

*E R v Sims* [2009] NTSC 10

PARTIES: E R

v

ERICA ANN SIMS

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION

FILE NO: JA 1 of 2009 (20833414)

DELIVERED: 2 April 2009

HEARING DATES: 25 March 2009

JUDGMENT OF: RILEY J

APPEAL FROM: WALLACE SM

**CATCHWORDS:**

CRIMINAL LAW – JUSTICES APPEAL – suspended sentence – sentencing discretion is not disturbed on appeal unless error in the exercise is shown – presumption that there is no error – parity with co-offender – suspended sentence must still be proportionate to the offending – sentence manifestly excessive – appeal allowed – re-sentence necessary

Youth Justice Act s 125

*Lowe v The Queen* [1984] 154 CLR 606; *R v Woods* (2009) NTCCA 2, referred to

**REPRESENTATION:***Counsel:*

Appellant:	C Dolman
Respondent:	B Wild

*Solicitors:*

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

Judgment category classification: B

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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*E R v Sims* [2009] NTSC 10  
No. JA 1 of 2009 (20833414)

BETWEEN:

**E R**  
Appellant:

AND:

**ERICA ANN SIMS**  
Respondent:

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 2 April 2009)

- [1] The appellant, who was then 14 years of age, appeared before the Court of Summary Jurisdiction on 30 December 2008. He pleaded guilty to one count of trespass, one count of unlawful use of a motor vehicle, one count of unlawful entry of a building with intent to commit the crime of stealing and one count of aggravated assault where the victim was threatened with an offensive weapon namely an empty beer bottle. On 9 January 2009 he was granted bail which included a curfew and on 10 January 2009 he was arrested for breach of bail constituted by his failure to honour the curfew. He remained in detention until sentencing on 20 January 2009 by which time he had served 40 days in custody.

- [2] On 20 January 2009 the appellant was sentenced to an aggregate term of 12 months detention suspended for 12 months from that day on various conditions including that he travel immediately to Shalom Christian College at Townsville in Queensland. At the same time he was dealt with for a breach of a suspended sentence which was constituted by the reoffending and that matter was dealt with by extending the period of supervision by 12 months.
- [3] On 20 January 2009 the appellant lodged a notice of appeal with the sole ground being that the sentence was manifestly excessive. He has subsequently added additional grounds of appeal as follows:
- (a) insufficient weight was given to the age and circumstances of the appellant,
  - (b) the learned Magistrate erred in his determination of the seriousness of the offence,
  - (c) the learned Magistrate erred by taking into account irrelevant and prejudicial factors, and
  - (d) the sentence offends the principles of parity.
- [4] The circumstances of the offending were not in dispute. On Friday 28 November 2008 at about 1.00 am the appellant and his co-offenders were in a stolen Toyota Tarago van in Houston Street, Larrakeyah. They drove around Darwin collecting further co-offenders. At about 3:45 am they drove

to the Railway Club in Parap and entered the club through a hole created by the breaking of a pane of glass. Once inside the appellant, along with his co-offenders, searched for alcohol. In so doing they made sufficient noise to wake CH who was the caretaker for the building and who slept in a bedroom near the main bar area. When CH emerged from his room he saw a group of youths inside the bar and he directed them to leave. He was, at the time, armed with a knife. One of the co-offenders took hold of a pool cue and struck the victim a number of times on the arm and shoulder in an endeavour to dislodge the knife from his grip. That action was not regarded as part of the offending apparently having been treated by the parties to the proceedings as an action taken in self defence by the co-offender. The assault that was the subject of complaint was constituted by the appellant taking an empty bottle from a nearby rubbish bin and throwing it at the victim. The bottle missed the victim. The appellant then left the premises. A number of his co-offenders threw empty bottles and ashtrays at the victim and one of those struck him on the head causing a small cut. The group then left the premises driving off in the stolen van. They travelled to Nightcliff where the appellant left the vehicle. The co-offenders then drove it to a semi-secluded area where it was set on fire and totally burnt out.

[5] The appellant was interviewed by police and made admissions.

[6] At the time of sentencing the appellant already had a regrettable criminal history for someone of his age. He first came before the Youth Justice Court in November 2007. Between that date and the time of sentencing he

had been dealt with for numerous offences. He had been dealt with without proceeding to conviction in relation to eight counts of unlawful use of a motor vehicle, two counts of unlawfully damaging property, one count of entering a dwelling with intent to commit a crime, one count of stealing and one count of driving without a licence. Thereafter he was convicted of 11 counts of stealing, one of driving unlicensed, two of unlawful use of a motor vehicle, eight of entering a building with intent to commit a crime, one of trespass and three of unlawfully damaging property. He had, as a consequence of his offending, been sentenced to periods of detention.

- [7] The learned sentencing Magistrate observed:

Your offences are becoming more serious and your part in the offences is becoming more central. You are getting, it would seem, virtually no education, so you are not improving yourself in any way, shape or form. Time is passing and the chances to sort you out and for you to find some happier way of living that doesn't cause harm, misery, pain and suffering to other people, those opportunities are being lost.

You have been locked up in Don Dale several times now for sizable slabs of time for a chap of your age; more than I can think of for just about anybody at your age, in fact. That, too, hasn't done any obvious good. You get back into trouble almost as soon as you have been released and you may be one of those people who actually gets worse being in Don Dale because you meet there, perhaps, people you might otherwise not have met; co-offenders who you meet on the outside and get into more trouble with them.

- [8] In sentencing the appellant the learned Magistrate was at pains to structure a sentence best suited to the needs of the appellant. It was noted that there was little else that the relevant officers from Family and Children's Services

could offer the appellant other than family support. His Honour observed that "we are running out of options". One option that had been identified was the prospect of the appellant being enrolled in the Shalom Christian College in Queensland. His Honour delayed sentencing more than once to ensure that the appellant could be enrolled in the College. He noted that the College was "a good school" which "had some success with troubled kids who haven't settled down and gone to school anywhere else." He went on to say to the appellant:

For kids like you, you have been avoiding school one way or another for a long time, it is obviously different, but, with a bit of luck, someone will click with you, some good teachers, one or two perhaps will actually get through to you and you will realise that going to school can in fact be fun in itself, and certainly the activities they have in and around a formal education can be fun for anyone. It is your best chance ... to plunge into that school and get as much as you can out of it, to try every class they put you in, to do your best, to try all the sports and other activities and find out what you can do with your hands, what you can do with your mind and get some idea then what you might want to do with the rest of your life. If you muck up there at the school they will expel you, no doubt, and send you back home again.

- [9] In relation to the offending on this occasion the learned Magistrate described the events at the Railway Club as serious matters. The maximum penalty for the offence of unlawful entry was imprisonment for 14 years. The maximum penalty for the assault was imprisonment for five years. His Honour imposed an aggregate penalty of 12 months detention in relation to the unlawful use of the motor vehicle, the unlawful entry and the assault. That sentence was backdated to the time he entered custody and was immediately suspended upon conditions.

- [10] The learned Magistrate was not able to impose an aggregate sentence in the circumstances of this case. One of the offences was a “violent offence” for the purposes of s 125 of the *Youth Justice Act*.
- [11] It is convenient to deal with the particular grounds of appeal before dealing with the more general complaint that the sentence was manifestly excessive.

**That insufficient weight was given to the age and circumstances of the appellant**

- [12] It was submitted on behalf of the appellant that, whilst his Honour did take into account the age of the appellant (which was 14 years at the time of the offending), insufficient weight was given to his age during sentencing and to the fact that he pleaded guilty.
- [13] Reference to the sentencing remarks makes it clear that his Honour was appreciative of the age of the appellant. He described him as "still really a very young person". At different points in the sentencing remarks the learned Magistrate observed that the appellant "had just turned 14 years of age" and referred to him as being a "kid" noting that he was "only 14". It is apparent that the young age of the appellant was in the forefront of the mind of the Magistrate.
- [14] Similarly, his Honour referred to the fact that there had been an early plea of guilty. His Honour said: “To your credit you have pleaded guilty to those charges ... you are the first, and so far the only one, to own up to what you did that night.”

[15] There is nothing in the sentencing remarks of his Honour which would point to any error on his part in his approach to dealing with a young person or with providing a discount for his plea of guilty. This ground was argued in support of, and in the context of, the complaint that the sentence was manifestly excessive.

**That the learned Magistrate erred in his determination of the seriousness of the offence**

[16] It was submitted on behalf of the appellant that, whilst his offending was serious, it was not in the same category as offences previously held to be "extremely serious offences" such as armed robbery and home invasion whilst armed. It was submitted that this is the type of offence that a juvenile, as opposed to an adult, might be expected to commit and that whilst there was potential danger for the victim the appellant did not cause actual harm or injury.

[17] In my view the characterisation of the offending suggested on behalf of the appellant does not reflect the true seriousness of what took place. The appellant got into a motor vehicle which he knew to be stolen and whilst travelling in that motor vehicle was part of a plan to break into the Railway Club. He was aware of the details of the plan and he participated in the break-in which occurred at night. What was already a serious offence became even more serious when the caretaker emerged from his bedroom. The offenders did not immediately depart the scene, instead, the appellant and his co-offenders attacked and assaulted the caretaker. This was not

offending of a kind that a juvenile might be expected to commit. It was offending of an adult kind. The attack upon the caretaker, in which the appellant participated, was particularly serious. It involved the use of weapons, including one employed by the appellant himself. I see no basis for concluding that the learned Magistrate erred by regarding this offending as "a really serious offence".

**That the learned Magistrate erred by taking into account irrelevant and prejudicial factors**

- [18] During the course of sentencing the appellant the learned Magistrate, who is a very experienced magistrate in this jurisdiction, referred to the unlawful entry and the attack upon the victim as "a really serious offence" and he went on to describe to the appellant how such matters may escalate into even more serious crimes. He did so by reference to a matter where young men broke into another set of premises and were disturbed by a caretaker. Those who broke in apparently attacked the caretaker who ultimately died of injuries suffered in the course of events. In so doing, his Honour was drawing on a relevant real-life experience in an endeavour to awaken in the appellant an understanding of the potential for tragedy to arise out of conduct similar to his own. There was no suggestion in the observations of the learned Magistrate that he regarded the two events as similar. He simply used the other case as a warning to the appellant of how matters that start out in the way that his offending started out may go horribly wrong.

[19] As counsel acknowledged during the course of the hearing, the submission on behalf of the appellant disclosed a misunderstanding of what took place. This ground of appeal was without foundation and ultimately was not pressed.

### **That the sentence offends the principles of parity**

[20] The appellant points out that one of the co-offenders of the appellant was dealt with in the Community Court and sentenced to three months detention for his part in this offending. It was submitted that the co-offender was slightly older than the appellant and had caused actual harm to the victim by striking him with a bottle. The sentencing remarks in relation to that matter had not been available to the learned Magistrate. They were available to me. In my view the sentence imposed upon the co-offender was at the lowest end of the available range. However, I do not consider the sentence to have been manifestly inadequate.

[21] Although there are points of distinction as between the appellant and his co-offender and some justification exists for a level of disparity between the two, the extent of the disparity is such that the appellant may feel a real and justified sense of grievance: *Lowe v The Queen*<sup>1</sup>.

### **The sentence was manifestly excessive**

[22] The primary complaint of the appellant was that the sentence was manifestly excessive in all of the circumstances including those addressed above. The

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<sup>1</sup> [1984] 154 CLR 606

principles applicable to such an appeal are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive, but manifestly so. The appellant must show that the sentence was clearly and obviously, and not just arguably, excessive: *R v Woods*<sup>2</sup>.

[23] Although the offending in this case was serious it seems to me that a sentence of detention for a period of 12 months, after allowing a deduction for the plea of guilty and remorse, is manifestly excessive. The appellant was aged just 14 years and, whilst he had a regrettable criminal history, his prospects for rehabilitation had not been exhausted. Indeed the main thrust of the sentence created by the learned Magistrate was directed towards achieving rehabilitation. The fact that the sentence was suspended does not alleviate the position. His Honour must have regarded a sentence of actual

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<sup>2</sup> (2009) NTCCA 2

detention of that length as being proportionate to the offending. In my view the sentence was manifestly excessive and must be set aside.

- [24] The appeal is allowed. It is necessary for the appellant to be re-sentenced and arrangements will be made for him to appear before the court for that purpose.
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