Barnes v Howie [2010] NTSC 42

PARTIES:	ANDREE BARNES v RICHARD HOWIE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 15 of 2010 and 16 of 2010 (21008482 & 21012227)
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JUDGMENT OF:	RILEY J
APPEAL FROM:	OLIVER SM

CATCHWORDS:

YOUTH JUSTICE ACT – Appeal against sentence – whether sentence manifestly excessive – youth – sentencing principles – weight to be given to seriousness of offending, age, deterrence, protection of the community, supervision – appeal dimissed

Liddy v R (2005) NTCCA 4

REPRESENTATION:

Counsel:

Appellant:	P Bellach
Respondent:	S Ozolins

Solicitors:

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

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

Barnes v Howie [2010] NTSC 42
Nos. JA 15 of 2010 & 16 of 2010 (21008482 & 21012227)

BETWEEN:

ANDREE BARNES
Appellant

AND:

RICHARD HOWIE
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 11 August 2010)

[1] On 20 April 2010 the appellant, who was aged 17 years, pleaded guilty in the Youth Justice Court to various offences arising out of events which occurred on 10 March 2010 and on 12 April 2010. On 5 May 2010 the appellant was sentenced in relation to those offences to an aggregate term of detention of six months with an order that the sentence be suspended after the appellant had served a period of detention of one month. He appeals against the sentences on the basis that the individual aggregate sentences and the total effective sentence imposed by the learned Magistrate were manifestly excessive.

The offending

[2] The first set of offences occurred between 1.00 am and 2.00 am on 10 March 2010. The appellant and co-offenders unlawfully entered the premises of the Beswick Community Store. They armed themselves with several metal bars which they used to force entry to the premises through a metal barrier. They then forced open a steel roller door which formed a secondary barrier to entry. Once inside the offenders located a safe which they unsuccessfully attempted to open with force. The safe was damaged in the process. The offenders then entered the kitchen area of the premises and consumed food and soft drink. They left the promises with a quantity of stolen items. Some time later they returned to the premises and gained entry in the same manner. Once inside they made their way to a third barrier which separated the store from a storeroom. They used the metal bars and other implements to create a hole through which they gained entry to the storeroom. They then smashed the lock of a shipping container within which was a second safe. They attempted to open the safe but again were unsuccessful. The offenders stole cigarettes, tobacco, soft drink and mobile telephones. The total value of items removed from the store was $3000 and the damage caused to the building was valued at $5000. The appellant was arrested on 10 March 2010. He later entered into an electronic record of interview in which he made full admissions. The appellant was granted bail.

[3] The second set of offences occurred approximately one month later on 12 April 2010. The appellant and co-offenders again decided to enter the

premises of the Beswick Community Store. They armed themselves with metal bars and other housebreaking implements. Once more they overcame the barriers to entry and stole drinks and grocery items. The value of items stolen was $1000 and the damage caused to the building was estimated at $5000. The appellant was arrested on 12 April 2010. He declined to participate in an electronic record of interview.

[4] In relation to the offending of 10 March 2010 the appellant pleaded guilty to: (a) having unlawfully damaged property when preparing to commit a crime, namely unlawful entry with intent to steal for which the maximum penalty is imprisonment for seven years; (b) unlawful entry of the building at night with intent to steal for which the maximum penalty is imprisonment for 14 years; (c) stealing property valued at $3000 for which the maximum penalty is imprisonment for seven years; and (d) attempting to steal the contents of the safe for which the maximum penalty is imprisonment for three years and six months. In relation to the offending of 12 April 2010 he pleaded guilty to: (a) unlawfully damaging property when preparing to commit a crime, namely unlawful entry with intent to steal (seven years maximum); (b) unlawfully entering a building at night with intent to commit the crime of stealing (14 years maximum); and (c) stealing a quantity of drinks and groceries valued at $1000 (seven years maximum).

[5] The learned sentencing Magistrate imposed an aggregate sentence of four months detention in relation to the offences committed on 10 March 2010. In relation to the offending of 12 April 2010 her Honour imposed an

aggregate sentence of detention of four months, two months of which were to be served concurrently with the earlier sentence. The total effective sentence was therefore detention for a period of six months backdated to reflect time in custody and then suspended from 12 May 2010 under conditions as to residence and supervision.

Manifest excess

[6] The complaint of the appellant is that the sentence was manifestly excessive in all of the circumstances. The 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 in 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. He must show that the sentence was clearly and obviously, and not just arguably, excessive.[1]

[1] *Liddy v R* (2005) NTCCA 4 at [12]

[7] In support of the ground of appeal that the sentences were manifestly excessive the appellant submitted that the learned Magistrate:

> (a) erred in application of the principles relevant to the sentencing of young offenders by imposing a sentence which gave special prominence to deterrence and protection of the community in circumstances where that approach was not warranted;
>
> (b) the learned Magistrate erred in approach when counsel for the appellant sought to challenge the veracity of material contained in the supervision and community work order assessments;
>
> (c) the learned Magistrate gave insufficient weight to the appellant's youth, maturity and lack of prior convictions; and
>
> (d) the starting point for the individual aggregate sentences was manifestly excessive.

Error in giving "special prominence" to deterrence and protection of the community

[8] In his written submissions counsel for the appellant focused upon the evolving position as it developed over the series of hearings leading up to the final disposition. It was submitted that the learned Magistrate was initially prepared to accept that a community-based disposition would be appropriate but then "appeared to dramatically change her view of the appropriate disposition". A fair reading of the transcript does not support the submission. It is apparent that the learned Magistrate regarded the offending as serious from the very start but, nevertheless, was prepared to consider an assessment for supervision and an assessment for a community work order. Early in the proceedings her Honour observed that the offending was not "ordinary juvenile offending" and noted that it was "out

of the normal category of juvenile offending" and that the appellant had "moved into much more serious behaviour and is 17 years old". When the matter came back before her Honour she observed:

> My view is that these are offences that warrant a term of detention. The real question is whether he should be required to serve the whole term of detention or whether it should be partly suspended on conditions.

[9] The view taken by her Honour of the seriousness of the offending is reflected in the sentencing remarks where it was said:

> At the end of the day, however, these are serious dishonesty offences and they require a term of detention to be served. That is both so that you understand how serious this misbehaviour is and you think twice before you get involved (with) anything of this nature again and second to send a message to the community that this sort of behaviour by young men in a community is not acceptable and will have strict punishment.

[10] The appellant conceded that the offences were serious but submitted that they were not so serious as to require immediate actual detention. It was submitted that the learned Magistrate "mischaracterised the gravity of the offences, inflating the objective seriousness of the appellant's offending". The appellant submitted that the offending was less serious because it occurred in a group, was unsophisticated and occurred in circumstances where the appellant was motivated by a desire for food and was influenced by others. It was noted that on the first occasion he was under the influence of petrol sniffing. Her Honour was aware of those matters but regarded the offending as serious, referring to the considerable damage done to the store

on each entry, the fact that the offending occurred at night time, the substantial value of the goods stolen, the attempts to steal the contents of the safe and the impact that the offending had upon the community at Beswick. According to the advice received by her Honour, the community was angry and the appellant was not welcome in the community at the time of sentencing. Her Honour noted that the appellant was aged 17 years and was therefore "not a particularly young youth". Her Honour could have added that the second set of offences occurred whilst the appellant was at large after having been arrested and charged in relation to the earlier offences and whilst he was on bail. In my view, in all the circumstances of the offending and the offender, the learned Magistrate was correct in describing the offending as serious and concluding that it warranted a term of detention.

[11] Her Honour did not, as it was submitted, place inordinate weight on a disposition which emphasised deterrence as a means of addressing the anger and frustration of members of the Beswick community. The extent to which the community was affected as a victim of the offence was a factor to be taken into account along with many other factors. There is nothing to suggest that it was accorded undue weight.

The challenge to the supervision and community work order assessments

[12] It was submitted on behalf of the appellant that counsel had requested that the author of the report give evidence and be available for cross-

examination. Reference to the transcript reveals that early in the submissions counsel in fact advised the learned Magistrate that he wished "to take issue with (the report) and if it is relied upon, seek it to be established in evidence". The issue being debated with counsel in relation to the report was whether the appellant was welcome to return to the relevant community and the level of support that may be provided to him in the community.

[13] As her Honour noted, the report was made to the Court pursuant to the provisions of the *Youth Justice Act*. It did not have to be established in evidence. The Act provides for such reports to be made to the court and permits a person, such as the appellant, to cross-examine the author of the report or the person who carried out an investigation on which the report was based. The youth reported on, or a responsible adult in respect of the youth, may give evidence or call witnesses to rebut the contents of the report.[2] Counsel was alerted to the right to lead evidence from the appellant or any other person to rebut the contents of the report but, at no stage, did he do so.

[14] There was further discussion between the Court and counsel and the learned Magistrate then said:

> Clearly he has to have somewhere to live that is supportive of him, and that is the concern that was raised in the Corrections report, is that there wasn't anyone who was providing support, control and direction in Beswick, so I think it's a matter of identifying if there is

[2] Section 74 of the *Youth Justice Act*.

> an appropriate residential situation that would provide that sort of level of support and control.

[15] The matter was then adjourned with counsel for the appellant indicating that the issue would be investigated. When the matter returned to Court counsel was unable to add any useful information. Counsel did not at that time seek to lead evidence or to cross-examine the author of the report. He did not seek an adjournment to enable evidence to be called. Her Honour suggested that the issue could be resolved by requiring the appellant to live with his uncle at Burunga but subject to the power in his Parole Officer to permit him to travel to Beswick. The learned sentencing Magistrate was concerned as to the safety of the appellant if he returned to Beswick and, in that context, made it clear that she was:

> ... not putting an absolute ban on that, but I think it is appropriate given what I have said and in terms of his own safety, that some direction be given by Probation with respect to the need to travel to and from Beswick. There may be occasions when he is required there for particular family ceremonial matters and that is a matter that the Probation Officer can consider on an issue by issue basis.

[16] Importantly, for present purposes, the place at which the appellant was to reside during the course of his suspended sentence did not have any impact upon the length of the sentence or the period of the supervision.

The youth of the appellant and his lack of prior convictions

[17] The appellant submitted that the learned Magistrate incorrectly stated the appellant's age and therefore characterised him as being more mature and closer to adulthood than he was. The learned Magistrate correctly said that

the appellant was 17 years of age but incorrectly commented that his birthday was in August rather than February. Her Honour then observed that he was "not a particularly young youth" and there is no challenge to that conclusion. There was no submission that he was immature for his age. I am unable to see how the difference of six months had any impact upon the sentence imposed in all the circumstances.

[18] In the course of submissions it was pointed out that the appellant had no prior convictions. However, he had been the subject of a diversion in January 2007 in relation to offences of entering a building with intent to commit a crime and stealing on two separate occasions being April 2006 and January 2007. On each occasion a family conference had been conducted. Those matters were addressed by the learned Magistrate.

Manifest excess

[19] It was submitted on behalf of the appellant that the learned Magistrate allowed a reduction in the order of 25% for the appellant's pleas of guilty on each file. It followed that the starting point must have been a sentence of five months and 10 days which, the appellant submitted, was outside the range of sentencing discretion having regard to the objective seriousness of the offences and all other relevant circumstances.

[20] In my opinion the sentences imposed for the two groups of offending were not outside the range available to her Honour. Error on the part of her Honour has not been demonstrated. In my view and in the circumstances of

the offence and the offender it cannot be said that the sentence was manifestly excessive.

[21] The appeal is dismissed.
