Clavell v Burgoyne [2003] NTSC 29

PARTIES:	TIMOTHY CLAVELL
	v
	ROBERT BURGOYNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	20208511 & 20208921
DELIVERED:	28 March 2003
HEARING DATES:	14 March 2003
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	C Roberts

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Department of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	tho200314
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Clavell v Burgoyne [2003] NTSC 29
No. 20208511 & 20208921

BETWEEN:

TIMOTHY CLAVELL
Appellant

AND:

ROBERT BURGOYNE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 28 March 2003)

[1] This is an appeal against the head sentence imposed on the appellant by a stipendiary magistrate sitting at Alice Springs.

[2] On 18 July 2002, Timothy Clavell entered pleas of guilty to the following two sets of charges.

"**File No. 20208511:**

1. On the 31st day of May 2002 at Tennant Creek in the Northern Territory of Australia, he unlawfully used a motor vehicle, namely, Toyota Landcruiser.

   And that the said unlawful use involved the following circumstances of aggravation:

   (i) the property unlawfully used was damaged by the said Tim Clavell and the cost of repairing/compensating for the same was $1,000.00 or more, namely, $6,538.00.

(ii) the property unlawfully used was of the value of greater than $20,000.00, namely, $60,000.00.

(iii) that as a result of the said unlawful use the whereabouts of the said Toyota Landcruiser remained unknown to the person entitled to lawful possession of the said Toyota Landcruiser, namely, William Slipper for longer than 48 hours, namely, 4 days;

Contrary to Section 218 of the Criminal Code.

2. On the 31st day of May 2002 at Tennant Creek in the Northern Territory of Australia, he did have in his custody, personal property, namely Toyota Landcruiser and $331.55, which at the time before making the charge was reasonable (sic) suspected of having been stolen or otherwise unlawfully obtained;

Contrary to Section 61 of the Summary Offences Act.

3. On the 31st day of May 2002 at Tennant Creek in the Northern Territory of Australia, he did, without lawful excuse, possess and carry a controlled weapon, namely a kitchen knife, in a public place;

Contrary to Section 7 of the Weapons Control Act.

4. On the 31st day of May 2002 at Tennant Creek in the Northern Territory of Australia, he drove a motor vehicle, namely Toyota Landcruiser, on a public street, namely Paterson Street, whilst not being the holder of a licence to do so;

Contrary to Section 32(1)(a)(i) of the Traffic Act.

File No. 20208921:

1. Between the 7th day of June 2002 and 8th day of June 2002 at Alice Springs in the Northern Territory of Australia, he unlawfully used a motor vehicle, namely, Toyota Tarago.

And that the said unlawful use involved the following circumstance of aggravation:

(i) That the property unlawfully used was damaged by the said Timothy Clavell and the cost of repairing/compensating for the same was $1,000.00 or more, namely, $6,675.00;

Contrary to Section 218(1) and (2)(c) of the Criminal Code.

2. Between the 7th day of June 2002 and 8th day of June 2002 at Alice Springs in the Northern Territory of Australia, did steal

work tools, valued at $8,000.00, the property of Alexander Stepin;

Contrary to Section 210 of the Criminal Code.

3. On the 8th day of June 2002 at Alice Springs in the Northern Territory of Australia, drove a motor vehicle, namely Toyota Tarago, on a public street, namely Tanami Highway, whilst not being the holder of a licence to do so;

Contrary to Section 32(1)(a)(i) of the Traffic Act.

4. On the 8th day of June 2002 at Alice Springs in the Northern Territory of Australia, he did, without lawful excuse, possess a controlled weapon, namely a large kitchen knife, in a public place;

Contrary to Section 7 of the Weapons Control Act.

5. On the 8th day of June 2002 at Alice Springs in the Northern Territory of Australia, being a person who was required to give his full name and address to a member of the Police Force, failed to do so;

Contrary to Section 134(2) of the Police Administration Act."

[3] The learned stipendiary magistrate made the following findings of fact with respect to these offences (tp 24):

> "The defendant has pleaded guilty to two counts of unlawful aggravated use of a motor vehicle. There are associated charges of unlawful possession of goods; money left in one of the cars by the owner, carrying an offensive weapon - a kitchen knife, and driving without a licence on the first unlawful use of the motor vehicle. In the case of the second unlawful use, the associated offences are of stealing a toolbox and tools in the vehicle, no licence and possession of a knife – kitchen knife again.
>
> The offence – the first offence occurred in Tennant Creek on 31 May of this year and while he's on bail for that offence, the second offence occurred on 7 June '02 at Alice Springs. In each case, the defendant purloined a valuable vehicle and caused considerable damage to it in the case of the first offence and destroyed it altogether in the case of the second offence.
>
> The defendant took the first motor vehicle from Adelaide. The Northern Territory has jurisdiction in the matter because the charge relates to his continuing unlawful use of the motor vehicle in the Northern Territory; the vehicle originally stolen from the Adelaide

> from the Adelaide suburb. The damage to the vehicle took place in the Northern Territory; the defendant hit a kangaroo. He had a knife in his pocket. He had no licence to drive the motor vehicle.
>
> He was brought on arrest to Alice Springs and given bail. Accommodation was found for him at the Anglicare Lodge. He then stole another motor vehicle from the car park of the lodge, drove it up the Tanami Highway. He drove it off the road into the bush. Under circumstances which are not relevant for present purposes the vehicle caught fire and was destroyed."

[4] With respect to the first set of offences, the appellant was sentenced to an aggregate sentence of eight months imprisonment.

[5] With respect to the second set of offences the appellant was sentenced to 12 months imprisonment cumulative on the eight months imprisonment a total sentence of 20 months imprisonment to commence on 8 June 2002 suspended after he has served three months from that date, upon the condition that he be of good behaviour for two years from the date of his release.

[6] Mr Goldflam, counsel for the appellant, quite fairly concedes that the sentence of three months actual imprisonment was a merciful disposition. The essence of the appeal relates to the length of the head sentence in view of the learned stipendiary magistrate's finding that he was satisfied at the time of the offences the defendant was "suffering from a bout of paranoid schizophrenia".

[7] It is the submission on behalf of the appellant that the head sentence of 21 months is excessively long for a person suffering a mental illness. It was

conceded that it would be an appropriate sentence for a person not suffering from a mental illness.

[8] The grounds of appeal are as follows:

> "1. The Learned Magistrate failed to have regard, or proper regard to a relevant consideration, namely the appellant's personal circumstances, and in particular his mental state, in imposing the total effective sentence.
>
> 2. The Learned Magistrate failed to have regard, or proper regard, to the principle of totality."

I deal with each of these.

Ground 1: The Learned Magistrate failed to have regard, or proper regard to a relevant consideration, namely the appellant's personal circumstances, and in particular his mental state, in imposing the total effective sentence.

[9] Counsel for the appellant, Mr Goldflam, referred to the provisions of s 40(3) of the Sentencing Act which provides as follows:

> "A court shall not impose a suspended sentence of imprisonment unless the sentence of imprisonment, if unsuspended, would be appropriate in the circumstances having regard to this Act."

[10] In the submission on behalf of the appellant, the learned stipendiary magistrate fixed a head sentence relative to the objective seriousness of the offence and without having regard to the appellant's mental state as a relevant circumstance. I agree with the principle submitted by Mr Goldflam that the head sentence imposed should take into account the objective seriousness of the offence and the relevant circumstances of the appellant. I

rely on the authority referred to (*Dinsdale v The Queen* (1999) 202 CLR 321 Kirby J at 346). See also *Tramontano v The Queen* [2002] NTCCA 4 delivered 17 May 2002 Riley J at par [56].

[11] From a reading of the learned stipendiary magistrate's reasons for sentence it would appear from the way he has expressed himself that he fixed a head sentence relative to the seriousness of the offending and then suspended all but three months of the sentence on the basis of the defendant's mental condition. I set out the balance of his Worship's reasons for sentence as follows (tp 24 – 25):

> "Objectively, a serious matter, the first offence in my view warrants a sentence of 8 months imprisonment – the first group of offences. The second group of offences committed while he was on bail for the first, warrants a sentence of 12 months imprisonment. These are the sentences which will be imposed. The question is whether to suspend the whole or any part of those sentences. The defendant has prior convictions but nothing like the present type of offending.
>
> They include urinating in a public place twice, resisting the police twice, drink driving three times, dangerous driving and driving while disqualified once each. No discretionary guidelines are laid down in the Sentencing Act as to whether or not to suspend a sentence. The court can do so if it thinks it desirable in the circumstances. Here, the circumstances urged upon me to suspend the whole concentrated upon the defendant's mental condition at the time of the commission of the offences.
>
> I am satisfied that the defendant was, at the time of the offences, suffering from a bout of paranoid schizophrenia. By his plea, while asserting that he had diminished responsibility for his actions, he was nevertheless able to exert his will had he chosen to do so and not to have committed the offences. That much is implicit in the plea of guilty. However, I agree that his capacity to refrain from doing what he did was diminished to a very great extent from the psychosis from which he was suffering.
>
> It appears that he for a long time suffered from the illness. The illness is capable of being controlled by appropriate medication, alas

> as with so many sufferers from mental illness, he did not believe himself to be so suffering and so he ceased his medication. That brought upon the crisis of mental illness which contributed to his offending. In these circumstances I am prepared to suspend the sentences after he has served, what is in my view, the bottom line minimum period of actual incarceration which I believe to be 3 months in this case.
>
> Of that 3 months, he has been in custody now since 8 June and his sentence is to commence from that date. The defendant would be well advised to think very carefully before declining again to take appropriate medication for his condition. He must know by now that to do so would lead to a breakdown in his thought processes and an inevitable lead in to another psychotic episode. That in turn, could lead to the commission of further offences and possibly to the revocation of his suspended sentence.
>
> Speaking for myself, I would place less emphasis next time around if the offending was triggered by a psychosis induced by failure to take appropriate mediation. …"

[12] I agree that it is not the correct approach to fix the head sentence solely on the basis of the seriousness of the offending and without regard to the appellant's personal circumstances. However, I am not able to conclude that the way in which the learned stipendiary magistrate approached the sentencing exercise resulted in a head sentence that was manifestly excessive, taking into account the objective seriousness of the offence and the appellant's personal circumstances, which included the fact he was suffering from a "bout of paranoid schizophrenia".

[13] A total reading of the transcript of the proceedings before the learned stipendiary magistrate reveals that there were extensive submissions as to the appellant's mental condition. The learned stipendiary magistrate said during the course of submissions (tp 6):

> "I'm quite happy to accept that he did what he did, at least in part, influenced by the mental illness from which he was suffering."

[14] The learned stipendiary magistrate had presented to him a number of reports concerning the appellant's mental condition. There was a report from psychiatrist Dr Marcus Tabart, dated 24 June 2002 (Exhibit P4) a report from the Guardianship Board of South Australia dated 2 September 1999 (Exhibit P5), a report from the Queen Elizabeth Hospital and Health Service dated 3 July 2002 (Exhibit P3), a clinical summary from the Royal Adelaide Hospital psychiatry unit dated 7 September 1999 (Exhibit P1), a discharge summary from the Glenside Hospital, Brentwood dated 30 July 1999 (Exhibit P2).

[15] It was on the basis of all these reports that the learned stipendiary magistrate made a finding that at the time of the offending the appellant was "suffering a bout of paranoid schizophrenia". It was obviously a matter very much in the mind of the learned stipendiary magistrate through the whole sentencing process even though his Worship did not make specific reference to it until after he had given an indication of what the head sentence would be. His Worship's reasons could have been better expressed, but I am not persuaded that the learned stipendiary magistrate did in fact fail to take into account the circumstances of the appellant in arriving at a head sentence.

[16] I agree with the submissions on behalf of the respondent as to the general principles applicable to appeals against sentence.

> "The onus is upon the appellant to show that the sentencing discretion of the learned magistrate was improperly exercised. See *Crannsen v. The King* (1936) 55 CLR 509 at 519
>
> An Appellate Court can only interfere if there is some reason for regarding the discretion conferred upon the magistrate was improperly exercised and the magistrate fell into error. See *Mason v. Pryce* (1988) 34 A Crim R 1
>
> The court can only interfere if it is convinced that the sentence was manifestly excessive. See *Raggett, Douglas and Miller v R* (1990) 50 A Crim R 41 at 46"

[17] Counsel for the respondent has usefully set out in his written submission the maximum penalties for the various offences.

[18] In summary with respect to the offences on file 20208511 the maximum penalty on Count 1 was seven years imprisonment or being found guilty summarily two years imprisonment.

[19] With respect to file 20208921 Count 1 and 2 a maximum of seven years imprisonment or two years imprisonment on being found guilty summarily. This is a jurisdictional limit only and the maximum penalty of seven years imprisonment is still applicable (*Kumantjara v Harris* (1992) 109 FLR 400 and *Cooper v O'Brien* (1992) 111 FLR 55, Angel J at p 59 – 61.

[20] The learned stipendiary magistrate did not make specific reference to the aspect of specific and general deterrence in his reasons for sentence, however, it was the subject of submissions to him (tp 18 – 19). It was also the subject of submissions on this appeal.

[21] On a reading of the reasons for sentence general and specific deterrence were matters to which his Worship had regard, although he has not used

those exact terms. I consider the learned stipendiary magistrate was entitled to give some weight to these two aspects of the sentencing process.

[22] The issue of the weight to be given to the aspect of general deterrence in respect of an accused suffering a mental abnormality was considered by the Northern Territory Court of Criminal Appeal in *McKay v The Queen* [2001] NTCCA 3, delivered on 20 June 2001, par 21 to par 24 inclusive:

> "**Ground 3 – General deterrence**
>
> [21] The nub of this submission as argued was that the learned Sentencing Judge gave too much weight to general deterrence when the appellant had a mental abnormality which made him an inappropriate medium for making him an example to others. Reliance was placed upon *R v Anderson* [1981] VR 155 at 160 where the Victorian Full Court applied a passage from a previously unreported Full Court decision in *R v Mooney* where it was said that:
>
> > General deterrence should often be given very little weight in the case of an offender suffering from a mental disorder or an abnormality because such an offender is not an appropriate medium for making an example to others.
>
> [22] In *Waye v R* [2000] NTCCA 5, this Court referred to the case of *R v Tsiaras* [1996] 1 VR 398 at 400 where the Victorian Court of Appeal set out a number of propositions as to the significance of finding that an offender is suffering from a serious psychiatric illness. The third such proposition is:
>
> > ...a prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, *whether or not the illness played a part in the commission of the offence*. (emphasis added).
>
> [23] The Court of Criminal Appeal expressed reservations about adopting the entirety of this proposition, and in particular the words emphasised above. The Court observed at paragraphs [19] to [21] of their joint judgment:
>
> > [19] It seems to us that in each of the cases referred to by their Honours (*R v Anderson* [1981] VR 155 and *R v Man* (1990) 50 A Crim R 79) the offender committed the offence whilst under the influence of

the mental illness (see also: *Thiele* (1986) 19 A Crim R 105 and *Payne* (1984) 12 A Crim R 226). Further, in the later case of *R v Yaldiz* (1998) 2 VR 376, the Victorian Court of Appeal would seem to have withdrawn from the absolute terms of the third proposition in *Tsiaras, supra.* In that case, Batt JA held at p381:

> ...general deterrence is not eliminated but still operates, sensibly moderated, in the case of an offender suffering from a mental disorder or severe intellectual handicap.

[20] His Honour also emphasised the absence of any evidence or submissions in the case before him 'to the effect that the illness contributed to the offence or that the offence was committed under its influence' (p380). Winneke ACJ (with whom Hampel AJA agreed) held at p383:

> Whether in the particular case a psychiatric condition should reduce or eliminate general deterrence as an appropriate purpose of punishment will depend upon the nature and severity of its symptoms and its effect upon the mental capacity of the accused.

[21] It is clear from the context of these remarks that His Honour was referring to the effect of an accused's mental capacity at the time of the offending in the sense of whether the accused's psychiatric condition had obscured the mental intent to commit the crime with which he had been charged.

[24] There was no evidence that the appellant was, at the time of the offending or at any subsequent time, suffering from a mental disorder, but it was put that he suffered from a mental abnormality. The medical and other reports tendered at the sentencing hearing demonstrated that the appellant did not suffer from any psychiatric illness, was cognitively intact and of normal intelligence, but had a significant personality problem. This does not amount to a mental abnormality of the kind warranting a more lenient sentence. There was no evidence that his personality problem reduced his moral culpability for the offending. There was no reason why the appellant's personality problems should be viewed as inappropriate media for deterrent sentences. Further, as the learned

> Sentencing Judge rightly observed, there was no evidence that the appellant's personality disorder was causally connected to the offending."

[23] The appeal before this Court is distinguishable from the Court of Appeal decision in *McKay v The Queen* (supra) in that in the appeal before this Court there was evidence presented and a finding made by the learned stipendiary magistrate that at the time of the offences the appellant was "suffering from a bout of paranoid schizophrenia". However, the principles established in *McKay v The Queen* (supra) are applicable, in that general deterrence is not eliminated as a sentencing factor although the weight which is to be given to it must be sensibly moderated and depends upon the nature and severity of its symptoms and its effects upon the capacity of the accused.

[24] In this matter, the learned stipendiary magistrate found that the appellant's capacity to refrain from doing what he did was diminished by his mental illness, however, he was nevertheless able to exert his will had he chosen to do so and not have committed the offence.

[25] I do not consider the learned stipendiary magistrate has been shown to be in error in his assessment of the effect of the mental illness upon the commission of the offence. I consider he did extend a leniency in the imposition of the head sentence because of the lesser weight that could be attributable to the aspect of general and specific deterrence.

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

Ground 2: The Learned Magistrate failed to have regard, or proper regard, to the principle of totality.

[27] Counsel for the appellant submits that a submission had been made to the learned stipendiary magistrate to the effect that the appellant was suffering from the mental illness throughout the period, in effect rendering his offending part of a continuing course of conduct. It was further submitted that in these circumstances the accumulation of sentences to an aggregate total head sentence of twenty months offended against the principle of totality, as being incommensurate with the appellant's criminal conduct (*Mill v The Queen* (1988) 166 CLR 59 at 62 – 63):

> "The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, *Principles of Sentencing,* 2nd ed. (1979), pp. 56 – 57, as follows (omitting references):
>
> > "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong['];
> > 'When … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."
>
> See also Ruby, *Sentencing*, 3rd ed. (1987), pp. 38 – 41. Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent

> or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."

This principle was followed by the Northern Territory Court of Criminal Appeal in *Waye v R* [2000] NTCCA 5 delivered 20 September 2000.

[28] In his reasons for sentence the learned stipendiary magistrate does not make a specific reference to the principle of totality. However, looking at the total head sentence of 20 months imprisonment, I consider it is implicit that regard was given to this principle.

[29] I am not able to find that the learned stipendiary magistrate failed to give consideration to the principle of totality or that there has been any error demonstrated. I am not persuaded the head sentence of 20 months imprisonment is manifestly excessive.

[30] For these reasons the appeal is dismissed.

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