

Westphal v Abbott & Abbott [2013] NTSC 69

PARTIES: WESTPHAL, Lindsay

v

ABBOTT, Barry Junior

AND

ABBOTT, Valerie Anne

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILES NO: JA 21 of 2012 (21134239)

AND

JA 22 of 2012 (21134242)

DELIVERED: 29 October 2013

HEARING DATE: 5 March 2013

JUDGMENT OF: SOUTHWOOD J

APPEAL FROM: J M R NEILL SM

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellant: N Kumar
Respondent: R Goldflam

Solicitors:

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

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

Westphall v Abbott and Abbott [2013] NTSC 69
No. JA 21 & 22 of 2013 (21134239) & (21134242)

BETWEEN:

LINDSAY WESTPHAL
Appellant/Cross Respondent

AND:

BARRY SHANE ABBOTT JUNIOR

AND

VALERIE ANNE ABBOTT
Respondents/Cross Appellants

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 29 October 2013)

Introduction

- [1] These proceedings involve two crown appeals against sentence, two cross-appeals against conviction and a cross-appeal against sentence.
- [2] On 7 December 2012, following pleas of guilty to all counts, Barry Shane Abbott Junior¹ was found guilty by the Court of Summary Jurisdiction of nine counts of deprivation of liberty² and two counts failure to supply the necessaries of life.³ For the nine counts of deprivation of liberty he was

¹ Hereafter referred to as “Barry Abbott”.

² contrary to s 196 of the *Criminal Code* (NT).

³ contrary to s 183 of the *Criminal Code* (NT).

ordered to be released without conviction. For the two counts of failure to supply the necessaries of life he was fined an aggregate sum of \$1000 without conviction and ordered to pay two victims levies of \$40.00 each.

- [3] On 7 December 2012, following pleas of guilty to all counts, Valerie Anne Abbott,⁴ was found guilty by the Court of Summary Jurisdiction of nine counts of deprivation of liberty and two counts failure to supply the necessaries of life. For the nine counts of deprivation of liberty she was ordered to be released without conviction. She was convicted of the two counts of failure to supply the necessaries of life and sentenced to a total sentence of four months imprisonment which was suspended at the rising of the court. An operational period of 12 months from 7 December 2012 was specified.
- [4] The maximum sentence for each of the offences was imprisonment for seven years.
- [5] The appellant has appealed against the sentences imposed on Barry Abbott and Valerie Abbott for the nine counts of deprivation of liberty and against the sentence imposed on Barry Abbott for the two counts of failure to provide the necessaries of life on the basis that the sentences were manifestly inadequate as the sentencing magistrate failed to convict both of them of each of these counts.

⁴ Hereafter referred to as “Valerie Abbott”.

Cross-appeal against convictions and sentence

- [6] Both Barry Abbott and Valerie Abbott have cross-appealed against their convictions for the nine counts of deprivation of liberty on the basis that the sentencing magistrate erred in ruling on 6 November 2012 that s 27(p) of the *Criminal Code* (NT) was not an available defence to a charge of deprivation of liberty.
- [7] Valerie Abbott has also cross-appealed against the sentences imposed on her for the two counts of failure to supply the necessaries of life.

The Crown Facts

- [8] The following facts were admitted by Barry Abbott and Valerie Abbott.
- [9] In September 2011, Michael Turner was 15 years of age, Paul Parker was 13 years of age, Walter Ahwon was 16 years of age, Daniel Wingo was 16 years of age, Daniel Blow was 16 years of age, Leon Patrick was 15 years of age, Nathan Tancred was 16 years of age, Charleston Willalang was 15 years of age, Clifford Joe was 21 years of age and Arthur Ninnal was 28 years of age. Each of them is a victim of the offences committed by Barry Abbott and Valerie Abbott.
- [10] In September 2011, Barry Abbott and Valerie Abbott were employed by the Ilpurla Aboriginal Corporation.⁵ Valerie Abbott was employed full time as an Administration Manager. Barry Abbott was employed full time as a Senior Alcohol and Other Drugs Counsellor.

⁵ Hereafter referred to as the “corporation”.

- [11] The corporation was funded by Commonwealth and Territory agencies to provide a residential rehabilitation facility and programs for youths referred by the Youth Justice Court, Court of Summary Jurisdiction, Central Australian Youth Link-up Service, Alcohol and Other Drugs Services of Central Australia, other agencies in the Northern Territory and individual family members. The residential rehabilitation facility and the rehabilitation programs were originally established by Mr Barry Abbott senior. Barry Abbott and Valerie Abbott have also been significantly involved in the work of the corporation. The rehabilitation programs provided by the corporation have been of enormous value to many young people in Central Australia.
- [12] Between 13 and 16 September 2011 the victims were residents of the corporation's facility at Ilpurla and were participating in rehabilitation programs. The corporation had responsibility for the daily care and control of the victims. Between 13 and 14 September 2011 Valerie Abbott was in charge of the residential facility as she was the most senior employee. From the time Valerie Abbott left on 14 September 2011 until 16 September 2011 Barry Abbott was in charge of the facility.
- [13] In the late hours of 13 September 2011 Michael Turner and others obtained petrol for the purpose of inhaling its fumes. The victims then sat around a camp fire sniffing the petrol. Michael Turner and Paul Parker suffered burns to their left legs when each of them spilt the petrol and it caught fire.

[14] In the early hours of 14 September 2014, Michael Turner and Paul Parker sought assistance from Valerie Abbott, Barry Abbott and other staff for the burns they suffered. Their burns were bandaged and pain relief medication was administered at the direction of Valerie Abbott. Valerie Abbott and Barry Abbott then directed all of the victims, save for Paul Parker, who was 13 years of age, to get into a cage on the back of Toyota four wheel drive motor vehicle and the door of the cage was secured. The victims remained in the cage until they were allowed to leave at mid-morning on 14 September 2011. They were kept in the cage against their will. The cage was not in a sanitary condition.

[15] Paul Parker was taken to a nearby house of one of the staff. Both Paul Parker and Michael Turner told Valerie Abbott and Barry Abbott that they were in pain.

[16] In the evening of 14 September 2011 Valerie Abbott travelled to Alice Springs because she wanted to obtain antibiotics as she had influenza.

[17] On 16 September 2011 Michael Turner was taken to his mother's home in Alice Springs and Paul Parker was driven to the Alice Springs Hospital. He was assessed by a triage nurse at 15:39 and admitted at 16:44. Michael Turner presented at the Alice Springs Hospital at 18:34 and was admitted at 19:20.

[18] On examination, Paul Parker was observed to have sustained a large area of partial to full thickness burns to the inner aspect of his left thigh, left lower

leg and groin. At the time of admission to hospital his burns had become infected and sepsis and purulent discharge were noted. He had a raised temperature, he was dehydrated and there was inflammation around the burns. He was given intravenous antibiotics.

[19] On 17 September 2011, Paul Parker was admitted to theatre for debridement of his burns. On 19 September 2011 he was transferred to the burns unit at the Women and Children's Hospital in Adelaide for skin grafting.

[20] On examination, Michael Turner was observed to have sustained burns to the medial part of his left thigh and left leg. The area involved the flexor surface of the knee. He was neurovascularly intact. There were no obvious signs of infection. He was initially managed with dressing, intravenous fluids and analgesia. On 17 September 2011 he was taken to theatre for debridement and washing of the injured areas. He was transferred to the Royal Adelaide Burns Unit on 28 September 2011.

[21] Both of Michael Turner and Paul Parker required professional medical assistance immediately after they suffered their burns. The delay in treating Paul Parker exposed him to a real risk of death from septicaemia. The delay in providing professional medical attention to Michael Turner left him at a real risk of infection sepsis and possible fatality.

[22] In addition to the above facts, the sentencing magistrate made the following findings of fact in his sentencing remarks.

- [23] Michael Turner's burns would have seemed to be reasonably serious to Valerie Abbott and Barry Abbott as while he was in the process of removing his trousers skin came off the burned area of his body.
- [24] Some staff present while the two boys were receiving first aid said that the boys should be taken to the Alice Springs Hospital. However, Valerie Abbott made a decision to put nine of the victims in the cage on the back of the Toyota motor vehicle and for Paul Parker to be cared for at the home of one of the staff. The decision seems to have been based on the risks associated with a night time drive to Alice Springs and the effects that inhaling petrol may have on the behaviour of the victims. She was concerned that the victims may become violent or engage in self harm. Barry Abbott agreed with this course of action although he was working under her direction.
- [25] The size of the cage prevented the victims from lying down. They could only stand or sit with their legs pulled up. They were unable to go to the toilet unless they chose to urinate through the bars of the cage. However, nobody requested to be released from the cage to go to the toilet. The victims were released from the cage at mid-morning on 14 September 2011 with the expectation that they were no longer acutely intoxicated by petrol.
- [26] The failure to supply the necessaries of life counts arise because Michael Turner and Paul Parker were not taken to hospital as soon as possible after

sunrise on 14 September 2014. They were only taken to hospital on 16 September 2011.

- [27] The sentencing magistrate was satisfied that the decision by Valerie Abbott and Barry Abbott not to travel to Alice Springs in the early hours of 14 September 2011 was justifiable because the boys were in an intoxicated state, it was dark and the roads were unsealed. However, his Honour found there was no justification for not taking the two boys to get medical treatment after daylight. Either Valerie Abbott, or Valerie Abbott and another member of staff, could have taken the two boys to get medical attention in Alice Springs.
- [28] His Honour was satisfied in the early hours of 14 September 2011 it was not obvious that the injuries suffered by Michael Turner and Paul Parker required immediate medical attention. Valerie Abbott and Barry Abbott were not medically sophisticated. They had no formal training which would have enabled them to make an informed decision about the extent of the injuries. The admitting doctor at the Alice Springs Hospital incorrectly described Michael Turner's burns as superficial to partial burns.
- [29] His Honour also found that Valerie Abbott and Barry Abbott did not just lock nine of the victims in the cage and retire to their beds. They took turns of sitting next to the cage to ensure that nothing happened for the rest of the night. They kept watch.

- [30] He also found that there was no reasonable explanation as to why the two injured boys were not taken to Alice Springs for medical treatment before the end of the day on 14 September 2011.
- [31] After Valerie Abbott left in the evening of 14 September 2011, Barry Abbott was in charge. He had the care of the two injured boys until he received a telephone call from his sister instructing him to bring the two boys into Alice Springs on 16 September 2011. It was not unreasonable for him to defer to his sister in the ordinary course of matters at the residential facility. Indeed she gave him some directions while she was in Alice Springs. However, once she left, it was up to him to decide whether and when to take the two boys to Alice Springs for medical treatment. Barry Abbott did not make a decision to take the boys into Alice Springs until he spoke to his sister on 16 September 2011.
- [32] The delay in taking the boys into Alice Springs exposed them to a real risk of their burns becoming infected.
- [33] Valerie Abbott's explanation for not taking the two boys into Alice Springs was that she thought the burns were superficial and did not require immediate treatment when they first came to her attention and first aid was provided. However, the sentencing magistrate found that Valerie Abbott knew she was medically unqualified, untrained and inexperienced and she should have known that her assessment of the conditions of the burns that the two boys suffered could not be relied on.

[34] As to Valerie Abbott's character, the sentencing magistrate found that she was a 38 year old woman who had not previously come before the courts anywhere. She had been involved with caring for troubled youths all her life. She was a person of good character and high reputation who had made significant contributions to the community. His Honour found that Valerie Abbott now accepted that the boys should not have been placed in the cage.

[35] His Honour also found that there were exceptional or extenuating circumstances which led Valerie Abbott and Barry Abbott to make the unfortunate decision to place nine of the victims in the cage on the back of the Toyota.

[36] His Honour found that there were no exceptional or extenuating circumstances which covered the whole of the period of time that there was a failure to provide the necessities of life to the two boys who suffered burns. Valerie Abbott and Barry Abbott were under a duty to get medical attention for the two boys as soon as reasonably practicable.

[37] As to the character of Barry Abbott, the sentencing magistrate noted his prior convictions, but found that he was nonetheless a man of exemplary character. He too had made a significant contribution to the community.

[38] His Honour regarded Barry Abbott's offending as significantly less serious than Valerie Abbotts because he was operating under her instructions.

Objective seriousness of the offending

[39] The key aspects of offences of deprivation of liberty committed by Valerie Abbott and Barry Abbott are as follows. Valerie Abbott was in charge of the residential facility. She had the primary responsibility for the care and control of the youths and she was in a position of trust. Barry Abbott was subject to Valerie Abbott's instructions as she was the most senior person present at the residential facility. The ages of those who were detained in the cage ranged from 15 to 28 years. The victims were vulnerable. The majority of the boys were 15 or 16 years of age. The boys were in the cage, which was unsanitary, for seven to nine hours. The boys were very cramped while they were in the cage. One of the boys, who were placed in the cage, had suffered serious burns and was exposed to infection. However, there is no evidence to suggest that his wounds were exacerbated or made worse because he was placed in the cage. No force or violence was used to place the boys in the cage. They got into the cage when told to do so. Valerie Abbott and Barry Abbott kept watch over the boys while they were in the cage. The boys were placed in the cage because they were intoxicated by petrol fumes which they had inhaled and there was a risk they may harm themselves or others while they were intoxicated.

[40] In my opinion, the offending is very much towards the lower end of the range of such offending but it is not trivial.

[41] As to the offences of failure to supply the necessaries of life, the key aspects are as follows. The two boys sustained serious burns which required skin

grafts. There was a significant risk of life threatening infection if the burns were not properly treated. There was no reasonable explanation as to why the boys were not taken into Alice Springs after midday on 14 September 2014. Valerie Abbott was only suffering from influenza. There is no evidence to suggest that the failure to take the boys to Alice Springs on 14 September 2011 exacerbated or accelerated their injuries in anyway. That is, the failure to provide the necessaries of life did not cause any harm other than perhaps increased pain until the boys were admitted to hospital and could be given appropriate pain relief.

The submissions of the appellant

[42] The appellant submitted that the sentences imposed on Valerie Abbott for the nine counts of deprivation of liberty and the sentences imposed on Barry Abbott were manifestly inadequate because the sentencing magistrate failed to give sufficient weight to the objective seriousness of the offending and failed to record convictions. The offences have a maximum penalty of seven years imprisonment and involved a breach of trust and are especially repugnant because they involve a breach of basic societal values such as care, dignity and the requirement to protect and nurture vulnerable children. Excessive weight was given to the circumstances in which the offences were committed. The Court had a duty to impose a sentence that would operate as a powerful factor in preventing the commission of similar offences. General deterrence is the main purpose of punishment. It was important to make it clear that the community does not approve of this type of conduct.

Consideration of the appellant's submissions on sentence

[43] In my opinion, the appellant's submissions about the sentences imposed for the offences of deprivation of liberty cannot be sustained. The submissions incorrectly elevate the level of the offending in this case by over emphasising the breach of trust. Essentially, what occurred was an overreaction of relatively short duration to the circumstances which confronted Valerie Abbott and Barry Abbott in the early morning of 14 September 2011.

[44] On the evidence which was before the Court of Summary Jurisdiction, the following matters are important in the exercise of the sentencing discretion. The offending was committed by two people of good character who had a previous good record for caring for children who were residing at the corporation's residential facility. The residential facility is in a very remote location and was run by a limited number of staff. Ten people engaged in inhaling petrol fumes not just one or two people. The majority of the victims were in their mid-teens, one was 13 years of age and two were adults. They all had complex needs and had broken the law. Michael Turner was given appropriate first aid before being told to get into the cage. No force or violence was used to place the nine victims in the cage on the back of the Toyota. They were simply told to get in the cage. While the cage was cramped and unsanitary, there was no risk of harm to eight of the nine boys and not a great risk of harm to Michael Turner. He fared better than Paul Parker who stayed at the home of one of the staff. Valerie Abbott and Barry

Abbott kept watch while the victims were in the cage. The victims were released from the cage by mid-morning on 14 September 2011. None of the victims were injured as a result of being placed in the cage. Valerie Abbott and Barry Abbott were remorseful about what they did. It was clear that they had learnt a lesson and both of them were likely to lose their employment. Such offences are not at all prevalent in the Northern Territory.

[45] No error is disclosed in the sentencing magistrate's exercise of the discretion he had under s 8 of the *Sentencing Act* (NT). His Honour correctly recognised that "at first blush" placing children in a cage for any length of time had the potential to cause alarm in the community. However, his Honour went on to carefully consider the facts of this case.

[46] While it does appear that there were problems in the manner in which the residential facility was being run including failure to properly store and secure the petrol, lack of an adequate number of staff and inadequate first aid training, these are not matters that aggravate the offences of deprivation of liberty which were committed in this case.

[47] The sentencing dispositions given to Barry Abbott for the two counts of failure to provide the necessities of life are more problematic. Michael Turner and Paul Parker suffered serious burns and they should have been taken to the Alice Springs Hospital on 14 September 2011. The failure to take them to hospital extended over two days. They were both exposed to serious risks to their health. General deterrence is an important object of the

sentencing process because of the danger that is created by a failure to act in such circumstances.

[48] The question is whether a fine of \$1000 alone is a proportionate response to the level of the offences of failure to provide the necessaries of life that were committed by Barry Abbott in this case. In my opinion, given (1) both youths received first aid, (2) the sentencing magistrate found that Barry Abbott essentially followed his sister's directions and this finding is not challenged on appeal, (3) the failure to provide the necessaries of life only extended over a period of two days, (4) there is no evidence which establishes that either of the boys suffered harm as a result of the failure to take them to Alice Springs Hospital on 14 September 2011 and (5) Barry Abbott's subjective circumstances, a fine of \$1000 without a conviction is not manifestly inadequate. While it is a lenient sentence, it is still within the range of appropriate sentencing dispositions. It is a significant fine and there was no callous disregard of the wellbeing of the two boys.

Valerie Abbott's cross-appeal against sentence

[49] Valerie Abbott has submitted that the sentences imposed on her for the crimes of failure to provide the necessaries of life were manifestly excessive. The sentencing magistrate erred by cumulating the sentences of imprisonment by one month when Valerie Abbott engaged in a single course of conduct. Further, there is a disparity between the sentences imposed on her and the fine of \$1000 that was imposed on Barry Abbott without conviction.

[50] I accept the submissions made on behalf of Valerie Abbott. In my opinion, the sentencing magistrate erred in failing to give proper consideration to the principle of parity and in cumulating the sentences that were imposed on Valerie Abbott. While the sentencing magistrate explained the disparity between the sentence for Barry Abbott and the total sentence for Valerie Abbott by reference to the fact that Valerie Abbott was in charge and was the primary decision maker, this factor alone does not adequately explain why she received a conviction and a period of four months imprisonment and Barry Abbott received a no conviction fine. Further, the fact that only one course of conduct was involved required that there should be no accumulation of the sentences.

[51] In the circumstances, the cross-appeal against sentence should be allowed. The sentence of four months imprisonment should be set aside and Valerie Abbott should be re-sentenced.

Re-sentence

[52] Giving all due allowance to Valerie Abbott's subjective circumstances, which are referred to above, it is important to give weight to the following factors: (1) the two youths should have been taken to hospital in Alice Springs on 14 September 2011; (2) there was no valid reason why the two youths were not taken into Alice Springs on 14 September 2014; (3) Valerie Abbott put her own interests ahead of the two boys; (4) she did all but completely "abandon the ship" at a critical period of time; (5) she was only suffering from influenza; (6) there was no medical evidence to suggest that

she had to have the antibiotics or was incapable of carrying on with her work until the two youths received proper medical attention; (7) she knew that she and other staff were not capable of making a proper assessment of the condition of the two youths; (8) she obviously appreciated there was a real risk that the condition of the two youths could deteriorate and become significantly worse and that is why she kept in contact with the residential facility; (9) the community strongly disapproves of such behaviour; (10) she was in a position of trust and she breached that trust; and (11) the court must ensure that proper standards of care are maintained for youths who are at such residential facilities.

[53] In the circumstances, it is necessary to impose a sentence of imprisonment on Valerie Abbott. She remains convicted of each of the two counts of failure to provide the necessaries of life. I re-sentence Valerie Abbott to an aggregate sentence of 14 days imprisonment. The sentence of imprisonment is to be wholly suspended. I fix an operative period of 12 months which is to commence on 7 December 2012.

The cross-appeal against conviction

[54] A court of appeal will only grant an appeal against conviction, where a plea of guilty has been recorded, if it appears that: (1) the plea of guilty was not unequivocal and was made in circumstances suggesting that it is not a true admission of guilt;⁶ (2) the appellant did not appreciate the nature of the

⁶ *Maxwell* (1996) 184 CLR 501 at 501-11.

charge;⁷ (3) upon the admitted facts the appellant could not in law have been convicted of the offence charged;⁸ or (4) there has otherwise been a miscarriage of justice.⁹

[55] It was submitted on behalf of Valerie Abbott and Barry Abbott that there has been a miscarriage of justice in this case because their pleas of guilty are tainted as they were induced to plead guilty by the sentencing magistrate's misinterpretation of s 27(p) of the *Criminal Code* (NT).¹⁰ There remains a real question about the guilt of the accused. In light of what I have stated about the elements of s 196 below, it is unnecessary to determine this question. However, I do note that no affidavit has been made by either Valerie Abbott or Barry Abbott about this and the appeal against conviction is a cross-appeal. It arises in the context of a Crown appeal against sentence and both Valerie Abbott and Barry Abbott received legal advice before they entered their pleas of guilty. That advice has not been divulged to the Court.

[56] In *Liberti v The Queen*¹¹ Kirby P stated:

For good reasons, courts approach attempts at trial or on appeal in effect to change a plea of guilty or to assert a want of understanding of what was involved in such a plea with caution bordering on circumspection. This attitude rests upon high public interest in the finality of legal proceedings **and upon the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission by that person of the necessary ingredients of the offence.**

⁷ *R v Forde* [1923] 2 KB 400 at 403.

⁸ *R v Forde* [1923] 2 KB 400 at 403.

⁹ *DPP (Cth) v Hussein* (2003) 8 VR 92 at 95.

¹⁰ *R v Chiron* [1980] 1 NSWLR 218.

¹¹ (1991) 55 A Crim R 120 at 122.

[57] Subsection 27(p) of the *Criminal Code* (NT) states:

In the circumstances following, the application of force is justified provided it is not unnecessary force and it is not intended and is not such as is likely to cause death or serious harm:

(p) in the case of a parent or guardian of a child, or a person in the place of such parent or guardian, to discipline, manage or control such child;

[58] Presumably, this subsection is sought to be relied on because there was no reasonable possibility that the youths were detained in the cage on the back of the Toyota by way of correction,¹² nor is there a reasonable possibility that the youths were detained in the cage on the back of the Toyota for their protection or benefit.¹³ That is, the justification and the excuse provided by s 196(2) and (3) of the *Criminal Code* (NT) are unavailable to the cross-appellants.

[59] It was submitted on behalf of Valerie Abbott and Barry Abbott, that the application of force is an element of the offence of deprivation of liberty. That the force used in this case was the force needed to secure the door to the cage on the back of Toyota. Consequently, the sentencing magistrate erred in finding that the justification provided by s 27(p) of the *Criminal Code* (NT) had no application in this case.

[60] In my opinion, this submission cannot be sustained. The application of force is not an element of s 196 of the *Criminal Code* (NT). There was no force

¹² s 196(2) *Criminal Code* (NT).

¹³ s 196(3) *Criminal Code* (NT).

used in this case and a person may be deprived of their liberty in circumstances of fraud, lack of knowledge, incapacity, and misuse of authority or threat of violence. I accept the appellant's/cross-respondent's submission that the offence of deprivation of liberty is committed where a person confines or detains another person in any place against their will; or otherwise deprives a person of their personal liberty. The essential element is the intentional and unlawful total restraint of the liberty of another person. This may be achieved without the use of force.

Conclusion

[61] It follows from the above reasons that:

1. The prosecution appeals against the sentences imposed on the appellants are dismissed.
2. The cross-appeal against the sentences imposed on Valerie Abbott for the crimes of failure to provide the necessaries of life are allowed. She is re-sentenced to a wholly suspended sentence of two weeks imprisonment with an operational period of 12 months commencing on 7 December 2012.
3. The cross-appeals against conviction are dismissed.
