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THE SUPREME COURT OF
THE NORTHERN TERRITORY

SCC 20916525

THE QUEEN

and

KENNY KELLS

(Sentence)

OLSSON AJ

TRANSCRIPT OF PROCEEDINGS

AT DARWIN ON THURSDAY 29 OCTOBER 2009

Transcribed by:
Merrill Legal Solutions

HIS HONOUR: Kenny Kells, you have admitted by your plea of guilty that on 16 May 2009, at Katherine, you unlawfully entered a building, namely, House 11 Binjari Community, with intent to commit an offence therein.

You further admit that the unlawful entry involved the circumstances of aggravation:

- (1) that the offence intended to be committed was assault;
- (2) the building was a dwelling house;
- (3) the unlawful entry occurred at night time; and
- (4) you were armed with an offensive weapon, namely, a machete.

A conviction will be recorded against you in respect of the offence. You must appreciate that this is an extremely serious offence which carries a maximum penalty of imprisonment for life.

The facts related to the commission of the offence are not in dispute.

At about 10:20 pm on Saturday, 16 May 2009, you were involved in a consensual fight outside House 6 Binjari Community with Andrew Lumai. At the conclusion of the fight, Lumai struck you on the head with a stick and, as a result of his doing so, you later required medical treatment at the Katherine District Hospital.

Lumai then ran to House 11 to avoid any further fighting. You went into your residence at House 6 and armed yourself with a 55-centimetre machete. Having done so, you walked along the main street to House 11 looking for Lumai.

You entered the residence at House 11 without permission, holding the machete in your right hand in an aggressive manner. This frightened the occupants who comprised three women and seven children who were gathered in the lounge room. The lawful occupier of the premises yelled at you to leave the residence.

To your credit, you, in fact, immediately did leave the residence as you were unable to locate Lumai. You returned to House 6 and placed the machete on the top shelf of the storage room, located to the side of the enclosed veranda area and then locked the door.

Police were tasked to attend the scene and arrived shortly after 11:15 pm. They found you standing in the driveway of House 5. You were wearing only shorts and had dried blood on your face and upper torso. You were arrested by the police and cautioned. A search was conducted of House 6 and the machete was located in the locked room. It was seized and exhibited.

You were conveyed to Katherine police station and placed in custody due to your then state of intoxication. You were subsequently taken to the Katherine District Hospital for treatment and returned back to the police station where you declined to take part in a formal electronic record of interview. You were charged and bailed to appear at the Katherine Magistrates' Court on 15 June.

At no stage did you have permission to enter House 11 at the Binjari Community and, I note, that a machete is a controlled weapon under the *Weapons Control Act*. The Crown has tendered a Victim Impact Statement that unsurprisingly indicates that the occupants of House 11 were very frightened by your conduct in entering the house with the machete. It is common ground that following your arrest you spent two days in custody for which you are entitled to credit.

You are 28 years of age and have a significant record of prior offending. Those offences included three offences involving violence: an offence of entering into an occupied dwelling whilst armed; and one offence of entering a dwelling with intent to commit a crime. There are also a number of other convictions for somewhat lesser offences.

Your counsel informs me that on the day of the offence you returned to the community in a state of considerable intoxication and upset family members by talking to a woman of the wrong skin. Somehow, Andrew Lumai, the partner of your cousin who was party to the debate that was taking place, became involved. You commenced to leave the location and Lumai followed arguing with you at one point, what was described as a "knuckle fight" developed between the two of you during which both of you went to ground.

At some stage, Andrew Lumai picked up a stick and hit you on the head causing a wound that later required the insertion of three staples, and that made you very angry. Having inflicted the wound, Lumai ran away. You got the machete and went to House 11, where he normally resided, you were demanding to know where he was.

Your counsel tells me that you now realise that your conduct was very frightening to the occupants of House 11, and that you did not know what you intended to do with the machete at the time. You did not think the situation through. It was emphasised that when you were told to leave, you did so, and realised that your conduct was wrong and thus put the machete away.

It was submitted that you cooperated with the police when they arrived; admitted your involvement in the fight; and agreed that you had picked up the machete. It is said that you now realise that it was a very bad decision to grab the machete and that you regret your conduct. It is also stressed that no physical injury was, in fact, caused to anyone. I am told that on the following day, you apologised to the occupants of House 11 and have not made contact with any of them since.

Your counsel further submits that this was a single incident and that you are not likely to re-offend in a like manner. There had been no previous trouble between Lumai and yourself, and I am informed that the two of you have since apologised to each other.

It is argued that you have good prospects of rehabilitation and that this was not the worst offence of its type, given that the wielding of the machete is an inherently dangerous act. I accept that you did not force entry into the premises, but simply walked in the front door. I also accept that the incident was brief and that you immediately desisted when requested to do so. As against that, it cannot be overlooked that you have previously been convicted of multiple offences of violence.

I now turn to your personal circumstances. Your father died when you were 8 years of age and you were the only child of his relationship with your mother. You do, however, have a number of half brothers and sisters. Following your father's death, you lived with your mother, although she struggled to adequately bring you up. It appears that there was a good deal of drinking by all family members and your mother seems to have constantly relied on others to look after you.

You attended a number of different schools and, at about the age of 10, moved to Queensland and lived with other relatives. You left school part way through Year 9. You then moved back to Katherine and undertook a course in station work for about 18 months and were thereafter employed for a time as a station hand.

You entered into a relationship with a woman and became a father at about the age of 17. This was not a positive relationship and it resulted in some incidents of domestic violence that are featured in your antecedent record, of which you are not proud. The relationship was terminated about 8 years ago and there have been no offences committed by you involving violence subsequent to about 2001. There are two children of the relationship, but you do not see them very often.

You commenced to consume alcohol and also used cannabis from a quite early age. It seems obvious that this led in turn to a number of your previous convictions.

It appears that you fairly recently formed a relationship with your present partner and this has proved to be a happy relationship not involving violence.

I understand that you have had reasonably consistent employment of various types. The evidence before me indicates that you have satisfactorily qualified in a variety of competencies related particularly to equipment operation. Details of these are set out in an exhibit that was placed before me. It is said that you have done well in landscaping activities in Queensland. You have also done a considerable work within the CDEP programme.

Having been in Queensland for some time, you returned to the Northern Territory in 2007. You particularly wished to see your mother. In 2008, you acquired your own house and have since then worked fairly consistently. You have recently been working in the clinic at the community.

In the course of sentencing submissions, your supervisor, the manager of Community Services, gave evidence on your behalf. He indicated that you had been working at the clinic since early this year in the role of transport officer and also performing gardening duties as well. You are said to have been a reliable and truthful employee who has been regarded as respectful and helpful towards those with whom you dealt. They have regarded you as being a good-hearted person.

Your supervisor states that you have acted responsibly and have matured over time, no longer using cannabis. He concedes that you have continued to consume some alcohol on weekends, but have not done so during the week when you were working. He is prepared to continue employing you, but cannot keep the job open if you are required to immediately serve a custodial sentence. The importance of the work is such that the position would have to be filled by another person. This witness indicated that you had reduced your level of drinking and appeared motivated to continue to stay away from trouble. He testified that you enjoyed your work and had a range of relevant skills in relation to it.

You are looking after a daughter who, as I understand it, is in Grade 5 at school, and have also provided needed assistance to your mother. It is common ground that your actions on the day in question had been prompted by some level of provocation by Lumai. That the whole incident was spontaneous and brief in point of time, and that you immediately desisted when asked to do so.

It has been put to me that a requirement to immediately serve a custodial sentence would be counter-productive to your rehabilitation and that either a partly suspended sentence or a home detention order would be appropriate to the circumstances.

It is not disputed that you are entitled to full credit for an early plea following a hand-up committal. I have received a report from Community Corrections that you are suitable for supervision by that service, and that you are also a suitable candidate for a home detention order. You have, in fact, consented to such an order.

I accept the submission of your counsel that, although this offence is of an inherently serious nature, nevertheless, it does lie towards the bottom end of the scale of relative seriousness of its type by virtue of the brief nature of the episode; the facts that you immediately desisted and no-one was actually hurt; and that the incident resulted from some degree of provocation.

Despite your prior record, I accept that the evidence of your supervisor suggests that there are positive prospects for continuing rehabilitation.

I take as my commencement point, therefore, a sentence of imprisonment for a period of two years as being appropriate to the particular circumstances. That will be reduced by 25%, in recognition of your timely plea and expressed remorse, to a sentence of imprisonment for one year and six months, which will be deemed to run from two days ago to allow for time already served.

The sentence that I have imposed on you will be suspended on the rising of the Court upon your entry into a home detention order for a period of six months on the following conditions to operate during that period:

- (1) That you reside at House 6 Binjari Community, Katherine, or any other residence subsequently approved by the Director of Correctional Services or his or her delegate for the duration of the order, and shall not leave those premises without the prior approval of the Director or an authorised surveillance officer.
- (2) That you wear or have attached a monitoring device in accordance with the directions of the Director, and allow the placing or installation in and retrieval from the premises to which I have referred such machine, equipment or device necessary for the efficient operation of the monitoring device.
- (3) That upon discharge from Court today:
 - (a) you report immediately to the Community Corrections courts officer;
 - (b) that you obey all reasonable directions of the Director or his nominee in relation to the home detention;
 - (c) that you attend such counselling and/or treatment as may, from time to time, be directed by your probation and parole officer.

That, I think, concludes the matter, does it not?

I take it that you will make arrangements for the immediate reporting that is required.

MS KEPERT: Yes, your Honour, I will take him across to the Court of Summary Jurisdiction.

HIS HONOUR: Yes, thank you. Very well, on that basis I will adjourn.
