

STATE OF TASMANIA v ELSAWI AHMED ELDAYAR
COMMENTS ON PASSING SENTENCE

24 JUNE 2016
ESTCOURT J

The defendant Elsawi Ahmed Eldayar has pleaded guilty to one count of causing grievous bodily harm.

On the evening of 24 December 2015 and in the early hours of 25 December 2015, the complainant, Gift Ochaya, who was 20 years old, was drinking with friends Gracia Itala-Mavuya, Nee Dho Sha and the defendant, Mr Eldayar completing the group.

The four males were walking along Murray Street after midnight when they were stopped by a police officer who asked Itala-Mavuya to accompany him to the Hobart Police Station, which he did. The complainant, the defendant and Nee Sha then continued drinking in a park near Salamanca.

At around 2am Itala-Mavuya had finished at the Police Station and rejoined the others. At about 3am the group were walking up Elizabeth Street near the Republic Bar. As they got close to the Republic Bar, the complainant and Itala-Mavuya were talking about why Mr Itala-Mavuya was at the Police Station. The complainant told him that he had done the wrong thing. At the time the two were speaking to each other the other defendant and Nee Sha were walking slightly ahead of them.

The complainant continued talking to Itala-Mavuya, who had told him the argument was over and tried to end the conversation. But at this point the defendant and Mr Sha walked back towards them. The defendant approached the complainant, stood face to face with him, and told him to "*shut up*". The two then began arguing.

The defendant raised his arm and punched the complainant once to the face. The incident was captured on CCTV footage, which I have viewed, and the complainant appears to immediately lose consciousness and fall backwards onto the road.

The defendant, Sha and Itala-Mavuya immediately walked away, leaving the complainant lying on the ground unconscious.

A group of tourists was walking along Elizabeth Street very shortly after and came across the complainant. He was still lying unconscious on the ground so a member of the group flagged down a passing taxi driver. The complainant was conveyed to the Royal Hobart Hospital.

The following day police conducted an investigation into the incident. As a result of their investigations, the defendant attended the Hobart Police Station on 1 January 2016. He denied assaulting the complainant.

At the conclusion of the interview the defendant was arrested, charged and detained. He has been in custody in relation to this matter since 1 January 2016.

The complainant was admitted to hospital and underwent a CT scan of the brain, skull and cervical spine. The scan revealed that he had suffered from a fractured skull, a bilateral parietal scalp haematoma and intracranial haemorrhage. After the scan he was sedated, and placed on a ventilator. He was transferred to the Intensive Care Unit.

He remained in the intensive care neurosurgery unit until 15 January 2016. From there the complainant was transferred to the Rehabilitation Unit until his discharge on 27 January 2016. The complainant suffered from severe post-traumatic amnesia as a result the injury to his head. He could easily have died as is often the case when a person is punched unconscious and falls to the ground, hitting his or her head on the pavement.

A victim impact statement has been read to the Court on behalf of the complainant, and I have been provided with a copy of a medical report from Dr Mark Stayer and Fleur Dewhurst, dated 21 June 2016. It is clear that prior to the time of the assault the complainant was a high achieving young man who was looking forward to university studies. Now, due to the cognitive issues that he is manifesting as a result of the assault, he may not be able to study and complete a university degree to the same level of achievement as he would have had he not suffered the traumatic brain injury. His high level balance has also been affected, and he is at risk of epilepsy as a result of his brain injury. It is obvious that he will never achieve his former potential. He has also lost his sense of taste and smell, and has been told that if they do not return within a year, they will not return at all. This is a great disappointment to him as he loved food and now cannot smell or taste, and has lost his appetite, sometimes having to force himself to eat.

The complainant's life has, he says, changed a lot since the assault. He is more anxious now when he goes into the city, and more observant of people, and always watching behind him. The assault has also affected his family. It was worrying for them to hear what had happened and for the complainant to be in hospital for so long.

The defendant is 21 years old. He was born in the Sudan and came to Australia with his family as a refugee, fleeing the war in 2007. He was then aged 13. He completed year 10 at Cosgrove High and years 11 and 12 at Elizabeth College. He also completed after that, a TAFE course in construction.

The defendant has no recollection of the events due to his intoxication. He was exposed to a great deal of violence as a child, and had a terrible and harsh upbringing. He started getting into trouble in Tasmania at about age 18. Alcohol abuse became a problem for him. He is remorseful for his assault upon the complainant, and whilst in custody he has completed an alcohol and drug course.

He has a prior conviction for assault committed in September 2014, and on 17 June 2015 received a suspended sentence of 12 months' imprisonment of which, as a result of the present offence, he is now in breach. On the occasion of his sentence in June 2015, the learned judge said:

"You also remain a youthful offender and rehabilitation is an important factor the Court has to consider. The difficulty, of course, with determining an appropriate sentence is that the Court must balance the prospects of rehabilitation, your age, your early plea and lack of prior history against the need for a deterrent sentence."

Her Honour said:

"This is yet another example of drunken, unprovoked violence occurring in our city streets. I was told that your actions were prompted by jealousy."

However that does not mean you can bash somebody in a way which was potentially extremely dangerous. You used a bottle and that could have broken and caused significant damage. In your case you used it a number of times."

On that occasion her Honour was told that the defendant no longer went out into the city at night, preferring to visit friends at home instead. She was told that the defendant had stopped drinking alcohol. Neither of these two states of affairs lasted for very long, although I am told that while completing some of the community service orders that were imposed on that last occasion by her Honour, the defendant did reduce his alcohol intake.

Intoxication, of course, is well known as being no excuse for the commission of crimes of violence, or any crime, for that matter.

I take into account the defendant's youth and troubled background, and the need to give importance to rehabilitation. However as against that I must balance his previous conviction, his total disregard of the complainant's injury which one punch assaults of this nature and severity often cause. These are all too common, often with dreadful consequences for the victim. This is not a dissimilar case to that of *DPP v Morgan* [2015] 11 TASCCA 15, where Pearce J said at [39]

"The severity of the attack and the potential for serious injury demanded that weight be given to general deterrence. The crimes required denunciation in the sense of 'appropriate vindication and to assuage public outrage', Evans J in *DPP v NOP* [2011] TASCCA 15 at [4]. This sentencing objective is to vindicate the rights of victims and reinforce the values of the community: *DPP v Neethling* [2009] VSCA 116; (2009) 22 VR 466 per Maxwell P, Vincent JA and Hargrave AJA at [56] and [57]."

The defendant is convicted and sentenced to 15 months' imprisonment to operate from 1 January 2016 the last 6 months of which are suspended on condition that the defendant commit no offence punishable by imprisonment for a period of two years. In arriving at that sentence I take into account the totality principle which arises given the suspended sentence which I am asked to give effect to.

I see no injustice in activating the entire period of the suspended sentence. It was imposed for a similar crime. I order that the defendant not be eligible for parole until he has served one half of the total operative period of his imprisonment.

In addition I make a probation order for a period of 12 months from the defendant's release from prison, and to the statutory conditions, I add conditions that the defendant must attend educational and other programs as directed by the court or a probation officer, and must undergo assessment and treatment for alcohol or drug dependency as directed by a probation officer.

I make the usual victim of crimes compensation levy order payable after the defendant's release from prison.