Liddle v Davis [2009] NTSC 32

PARTIES:	LIDDLE, SEAN EVANDA
	v
	DAVIS, STUART AXTELL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE YOUTH JUSTICE COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 24 and JA 25 of 2009
DELIVERED:	10 July 2009
HEARING DATES:	8 and 10 July 2009
JUDGMENT OF:	OLSSON AJ
APPEAL FROM:	YOUTH JUSTICE COURT AT DARWIN

CATCHWORDS:

Sentence -- Principles and factors to be taken into account in relation to young offenders -- Multiple serious offences committed on three separate victims in concert with other young offenders -- Appellant appeared as a first offender -- Conceded that custodial sentences warranted -- Requirement for immediate actual service of a custodial term not in accordance with the concept of Youth Justice Act in the circumstances -- Sentences varied by fully suspending them with an operational period of 12 months.

REPRESENTATION:

Counsel:

Appellant:	S Musk
Respondent:	G McMaster

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	ols200902
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Liddle v Davis [2009] NTSC 32
No. JA 24 and 25 of 2009

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against the sentence of the Youth Justice Court at Darwin

BETWEEN:

LIDDLE, SEAN EVANDA
Appellant

AND:

DAVIS, STUART AXTELL
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 10 July 2009)

Introduction

[1] The appellant lodged two separate notices of appeal in these proceedings, each couched in virtually identical terms.

[2] The first related to File 20833129 in the Court of Summary Jurisdiction at Darwin sitting as the Youth Justice Court. The second related to File 20832374 in the same Court.

[3] Each appeal was prosecuted in relation to sentences imposed by a stipendiary magistrate on the appellant on 20 May 2009.

[4] The notices, in each instance, asserted that the relevant sentences imposed were manifestly excessive in all the circumstances.

Specific grounds of appeal

[5] In both instances the specific grounds of appeal relied on were stated to be that the learned magistrate erred in giving insufficient weight to the appellant's subjective factors, namely, his early plea, lack of prior convictions, youth and prospects for rehabilitation.

[6] When the appeals came on for hearing, Ms McMaster, of counsel for the respondent, conceded that, having regard to relevant published and unpublished authorities, the appeal ought to be allowed and that the appellant should be re-sentenced by this Court. I received submissions accordingly.

Relevant narrative events

[7] In relation to the first file, the appellant, who was 17 years of age at the time of the relevant offending, but had turned 18 years of age when he appeared before the learned magistrate, pleaded guilty to a charge that, on 22 November 2008 at Palmerston, he unlawfully damaged property belonging to a victim named Tom Helleren. It was admitted that, on the occasion in question, the appellant had jumped up on the back of the

victim's Hyundai Excel motor vehicle and used his feet to smash in its rear window, causing damage to the value of about $600.

[8] In relation to the second file, the appellant pleaded guilty to one count of aggravated assault on a victim named Dion Martin and one count of aggravated assault on a victim named Trent Batchelor. Both offences were also alleged to have been committed at Palmerston on 22 November 2008.

[9] During the evening of 21 November 2008 the appellant was drinking at a private residence in Moulden with three other persons named Mills, Taylor and Forrester. At about midnight the four of them caught a minibus to the Caltex service station in the Palmerston CBD. After purchasing food and drinks they then walked across to the Palmerston Oasis Shopping Centre.

[10] At about 12:30 a.m. all four approached the victim Dion Martin, who was sitting with his wife near the Eagle Boys Pizza Store. One of the co-offenders asked Martin for the time and an argument then ensued. The cause of that argument is not known to me. The co-offender threw a meat pie at the victim, which hit him in the chest. Upon the victim getting to his feet he was punched in the face by a co-offender. The appellant then approached Martin and punched him with a closed fist in the face, causing him to fall to the ground. He then managed to get free and ran off towards the Coles shopping centre, with all offenders chasing him on foot.

[11] In the process Martin tripped and fell, whereupon the appellant kicked him with his right foot to the body. The appellant was not wearing shoes. A co-offender kicked the victim a number of times while he lay on the ground.

[12] As a consequence the victim was conveyed to the Royal Darwin Hospital by ambulance, where he received treatment for cuts and bruising to his face and body. He lost his big toe nail during the assault, sustained bruised ribs, a swollen eye and cuts inside his mouth. He did nothing to provoke the assault upon him.

[13] On 24 November 2008 the appellant was arrested at his home address. He was conveyed to the Darwin Police Station, where he later took part in a record of interview during which he denied taking part in the assault. He asserted that he just watched others assaulting the victim.

[14] At about 1 a.m. on the same day the appellant and his co-offenders left the Palmerston Shopping Centre and walked along Temple Terrace towards Driver. They approached the victim Batchelor who was walking towards the shopping centre.

[15] One of the co-offenders asked Batchelor for a cigarette. The latter responded that he did not have any. The co-offender responded "Well, give us your wallet then". Batchelor refused to do so, whereupon the appellant punched him in the face with a closed fist, causing him to fall to the ground. The appellant subsequently ran away to a nearby alleyway.

[16] On being arrested at his home on 24 November 2008 and being conveyed to the watch house the appellant denied taking part in the assault on Batchelor, stating that he was too drunk to remember.

[17] As a consequence of the assault, Batchelor was conveyed to the Royal Darwin Hospital by ambulance where he received treatment for cuts and bruising to his face. He required several sutures to cuts above both his eyes and lips and received injections to relieve the pain and swelling. He had done nothing to provoke the assaults on him.

[18] The offence of unlawful property damage was committed at about 9:30 a.m. on the same day. At that time the victim Helleren was driving his vehicle on the road near the flats at 35 Cornwallis Circuit in Gray and a passenger, Trent Hounslow, occupied the front passenger seat.

[19] The vehicle was stopped by persons unknown to Helleren, who ran onto the road. These proved to be the appellant and co-offenders named Mulhall and Pederson-Cummings. Mulhall was carrying a machete approximately 40 cm in length, whilst Pederson-Cummings was holding a metal baseball bat.

[20] These two offenders approached the driver's side of the vehicle and, whilst smashing the car with their weapons and threatening Helleren demanded that the two victims give them their wallets. Whilst this was occurring the appellant jumped up on the back of the vehicle, used his feet to smash its rear window and entered into the vehicle. Whilst he did so Helleren was struck in the mouth by the baseball bat and his front tooth was knocked out.

[21] Helleren was then dragged out of the vehicle by Pederson-Cummings.

[22] At some stage Hounslow was dragged out of the vehicle by Mulhall and punched in the left eye socket.

[23] The two victims somehow managed to get back into the vehicle and drove off to their respective homes. Helleren discovered that his wallet and its contents containing $700 had been removed from the centre console of the vehicle.

[24] The appellant and the co-offenders left the area and also returned to their respective homes.

[25] At 11:45 a.m. on 29 November 2008, the appellant was arrested at the Darwin police station. His fingerprints had been found on the rear boot lid of Helleren's vehicle. He later took part in a record of interview in the presence of his guardian. He refused to answer any questions in relation to the incident and was charged. The total cost of repairs to Helleren's vehicle was estimated at $1,000.

The proceedings before the learned magistrate

[26] The appellant entered the relevant pleas before the learned magistrate on 7 April 2009. The proceedings were adjourned to enable a pre-sentence report to be prepared in relation to the appellant. The matters were thereafter re-listed before the learned magistrate on 20 May 2009.

[27] At that time the appellant had just turned 18 years of age. It was said that he had been on a curfew since March 2009.

[28] Various aspects of the pre-sentence report were discussed with the learned magistrate. A copy of that report has been supplied to me by counsel.

[29] The learned magistrate was informed that the appellant was living with his mother and her partner (not the appellant's biological father, who had separated from his mother when he was only six months old). The appellant was born in Alice Springs and initially attended primary school there. He had relocated to Darwin with his mother in 2003.

[30] Having completed year 11, the appellant left school and worked with his uncle for a period of about eight months doing remote bush work. He then underwent a traineeship with Green Corps for about two months, after which he moved back to Darwin. On doing so he was not employed for a time.

[31] It was put to the learned magistrate that, although the co-offender Forrester was the appellant's cousin he had had relatively little connection with any of the other offenders involved in the various offences.

[32] It was said that, on the evening of 21 November 2008, he had encountered the co-offender Taylor, who he knew slightly, at the Gray shops and had been invited to attend a party at a house in Moulden. He had done so commencing at about 6:30 p.m. and had consumed a good deal of alcohol

between that time and about midnight. He became what was described as very intoxicated.

[33] The learned magistrate was told that the appellant left the Moulden house with co-offenders at about midnight and went with them to the Palmerston shopping centre where the incidents involving the victims Martin and Batchelor occurred. Mills was said to be about 19 years of age at the time whilst Forrester was 20 years old and Taylor was only about 15 years of age.

[34] As the learned magistrate pointed out in the course of submissions, the circumstances in which the appellant became involved in the incident involving the victims Helleren and Hounslow were somewhat odd and not really explained. The appellant was said to have encountered the other co-offenders, who were contemporaries of his, in the course of walking home to his own house.

[35] It was argued that, at least from the point of view of the appellant, the incident was not premeditated and that he had merely impulsively joined in what had been initiated by the co-offenders whilst he was still intoxicated to some degree.

[36] The learned magistrate was informed that, shortly prior to the resumed hearing on 20 May 2009, the appellant had commenced full-time employment working in a furniture factory at East Arm. It was urged upon the court that any sentence imposed ought to be structured so as to enable the appellant to serve it in the community in recognition of the facts that he

had not instigated the various offences but had been influenced by co-offenders to make inappropriate, unsophisticated decisions to join in what occurred. It was submitted that the appellant had recognized the inappropriateness of his conduct and regretted and was ashamed of it.

[37] Counsel for the appellant stressed to the learned magistrate that the offending had been very much out of character and that the appellant had never been before the court for any other matters nor had he been involved in any juvenile diversion activity. He had strong family support. It was submitted that, whilst a custodial sentence was inevitable in relation to the assault offences, it would be appropriate either to fully suspend it or impose a sentence of home detention. It was argued that a non-custodial disposition would be appropriate in relation to the unlawful damage offence, on the basis that he was prepared to undertake to pay the cost of replacing the smashed window.

[38] In the course of his submissions the prosecutor stressed the fact that the appellant had been guilty of multiple breaches of his bail conditions, a situation that was relevant to the situation of any proposal relating to a sentencing disposition to be served in the community.

[39] Unsurprisingly, the prosecutor emphasised that the appellant had voluntarily participated in what had been unprovoked, vicious attacks of a predatory nature on members of the community previously unknown to him, who were minding their own business. It was argued that, whilst he may not have

been the main protagonist, he, nevertheless, readily participated in serious group attacks, in one instance in concert with persons who were overtly armed with offensive weapons.

[40] He submitted that each offence was of an inherently serious type and that the pack nature of the attacks must have been quite frightening to the victims concerned. He further emphasised that three quite separate and distinct offences had been involved. The relevant incidents had not simply flowed on from one to another. Separate sentences for each were therefore clearly indicated, due regard being had for the totality principle.

The approach of the learned magistrate

[41] Quite properly, the learned magistrate took a serious view of the appellant's conduct.

[42] He pointed out that both victims of the assault charges had sustained injury. He commented:

> "In the first attack it was a consistent attack, the person tried to escape you and you and the others pursued him. And the second one, after delivering the blow which put the person on the ground which allowed your co-offenders to kick him, after delivering that blow it seems that you departed the scene. Perhaps that slight element of worry and concern of the seriousness of your offending became apparent.
>
> .....
>
> The third offence being that I suppose almost a moment of madness I could describe it as when as I am told by your counsel and the Crown has not contradicted, you saw some other people belting a person's car in the process of attempting to rob him, you decided to join that

> fray and leap up on the back of the car and put your feet through the rear windscreen."

[43] The learned magistrate pointed out that, given the circumstances put to him, the appellant must have been pretty close to sober by the time of the third offence, because it was then many hours since he had stopped drinking. Whilst he noted that the appellant was a first offender and acknowledged that he was in the company of older individuals at relevant times and may to some extent have been led, the learned magistrate was of the view that it was nevertheless clear that the appellant had acted of his own volition.

[44] The learned magistrate pointed out that, like all the courts in the Territory, the Juvenile Justice Court had been concerned for some time at the level of violence in the community and had made it clear that groups who chose to pick on an individual as a group would not be treated lightly.

[45] He expressed the view that the offending was of such a serious nature that an actual custodial disposition was necessary. Even acknowledging the youth of the appellant and the fact that he was a first offender, as well as the other matters to which his attention had been directed by counsel, he was of the opinion that it would be sending the wrong message to others if he did not impose a term of actual imprisonment.

[46] By reason of the fact that the appellant would have to serve any sentence in an adult prison the learned magistrate resolved to impose a sentence of about half that which would otherwise be called for by the nature of the

offending. He did not consider that home detention was a viable option having regard to the seriousness of the offending and (I assume) the attitude of the appellant expressed to the probation officer who prepared the pre-sentence report.

[47] On that basis he recorded a conviction in respect of the unlawful damage offence and imposed a sentence of imprisonment for three months, to commence from 15 May 2009 to take into account time already served.

[48] He further recorded convictions in relation to both offences of aggravated assault. As to the first assault he imposed a sentence of six months imprisonment, cumulative upon that imposed with regard to the unlawful damage. As to the second assault he imposed a sentence of three months imprisonment to be served cumulatively, having reduced that which would otherwise be justified to that period, to take into account the totality principle.

[49] Having done so he conditionally suspended the aggregate sentences after service of a period of three months, with an operational period of 12 months from the date of the appellant's release.

[50] On the application of counsel the learned magistrate granted the appellant bail pending the hearing of the present appeals.

Issues arising on the appeals

[51] Against that background, Ms Musk, of counsel for the appellant, indicated on the hearing of the appeals that she did not seek to impugn the actual head sentences imposed by the learned magistrate. She accepted that, considered objectively, the violent offending here involved did warrant the custodial sentences imposed. The substantial issue was whether or not the sentences ought to have been fully suspended or home detention ought to have been ordered.

[52] I took her primary submission to be that the head sentences imposed by the learned magistrate ought to stand, but that the aggregate of those sentences should be suspended forthwith, with an operational period of 12 months.

[53] I did not take Ms McMaster to oppose such a proposal. I therefore directed the preparation of an updated report pursuant to s103 of the Sentencing Act. This duly came to hand and I note that it accepts the appellant as suitable for supervision by Community Corrections.

Conclusion

[54] Whilst it must be accepted that the appellant was not the prime mover in the regrettable series of group offences that took place, he was a willing enough participant. As the learned magistrate pointed out, his involvement in the events that finally occurred on 22 November 2008 involving Mr Helleren is not explained by possible intoxication.

[55] Both individually and viewed as a totality, the offences committed by the appellant were very serious. Although the appellant was a young first offender and considerations of his rehabilitation were a major factor to be considered, so also the factors of accountability and the rights of the victims and interests of the community also needed to be given due weight.

[56] These, after all, were unprovoked attacks that took place in fairly rapid succession on law abiding members of that community. Ms Musk was, with respect, entirely pragmatic in conceding that the head sentences imposed could not realistically be criticised. The accused committed them when he was little short of attaining adult age.

[57] Bearing in mind what was put to the learned magistrate and is said in the relevant pre-sentence report, I do not consider that home detention is a realistic sentencing strategy in respect of this offender and would, in fact, probably set him up to fail.

[58] I agree that an appropriate conditional order of full suspension is warranted, as suggested by counsel.

[59] Accordingly, I make the following orders:

1. That the appeals be allowed for the purpose of varying the sentences imposed by the learned magistrate.

2. That such sentences be varied by fully suspending each of them forthwith, on the conditions hereafter expressed in lieu of suspension of

them after service of a period of three months, but that such sentences otherwise be confirmed.

3. That the period of operation of the suspension be 12 months from the present date.

4. That the suspension be subject to the condition that, during the period of operation of it, the appellant be subject to supervision by Community Corrections and comply with all reasonable directions of that service, including directions as to residence, employment, participation in rehabilitation programs and services, abstaining from possession and use of illicit drugs and non-association with a nominated persons or groups of persons; and, further, that, during such period, the appellant submit to such random drug testing procedures as may be directed by his probation and parole officer.

[60] The appellant should be aware that, if he is convicted of an offence punishable by imprisonment within the period of operation of the suspension, he will be brought back before the Court to be dealt with under the Sentencing Act and may have the sentences imposed wholly or partly restored, as well as being dealt with for any further offence.

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