socket
- A laceration to his right leg
- Soreness to his jaw
- Bruising and swelling around his face and head.

As a result of the assault [Victim 2] suffered the following injuries:

- Bruised left eye
- Laceration above the left eye
- Large lump to the base of his skull
- Large lump on his upper back
- General soreness around the body.

At no time did either victim give permission for any of the offenders to assault him in any way.

The injury (fractured skull) to [Victim 1} was caused by a brick being thrown at him and striking him to the forehead. The Crown is not able to establish at this time who threw the brick which caused that injury.

The offenders caused fear and concern to neighbours in the area.

The Submissions in the Youth Justice Court

[14] At the sentencing hearing before the learned Magistrate, the Crown submitted that the appellant played a lesser role, but that his presence and conduct at the scene contributed significantly to the melee in that he provided backup and egged on the principal offenders. The Crown submitted that the offending was sufficiently serious for the Magistrate to consider a period of detention in relation to the two principal offenders, ECF and MC. The Crown said that they were not making that submission in relation to the appellant or CF. Counsel for the appellant submitted that the appellant's role was very much a case of following to see what was going on and that he admitted, although he has no memory of it because he was

intoxicated, that he picked up sticks and threw them in the general direction of Victim 1. It was put that the appellant did not escalate his involvement over and above of being initially there throwing sticks as part of the onset of the conduct and that his level of culpability was a lot less than others in this matter.

[15] The learned Magistrate indicated at the initial sentencing hearing on 15 May 2009 that he would adjourn all the matters he was dealing with that day to 29 June for sentence and that he was going to seek a presentence report in relation to the appellant as well as the other offenders. He said:

> However, it is not only for reasons that the Court is considering detention that presentence reports may be appropriate. We've got a situation here where we've got young juveniles clearly in an unsupervised situation where clearly drinking to a level which is damaging to themselves, if not the community at large. And we've got in relation to [the appellant] someone who has an extremely bad record of offending. He's been to detention before and has been before the Supreme Court and has not re-offended again in a serious manner.

[16] In fact, the appellant's record does not disclose that he had committed offences which were dealt with in the Supreme Court, but rather that he had appealed to the Supreme Court successfully against sentences previously imposed by the Youth Justice Court and was resentenced as a result of his appeal being successful. The other observation to be made about the appellant's prior convictions is that so far as offending is concerned, apart from some traffic offences for which he was sentenced in 2007, he had no previous convictions in the Juvenile Court for any offending since 21 April

2006 when he was 13 years of age. The other thing that really stands out about his prior record is his persistent failure to comply with suspended sentences and Youth Court orders, and breaches of orders whilst released on a bond.

[17] At the subsequent hearing before the learned Magistrate on 2 July 2009, the Court had available to it a presentence report the substance of which was that as neither the appellant nor his parents had contacted the author of the report, the author was unable to provide the Court with a full presentence report. The report indicated that on one occasion the appellant did attend, but without a parent or guardian and he was requested to return with a parent or guardian that day, but that he failed to do so. The report concluded:

> As the youth or his parents failed to make themselves available to participate in the Pre Sentence Report, the writer cannot assess [the appellant] as suitable for any order which would require Community Corrections involvement.

[18] The report also dealt with the persistent failure of the appellant to comply with various Court orders relating to supervision, community work orders and the like in the past.

The Decision of the Youth Justice Court

[19] At the time of sentencing, the appellant had turned 16 and had been on bail for a period of seven months. The appellant's counsel indicated to the Court that the appellant did not think there would be any use in engaging with the

Department of Corrections at this stage and that he did not want to talk to Corrections in relation to his matter. Subsequently, the appellant's counsel received instructions over the lunch hour that he would agree to be supervised by Corrections and to comply with conditions. So far as the appellant was concerned, the learned Magistrate only said this:

> In relation to [the appellant], he is also charged with the less serious charge, which is count 3 on his information or the charge sheet in relation to him, however, he did take part in an active way **in a very violent serious of offences**. His part was quite serious. He is someone who has a long history of offending; he has been sentenced to detention before. It is the fact that his offending in the past has not been violent related that I am not sentencing today to an immediate period of detention (emphasis mine).

[20] His Honour then found him guilty in relation to the count, convicted him and ordered him to serve a period of detention of three months suspended forthwith. He specified an operational period of two years from the date of sentence. As to the conditions, he ordered: that he was to be supervised by the Director of Correctional Services for 12 months; that he was not to consume alcohol or illicit substances whilst supervised; and he was not to associate with CF, MC or ECF.

[21] In this case, the appellant's counsel had submitted to the learned Magistrate that the appellant only got involved after Victim 1 had returned armed with a pole. Prior to that he was not involved at all and there is no evidence that he was involved in any way after Victim 1 had been assaulted. Furthermore, the suggestion that the appellant "did take part in an active way in a very violent series of offences" is apt to mislead. The appellant had not pleaded

guilty to the offences of aggravated assault on either Victim 1 or Victim 2. The maximum penalty for those offences is imprisonment for five years. It would not be open to punish the appellant as a participant in that offending.[2]

[22] As to his prior convictions, it is to be noted that there were no prior convictions involving violence and he had not committed any offence other than breaches of bonds and the like since he was 13 years of age. At the time of sentence, he was 16 years of age.

The Appeal is Allowed

[23] The main difficulty for the learned Magistrate was that although the appellant's role was much less than some of the others who were involved, his previous record, and in this respect his recent record, indicated that he was not interested in a disposition which would involve supervision or complying with conditions until the very last minute. Nevertheless, I consider that a head sentence of three months detention, having regard to his limited role, previous history and the sentences imposed on the principal offenders, is manifestly excessive and so out of proportion to the sentences imposed on the other co offenders as to offend the parity principle. I would therefore allow the appeal and set aside the sentence imposed by the learned Magistrate.

[2] *R v De Simoni* (1981) 147 CLR 383 at 389 per Gibbs CJ.

Resentencing

[24] At the time of hearing the appeal, evidence was received showing that the appellant has now obtained employment at the Finke Community working for the Shire in the housing maintenance team. The Team Leader of Civil Works for the Finke Community, Mr James Mason, has provided a letter to the effect that the appellant has performed consistently well:

> He is the most reliable worker I have and is easy to supervise.
>
> When given a job he sets about it immediately. He continues his desire to learn more skills.
>
> Over the last two weeks [the appellant] has made it easier for me because I have been able to give him jobs and the tools necessary and send him off to do them on his own and he has again impressed me by showing the ability to think outside the box and work our problems on his own.
>
> [The appellant] is a valuable asset to me and the team and therefore the community.

[25] I was informed by Ms Collins that he is now receiving $400 per fortnight and would be able to pay a fine. I was also informed that before he obtained this employment, he was doing a literacy and numeracy course at the Institute of Aboriginal Development in order to obtain labouring work in the community.

[26] The evidence now before the Court shows that the appellant is maturing. I consider that the Court should impose a disposition which recognises that.

[27] The maximum fine is 100 penalty units.[3] This translates into $11,000.[4]

[28] In all the circumstances, including the appellant's age and capacity to pay a fine, the appellant is convicted and fined $400 with the victim impact levy of $20.00.

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[3] *Interpretation Act*, s 38DA.
[4] *Penalty Units Act 2009*, s 9(1); *Penalty Units Act 1999*, s 3(1).