

***Idai v Malogorski* [2011] NTSC 102 (14 December 2011) – Northern Territory Supreme Court**

‘Aggravated assault’ – ‘Breach of domestic violence order’ – ‘Concurrent sentences’ – ‘Drugs’ – ‘Emotional and psychological abuse’ – ‘Manifestly excessive’ – ‘People living in regional, rural and remote communities’ – ‘Physical violence and harm’ – ‘Sentencing’ – ‘Totality’

Charges: Breach of domestic violence order (two counts), aggravated assault (two counts), administration of a dangerous drug (cannabis)

Appeal type: Appeal against sentence

Facts: The appellant and the victim had been in a relationship for three to four years. After self-administering cannabis one afternoon (count 2), the appellant became abusive and called the victim a slut (count 4). Early the next morning the victim locked herself in the bathroom to get away from the appellant. In response, the appellant banged and kicked the door, demanding the victim come out (count 5). When she did the appellant threw the contents of a bong and a flour tin over her (count 1). Later that day the appellant shouted at the victim, grabbed her chin and squeezed her cheeks to force her to face him (count 3). In relation to this conduct, the appellant was charged and convicted of two counts of contravening a domestic violence order (counts 4 and 5), two counts of aggravated male-on-female assault (counts 1 and 3) and one count of administering a dangerous drug (count 2). The effective head sentence imposed by the magistrate was 15 months’ imprisonment with a non-parole period of 10 months. This head sentence comprised of:

- Count 4: five months’ imprisonment
- Count 5: five months’ imprisonment cumulative on the sentence imposed on count 4
- Count 1: five months’ imprisonment cumulative on the sentence imposed on count 5
- Count 3: five months’ imprisonment concurrent with the sentence imposed on count 1
- Count 2: \$200 fine

Issues:

- Whether the magistrate erred in the application of the totality principle.
- Whether the sentence imposed was manifestly excessive in relation to counts 4 and 5.

Decision and reasoning: The appeal was allowed on ground 2 and the appellant was resentenced.

- The conduct that constituted the breaches of the domestic violence order (counts 4 and 5) occurred very closely together in time. They could be seen as facets of the one course of conduct leading up to

the aggravated assaults that occurred later that day (counts 1 and 3). Therefore, the sentences imposed for counts 4 and 5 would ordinarily have been made concurrent or substantially so under the general principle of totality. However, in a process of statutory interpretation, Barr J found s 121(7) of the *Domestic and Family Violence Act 2007* (NT) requires the court to order the term of imprisonment for a domestic violence order offence to be served cumulatively on any other sentence. Therefore, the magistrate did not err in ordering that the sentences on both the domestic violence order offences (counts 4 and 5) had to be cumulative on one another and on the sentences on the aggravated assault offences (counts 1 and 3).

- > The magistrate allowed a discount of 25 per cent for the appellant's guilty pleas, suggesting a point for each offence of approximately seven months imprisonment. Considering the offending was at the lower end of the scale, the individual sentences were manifestly excessive. Barr J found an appropriate starting point for each domestic violence offence (counts 4 and 5) was a sentence of four months, reduced to three months allowing for a 25 per cent discount for the guilty pleas. Each domestic violence order sentence (counts 4 and 5) should further be reduced to two months' imprisonment, applying the principle of totality. Barr J ordered the appellant be resentenced on counts 4 and 5 to:
- > Count 4: two months' imprisonment
- > Count 5: two months' imprisonment cumulative on the sentence imposed on count 4

The effective head sentence for all counts was therefore nine months' imprisonment.