Bara Bara v James [2000] NTSC 8

PARTIES:	BARA BARA, Dabian
	v
	JAMES, Robert
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOs:	68 & 69 of 1999
DELIVERED:	10 March 2000
HEARING DATES:	11 February
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

CRIMINAL LAW – CONVICTION

Whether sentence was manifestly excessive – warrant for imprisonment not truly reflecting the sentence imposed – not a matter of appeal under the *Justices Act* 1928 (NT).

Criminal Code 1983 (NT), s 213, s 251(1) and s 218(1)

CRIMINAL LAW

Whether sentence manifestly excessive – reference to sentencing like conduct since mandatory sentencing not available – offender's circumstances considered.

REPRESENTATION:

Counsel:

Appellant:	Mr J Lewis
Respondent:	Ms A Fraser

Solicitors:

Appellant:	Miwatj Aboriginal Legal Service
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	mar20003
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Bara Bara v James [2000] NTSC 8
Nos. JA 68 & 69 of 1999

BETWEEN:

DABIAN BARA BARA
Appellant

AND:

ROBERT JAMES
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 10 March 2000)

[1] Appeal against sentence. The appellant was convicted upon his pleas of guilty to a number of charges before the Court of Summary Jurisdiction sitting at Alyangula on 17 August last year.

[2] He was effectively sentenced to imprisonment for four months to be suspended after he had served six weeks, and an operational period of 18 months was fixed. He simply says the sentence was manifestly excessive.

[3] During the course of argument on the appeal it appeared that it had been motivated in part by the warrant for imprisonment which did not truly reflect the sentence imposed. It was expressed in terms such that the appellant was to be kept in gaol for two months, at the expiry of which time

a sentence of four months was to commence, and that the sentence of four months was to be suspended after the appellant had served six weeks. Thus on the face of the warrant he had to spend three and a half months in prison, whereas examination of the transcript of the proceedings make it quite clear that the two sentences were to be served concurrently and were to be suspended after six weeks.

[4] If the sentences imposed by his Worship were as apparently reflected in the warrant, then appeal under the *Justices Act* 1928 (NT) would be the appropriate way to bring the matter before this Court. However, in the view I take, it was the warrant which was erroneous and the procedure adopted by way of appeal is not the way to correct such an error. A fresh warrant will have to be issued in accordance with the decision of this Court, and that would overcome any injustice which reliance upon the original warrant may well have brought about.

[5] The offences were divided into two groups. The first occurred on 9 July 1999 when the appellant:

(a) unlawfully entered the Umbakumba Community School with intent to steal contrary to s 213 of the *Criminal Code* 1983 (NT), an offence carrying a maximum penalty of seven years imprisonment;

(b) unlawfully damage property, namely a perspex window, to the value of $100, being the property of the school contrary to s 251(1) of the

Criminal Code, carrying a maximum penalty of two years imprisonment, and

(c) unlawfully damage property, namely a window of a motor vehicle, to the value of $200, the property of the Umbakumba Community store, contrary to s 251(1) of the *Criminal Code*.

[6] In respect of this group of offences the appellant was sentenced in the aggregate to a term of imprisonment of two months.

[7] The second group of offences were committed on 20 July 1999 when the appellant:

(a) unlawfully used a motor vehicle contrary to s 218(1) of the *Criminal Code* carrying a maximum penalty of two years imprisonment. For that he was sentenced to four months imprisonment, and

(b)&(c)committed associated motor vehicle offences for which he was convicted and fined and from which no appeal is brought.

[8] The second group of offences were committed whilst the appellant was on bail in relation to the first group, and on the day upon which he was to have appeared in court on those charges. He failed to appear and it was ordered that he forfeit the $500 to the Territory and in default serve 10 days in gaol. A warrant was issued for his arrest.

[9] All of the charges came before the court at the one time. In those circumstances, three of the offences being property offences under the

provisions of the *Sentencing Act* 1995 (NT), he was subject to the mandatory minimum sentence provisions requiring that he be convicted and sentenced to a term of actual imprisonment of not less than 14 days.

[10] The circumstances of the offending, briefly, were that on 9 July the appellant, in company with two co-offenders, broke into the school, and in the process broke the perspex window. They misbehaved somewhat, but none of that was the subject of any criminal charges. When they left the school, the appellant with one of the co-offenders went to the community store where the appellant smashed the driver's side window of the motor vehicle intending to steal the vehicle. However, the noise awakened the store manager and the two of them were chased away. On 13 July he was arrested for the offences, apparently readily admitting to his offending, saying that he had broken into the store because he was thirsty and that he had smashed the window of the motor vehicle because "I wanted to skid around".

[11] As to the matters on 20 July, the appellant was near the basket ball courts and a co-offender arrived driving the stolen motor vehicle. The co-offender told the appellant that he had stolen it, and the appellant took over the driver's position and commenced driving around the community. When questioned about this offence he said that his co-offender had "told me to".

[12] The circumstances of the offending do not strike me as being anything out of the ordinary for offending of that type by young Aboriginal men living on

Groote Eylandt. The matters brought to this Court on appeal from that place display consistency in criminal conduct such as this on the part of those young men. It would be interesting to know just how many of them have been sentenced to imprisonment for like conduct since the commencement of the mandatory sentencing regime. There was no information available to this Court as to the relevant pattern of sentencing and thus there is no basis upon which it could assess whether the sentence imposed was out of the usual range. The record of proceedings before his Worship does not show that any such information was before him either, but I take notice of the fact that that court sits at Alyangula regularly and that his Worship is a Magistrate of many years experience. He must be taken as having the requisite knowledge as to the range of sentences imposed for like offences and like offenders.

[13] At the time of the offending the appellant was 19 years of age. He was born in Darwin and spent most of his youth in the city attending school until shortly prior to his going to Umbakuma to live. His counsel before his Worship said that he was subjected to the influence of others, who it appears were all somewhat younger than he. It was put that there was huge pressure put upon young men such as the appellant to fit in and be part of the gang. According to the submission, the offending would seem to be regarded as some sort of initiation ceremony whereby the offender goes to gaol, if an adult, or to a detention centre if a juvenile. He had no prior convictions.

[14] His Worship took into account the plea of guilty, noted his age and the fact that he was before the court for the first time, and expressed concern that upon his return to the community he could be led into trouble so quickly, especially by people who were younger than himself.

[15] The sentence in fact imposed by his Worship may have been stern, but does not strike me as being manifestly excessive, especially bearing in mind that the appellant was on bail and should have appeared before the court on the very day he committed the second series of offences. No explanation was given in mitigation of his failure to abide by his undertaking, and it displayed a disregard for the law which his Worship was entitled to take into account as an aggravating circumstance. The suspension of the sentence gave the appellant the opportunity to serve the remainder of the sentence in the community.

[16] The appeal is dismissed. The sentence imposed by his Worship is affirmed. In so far as the warrant does not properly reflect the sentence, it is of no effect.

[17] I note that the appellant had served 22 days in custody under the warrant before being released on bail. The sentence affirmed is ordered to commence 22 days prior to his being taken into custody pursuant to the dismissal of the appeal. He must be returned to gaol to serve the balance of the period of the term of actual imprisonment of six weeks. His bail undertaking requires him to appear at this Court within 14 days from the

date from which the decision on his appeal is announced, or at any other time and place as specified in the notice given to him or his legal practitioner by the Director of Public Prosecutions or a person authorised by the Director in writing.
