The Queen v Kenny [2000] NTSC 43

PARTIES:	PETER STUART KENNY
	v
	LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	9914847
DELIVERED:	21 June 2000
HEARING DATES:	14 June 2000
JUDGMENT OF:	THOMAS J

CATCHWORDS:
APPEAL – APPEAL AGAINST SENTENCE
Appeal from Court of Summary Jurisdiction – against sentence –whether sentence manifestly excessive – serious offences – matters taken into account – appeal dismissed – decision of stipendiary magistrate affirmed

McGookin & Robertson v The Queen (1986) 20 A Crim R 438, cited.
Pearce v The Queen (1983) 9 A Crim R 146, referred to.

Criminal Code Act 1983 (NT), s 213, s 251
Justices Act 1928 (NT), s 176A
Sentencing Act 1995 (NT), s 5.

REPRESENTATION:
Counsel:

Appellant:	D Bamber
Respondent:	R Noble

Solicitors:

Appellant:	CAALAS
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	tho20012
Number of pages:	13

IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v Kenny [2000] NTSC 43
No. 9914847

BETWEEN:

PETER STUART KENNY
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 21 June 2000)

[1] This is an appeal from a sentence imposed by a stipendiary magistrate in the Court of Summary Jurisdiction in Alice Springs on 9 February 2000.

[2] On 16 December 1999 the appellant entered a plea of guilty to the following three charges 2, 3 and 4 on information. The Crown withdrew charge number 1:

> "AND FURTHER
> On the 8th day of January 1999
> at FINKE in the Northern Territory of Australia
> 2. unlawfully damaged property, namely property and building, the property of Aputula Housing Association and Larry Doolan:
> AND THAT the said unlawful damage involved the following circumstance of aggravation:

(i) That the loss caused by such damage was greater than $500, namely $40,000.00.

Contrary to Section 251 of the Criminal Code.

AND FURTHER

On the 8th day of January 1999

at FINKE in the Northern Territory of Australia.

3. unlawfully damaged property, namely Ford Falcon, the property of Patricia Coombes:

AND THAT the said unlawful damage involved the following circumstance of aggravation:

(i) That the loss caused by such damage was greater than $500, namely $2000.00.

Contrary to Section 251 of the Criminal Code.

AND FURTHER

On the 8th day of January 1999

at FINKE in the Northern Territory of Australia.

4. unlawfully entered a building, namely, Lot 27B, Finke Community with intent to commit therein a crime, namely, Criminal Damage:

Contrary to Section 213 of the Criminal Code."

[3] With respect to Count 2 and 3, the maximum penalty under the provisions of s 251 of the *Criminal Code Act 1983* (NT) is seven years imprisonment and where the matter is dealt with summarily the maximum penalty is two years imprisonment. With respect to Count 4, the maximum penalty under s 213 of the *Criminal Code* is five years imprisonment and where the matter is dealt with summarily the maximum penalty is two years imprisonment.

[4] On 16 December 1999, the learned stipendiary magistrate heard submissions from the Crown and submissions made on behalf of the defence. Counsel

for the defence, Ms Sullivan called two witnesses, Mr David Doolan and Ms Pauline Coombes. The essential aspect of their evidence was that the two families who were fighting at the time these offences occurred, have become reconciled and there is no continuing problem between them.

[5] The learned stipendiary magistrate was informed that the appellant was in custody on other matters until 16 March 2000 and stated that the criminal damage would have to be cumulative upon any sentence.

[6] The matter was adjourned to 8 February 2000 and the appellant remanded in custody.

[7] On 8 February 2000 the matter was adjourned for sentence to the following day, 9 February 2000.

[8] On 9 February 2000, the appellant was sentenced to an aggregate sentence of 15 months imprisonment in respect of the three offences with a non parole period of eight months.

[9] There is no issue taken with the learned stipendiary magistrate's finding of fact which were as follows:

> "I am told that on 7 January of 1999 you were at an outstation near Finke. You were approached by one of your co-offenders and you were asked to go to Finke, but you didn't go because you were drunk. The next morning, however, you went to Finke and you were told of an incident the previous night.
>
> You and two others then went to Mr Doolan's house, that's the property in counts 2 and 4, and smashed property. You apparently pushed a fridge over and you kicked it. You piled mattresses against a wall, you asked for matches, you watched as a co-offender put

burning clothes onto the mattresses. You then went outside with the others. Every window of the car was smashed and every light. You then went to a Mr Lucky's house. You saw smoke coming from Mr Doolan's house. The house burnt down and there was some $40,000 damage.

You were spoken to on 29 June. You apparently admitted the offences. You told the police you'd dragged the mattresses out so that you could burn them, but you didn't think that the whole house would burn down. I am told that there had been unrest in the community between various families and early in the morning of 7 January the tenant of this house had got into a Council pick-up truck and followed your niece.

There were passengers in a vehicle who were all relatives of yours. People in the car included your co-accused and a disabled woman. You were apparently told that Mr Doolan had followed the car, bumped it, chased it and that the people in the car feared for their safety and jumped out. You were told that the car had been rammed beyond repair. Mr Doolan was in fact charged with dangerous act and I'm told he has been dealt with.

Immediately after you had been told about what occurred, you and two others went to Mr Doolan's place looking for him. You were angry about the damage to the car and particularly about the fact that your disabled cousin had been in the car. You approached the house; it was unoccupied. You apparently went inside. You admit to the damage which was caused in the house.

I am told you intended to burn the clothing of Doolan. You moved the mattresses and you were going to burn the clothes. I'm told you never intended to burn the house down, but you accept that it was the mattresses starting which caused the house to burn. At the time when you left the house I am told that the clothes were burning, but the rest of the house was not on fire at the time when you left the house.

I am also told that you admit smashing the car which was outside; you smashed the windscreen. After smashing the car, you left the premises. When you were down the road you saw some smoke. You went back to see if you could do anything, but it was too late. It is put that there was some provocation on the part of Mr Doolan."

[10] The grounds of appeal set out in the Notice of Appeal dated 8 March 2000 are as follows:

"(a) that the said sentence imposed by the learned Stipendiary Magistrate was in all the circumstances manifestly excessive;

(b) that the learned Stipendiary Magistrate impose a sentence of imprisonment which was not proportional to the objective circumstances of the offence."

[11] On 17 May 2000, additional grounds of appeal were filed which were:

"1. That the learned Stipendiary Magistrate gave insufficient weight to the assistance the Appellant gave the authorities.

2. That the learned Stipendiary Magistrate erred in failing to distinguish between the acts done as in response to provocation or revenge."

[12] The submissions made by Mr Bamber essentially addressed these two additional grounds of appeal.

Ground 1

"That the learned Stipendiary Magistrate gave insufficient weight to the assistance the Appellant gave the authorities."

[13] The learned stipendiary magistrate was informed on 16 December 1999 (t/p 10) that the Crown would be relying on Mr Kenny as a Crown witness with respect to the co-offenders. On 8 February the learned stipendiary magistrate was informed by counsel for the Crown as follows (t/p 14):

"…. he provided statements to police in relation to his involvement and the co-accused and certainly, Your Worship, if need be that statement could be used in committal proceedings against the co-accused. He has been co-operative with the police, Your Worship. That's something which Your Worship can no doubt take into account when finalising it. …."

[14] In the course of her reasons for sentence, the learned stipendiary magistrate stated as follows on 9 February 2000 (t/p 4):

> "I am also told that you have given a statement to the prosecution as regards the other offenders, and that that statement may well be useful as regards their prosecution. I take into account the fact that you have pleaded guilty, despite the fact that your co-offenders apparently are continuing to proceed with the committal proceedings. I also take into account the fact that you have given that statement."

[15] Since imposing sentence on 9 February 2000, there have been further developments with respect to the issue of Mr Kenny providing evidence for the Crown with respect to the co-offenders.

[16] Dr Nanette Rogers, Crown Prosecutor in charge, Office of the Director of Public Prosecutions, Alice Springs, filed an affidavit sworn 2 June 2000 in which she states inter alia:

> "4. On 19 April 2000 I attended Alice Springs Correctional Centre for the purposes of proofing Mr Kenny. At the conclusion of the interview he informed me he would give evidence for the prosecution.
>
> 5. On 20 April 2000 Peter Kenny was in custody in the back row of court 3, Alice Springs Court of Summary Jurisdiction. I spoke with him. He reiterated his willingness to give evidence against Messrs Wongaway and Luckey.
>
> 6. I noticed that Adrian Luckey sat in the row in front of Mr Kenny and close to him. Again, I spoke to Mr Kenny and he indicated he would still give evidence for the prosecution.
>
> 7. I proofed other witnesses in this matter.
>
> 8. When the matter was called on to commence the committal hearing, counsel for each defendant indicated pleas of guilty.
>
> 9. Pleas of guilty were entered by each defendant and the matters adjourned for plea."

[17] Copy of the statement made by the appellant, Mr Kenny, on 5 February 2000 is annexure "A" to the affidavit of Dr Nanette Rogers.

[18] This further evidence was received by this Court pursuant to the provisions of s 176A of the *Justices Act 1928* (NT).

[19] The submission made to this Court is that as a consequence of the appellant affirming his intention to give evidence when spoken to on 20 April 2000 in the presence of the two co-offenders the co-offenders have indicated they will be pleading guilty to the charges and there will now not be the necessity for the committal hearing in respect of the two co-offenders.

[20] This information was not before the learned stipendiary magistrate when sentence was imposed on 9 February 2000.

[21] I accept the principle that an accused person who renders assistance to the prosecuting authorities as an informer is entitled to a very substantial discount on what would otherwise be their sentence (*McGookin & Robertson v The Queen* (1986) 20 A Crim R 438).

[22] The effect on the co-accused of the appellant's undertaking to give evidence to assist the Crown has crystallised since the matter came before the learned stipendiary magistrate on 9 February 2000. However, the fact that he had made a statement to police and indicated a willingness to give evidence to assist the Crown remains the same and is a matter the learned stipendiary magistrate did take into account in considering the appropriate sentence.

[23] I have concluded that although there were subsequent developments with respect to the appellant's declared intention to assist the Crown by giving evidence against the co-offenders the substantial fact of his willingness to give evidence as an informer against his co-accused was taken into account by the learned stipendiary magistrate together with a number of other factors.

[24] The offences themselves are objectively very serious. The learned stipendiary magistrate clearly reduced the sentence that would otherwise have been imposed by taking into account a number of factors which included: (1) the plea of guilty even though the co-accused were pleading not guilty; (2) the remorse expressed by the appellant; (3) that there were no relevant prior convictions although her Worship noted a prior conviction for criminal damage in January 1996 and other convictions for unrelated offences; (4) the affect of provocation and anger; (5) the evidence of David Doolan and Pauline Coombes that the families were now reconciled and wanted to forget the incident; (6) the appellant was a hard worker; (7) the fact that the appellant had given a statement to the prosecution with respect to the co-offenders which "may well be useful as regards their prosecution" (t/p 4).

[25] I am not persuaded the learned stipendiary magistrate failed to give a sufficient discount in sentence by reason of the fact that the appellant had agreed to give evidence against the co-accused.

[26] For these reasons this ground of appeal is dismissed.

Ground 2

"That the learned Stipendiary Magistrate erred in failing to distinguish between the acts done as in response to provocation or revenge."

[27] In her reasons for sentence, the learned stipendiary magistrate noted that she had been informed that there was some provocation on the part of Mr Doolan and referred to the decision of *Pearce v The Queen* (1983) 9 A Crim R 146.

[28] In the matter *Pearce v The Queen* (supra) Brooking J at 150 referred to the insult that was offered to the applicant and his companions as a "highly significant extenuating circumstances". In the matter before Brooking J the applicant and his companions had been invited to a party. They were settled there and behaving themselves when they were suddenly and most offensively told to leave by persons who had no authority to do so and who wanted to get rid of them simply because they were aboriginals.

[29] In the matter which is the subject of the present appeal, the learned stipendiary magistrate noted that there was some provocation on the part of Mr Doolan. The learned stipendiary magistrate then made reference to the case of *Pearce v The Queen* (supra) and that provocation can result in a substantial discount in sentence.

[30] The learned stipendiary magistrate stated on 9 February 2000 at t/p 4.4:

> "I think it would be fair to say, as the prosecutor noted, that rather than provocation this incident would appear to be as a result of anger on your part. Whether one calls it provocation or revenge probably doesn't really matter. Either way the incident appears to have occurred because of the earlier ramming of the car."

[31] I am satisfied on a total reading of Her Worship's reasons for decision that she did give due weight to the effect upon the appellant of the earlier actions of Mr Doolan in the "ramming of the car".

[32] The appellant did not put forward that this action by Mr Doolan was sufficient to create a defence to the charges faced by the appellant. I consider the learned stipendiary magistrate did not fall into error by referring to the reaction by the appellant as anger on his part and that he reacted in anger.

[33] In the matter of *Pearce v The Queen* (supra) Brooking J at 150 found there was no provocation in law but nevertheless accepted that the "insult" was "a highly significant extenuating circumstance".

[34] Similarly, in the matter before this Court, I am satisfied that whilst the actions of Mr Doolan did not amount to provocation in law, these actions could be taken into account in assessing the culpability of the appellant.

[35] I am not persuaded that the learned stipendiary magistrate failed to give significant weight to the response of the appellant and the reasons for his anger.

[36] Accordingly, this ground of appeal is dismissed.

[37] With respect to the following two grounds:

Ground (a) that the said sentence imposed by the learned stipendiary magistrate was in all the circumstances excessive.

[38] I do not agree with this submission. The objective facts of the offences are serious. The learned stipendiary magistrate took into account all relevant matters under s 5 of the *Sentencing Act 1995* (NT) including the matters referred to in favour of the appellant. The learned stipendiary magistrate acknowledged on 9 February at t/p 4.2 that:

> "As at the time of submissions you were serving a sentence which I am told is due to expire on 16 March of this year."

[39] On 16 September 1999, the appellant had been convicted in the Alice Springs Court of Summary Jurisdiction for an offence of drive exceed .08 and other driving offences including drive at a speed and in a manner dangerous and drive unlicensed. The appellant was sentenced to six months imprisonment. It is agreed he was due for release with respect to this offence on 16 March 2000. This is not a prior offence to be taken into account as a prior conviction. However, the magistrate was aware on 16 December 1999 that the appellant was in custody on an unrelated matter until 16 March 2000. The learned stipendiary magistrate stated the criminal damage "would have to be cumulative upon any sentence".

[40] On 9 February 2000 the learned stipendiary magistrate backdated the sentence to 16 December 1999. The practical consequence of this was that

three months of the 15 months sentence imposed by the learned stipendiary magistrate on 9 February 2000 was in fact made concurrent with the sentence the appellant was already serving for drive exceed .08 and other driving offences for which he had been convicted and sentenced on 16 September 1999.

[41] I consider it appropriate to take that into account when considering whether the sentence was manifestly excessive.

[42] For this reason and the other reasons more extensively covered under the other two grounds of appeal I do not accept the argument that the sentence imposed by the learned stipendiary magistrate was in all the circumstances manifestly excessive.

Ground (b) that the learned stipendiary magistrate imposed a sentence of imprisonment which was not proportional to the objective circumstances of the offence.

[43] I have already found that the offences were serious. Were it not for the matters taken into account by the learned stipendiary magistrate that were in favour of the defendant and entitled him to a discount, then I anticipate the sentence would have been substantially longer than 15 months imprisonment and would have been cumulative upon the completion of a sentence being served for a totally unrelated offence.

[44] I would dismiss the appeal and affirm the decision of the learned stipendiary magistrate.

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