***Elson v Ayton* [2010] ACTSC 70 (15 July 2010) – Australian Capital Territory Supreme Court**

'Assault' – 'Assault occasioning actual bodily harm' – 'Damaging property' – 'Emotional abuse' – 'Exposing children' – 'Manifestly excessive' – 'People affected by substance misuse' – 'Physical violence and harm' – 'Sentence accumulation' – 'Sentencing' – 'Totality'

Charge/s: Assault occasioning actual bodily harm, assault x 3, damaging property x 2.

Appeal type: Appeal against sentence.

Facts: The male appellant and the female complainant were in a relationship. The appellant became very angry with the complainant and she got in her car with her daughter to leave. The appellant punched the driver's side window of the car causing the window to shatter. He then punched the complainant in the nose and eye, causing her nose to bleed. On a subsequent occasion, in breach of his bail conditions, the intoxicated appellant went to the complainant's house. He abused her saying, 'he would kill her and hurt her,' and put his right arm around her throat. He threw a jar and punched his fist through the microwave door. On a third occasion, again in breach of bail conditions, the appellant went to the complainant's home with his teenage son. He grabbed her by the throat, punched her in the face, and kicked her. The appellant only stopped when the complainant's 10 year old son called the police.

While the sentencing magistrate stated that she intended to impose a total sentence of 48 months, with a 24 months non-parole period, the accumulation of sentences the magistrate articulated in court was only a total of 30 months. However, amendments were subsequently made to the bench sheets to reflect what Her Honour intended.

Issue/s:

1. The sentencing magistrate erred in amending the sentences.
2. The sentencing magistrate erred in imposing the maximum penalty for the damaging property offences.
3. The sentence was manifestly excessive and the sentencing magistrate misapplied the totality principle.

Decision and Reasoning: The appeal was upheld. First, the parties should have been given an opportunity to be heard before the sentences were amended. This failure amounted to an error requiring the sentence to be set aside (See [81]-[93]). Second, the offences of damaging property were not in the worst category of offences — the damage was not considerable and there were no matters of aggravation of either offence such as planning or premeditation. The magistrate erred in imposing the imposition of the maximum penalty on these offences (See [94]-[103]).

Third, the sentence of 15 months imprisonment imposed for the second assault was excessive in light of the sentence of 18 months imprisonment for the first assault. The first assault was more serious. It involved the smashing of a window, the appellant caused the complainant's nose to bleed, it was committed in the presence of a child, and the appellant pleaded not guilty to this offence (See [105]-[109]). Further, by merely accumulating the sentences for the three episodes, the sentencing magistrate could not be said to have applied the principle of totality (See [109]-[116]).

The appellant was re-sentenced by Refshauge J to a total sentence of 34 months imprisonment, with a non-parole period of 15 months based on evidence that the appellant had taken steps to address his drug and alcohol use (See [121]-[130]). His Honour noted, *'these offences are serious, particularly because they are offences of family violence, some committed in the presence of children, some committed whilst on bail and in breach of conditions of that bail. The repetition of assaults on the victim also makes the offences serious'* [122].