Kuiper v Brennan [2006] NTSC 54

PARTIES:	KUIPER, Mark Jason
	v
	BRENNAN, Michael David
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 10 of 2006 (20512508)
DELIVERED:	5 July 2006
HEARING DATES:	4 July 2006
JUDGMENT OF:	RILEY J
APPEAL FROM:	Court of Summary Jurisdiction sentence, Mr G. Cavanagh SM, 3 March 2006

REPRESENTATION:

Counsel:

Appellant:	P Saraf
Respondent:	C Heske

Solicitors:

Appellant:	North 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

Kuiper v Brennan [2006] NTSC 54
No JA 10 of 2006 (20512508)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

KUIPER, Mark Jason
Appellant

AND:

BRENNAN, Michael David
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 5 July 2006)

[1] On 3 March 2006 the appellant pleaded guilty to the offence of unlawfully entering a building in Winnellie with intent to commit a crime therein, namely stealing, contrary to s 213 of the Criminal Code. The maximum penalty for the offence is imprisonment for seven years. He was sentenced to imprisonment for a period of six months suspended after he had served two months.

[2] The offending occurred on 8 June 2002 when the appellant went to the business premises at Winnellie. He gained entry to the premises through the back doors and, when inside, searched through drawers looking for money. He then emptied the contents of a fire extinguisher within the office causing damage to the carpets and furniture. He avoided detection for some time but was subsequently identified through DNA comparisons. Police first spoke with him in May 2005.

[3] On 25 May 2005 he was arrested and taken to the Darwin Police Station where he participated in an electronically recorded interview. In that interview he was asked why he had unlawfully entered the premises and he responded: "I was desperate". He was asked why he caused criminal damage and he responded: "It was the wrong thing". The value of the damage done was $12,000. The appellant was not alone at the time of the offending. Notwithstanding his admissions to police in the record of interview the appellant did not plead guilty until the morning of the trial. It had previously been indicated to the court that the admissions in the interview would be the subject of challenge.

[4] Counsel appearing on behalf of the appellant acknowledged to the learned sentencing magistrate that his client had a history of offending by way of unlawful entry of premises. His last conviction for such offending was in 1997 when he received a significant period of imprisonment. He was sentenced to imprisonment for a period of two years with a non-parole period of 15 months. It was put to the court that on that occasion he had

determined not to reoffend in the same way and he had stayed out of trouble of this kind from the date of his release from prison until June 2002. In June 2002 he had been approached by a close friend who informed him that "he was in debt to some serious people and he needed money fast". The friend asked the appellant to assist "because of his expertise" and he agreed to do so.

[5] In further submissions on behalf of the appellant the learned sentencing magistrate was told that the appellant was 30 years of age and the father of three children, the oldest of whom was 14 years of age. The court was informed of the tragic circumstances surrounding the death of the appellant's long-term partner who suffered a brain tumour which was first diagnosed in September 2004 and led to her death some months later. The appellant was her primary carer during that period and dedicated himself to that cause. He travelled to Adelaide with his partner and the youngest child and stayed for four months whilst she underwent chemotherapy and radiotherapy. It seems the older children remained in Darwin. After her death he became the carer for the three children although he was assisted in that regard by the parents of his deceased partner.

[6] Having heard those submissions and taken time to consider the matter his Honour convicted the appellant and sentenced him to imprisonment for a period of six months to be suspended, on condition, after he had served two months. The appellant appealed against that sentence on nine grounds, namely:

(1) The unsuspended sentence of imprisonment was in all the circumstances manifestly excessive;

(2) The learned sentencing magistrate erred in placing too much weight on personal and general deterrence and punishment;

(3) The learned sentencing magistrate erred in the view that only an actual period of imprisonment would serve the purposes of deterrence (general and personal) and punishment;

(4) The learned magistrate erred in placing no weight on the gap in relevant offending;

(5) The learned magistrate erred in placing insufficient weight on the delay in sentencing;

(6) The learned sentencing magistrate erred in placing too much weight on the appellant's prior criminal record;

(7) The learned sentencing magistrate erred in placing insufficient weight on the appellant's successful rehabilitation and considerations of mercy;

(8) The learned magistrate erred in failing to consider the hardship a sentence of actual imprisonment would cause the appellant's family;

(9) The learned sentencing magistrate erred in his consideration of the weight to be placed upon the appellant's plea of guilty.

[7] During the hearing of the appeal the appellant obtained leave to add a further ground, namely:

(10) The learned sentencing magistrate erred in not giving adequate consideration to alternative dispositions to a term of actual imprisonment.

[8] The principal ground of appeal relied upon was that the sentence was manifestly excessive (ground 1). The other grounds of appeal were each argued in support of that contention and it was submitted that each gave rise to "a manifest error in the sentencing process and a miscarriage of the broad discretion the learned magistrate had in sentencing the appellant". It was acknowledged that the sentence of imprisonment imposed was warranted in the circumstances but it was argued that the sentence ought to have been wholly suspended and that the learned magistrate erred in not so doing.

Grounds 2 and 3 - Deterrence

[9] These grounds may be dealt with together. It was submitted that his Honour placed too much weight on personal and general deterrence in determining an appropriate sentence. Counsel submitted that his Honour "erred in his assessment that only an actual sentence of imprisonment would result in personal and public deterrence". With respect to counsel, reference to the sentencing remarks does not support the submission. The words relied upon by the appellant to found the submission make no mention of the requirement that an actual period of imprisonment be served for the purposes of deterrence. His Honour said:

> "His interests are not the only interests that I have to take into account. The principles and guidelines of the Sentencing Act have me taking into (account) other matters, public deterrence, personal deterrence, and the need to send a message that this kind of offending will not, and especially repeat offending, just won't be tolerated and will be punished."

Those remarks are entirely unexceptional. It is clear that a suspended sentence of imprisonment may play a role in deterring others: *DPP (Commonwealth) v Carter* (1997) 91 A Crim R 222 at 229. The sentencing remarks of his Honour do not suggest otherwise. Nowhere does his Honour suggest that he has excluded a fully suspended sentence from consideration on the basis that such a sentence would not act as a deterrent.

[10] The information available to the learned sentencing magistrate was that the earlier sentence of imprisonment had a deterrent effect upon the appellant. It had led to his determination not to reoffend in the same way and the absence of such offending for the period to June 2002. There was a sound basis for his Honour regarding a further short period of actual imprisonment as of positive rehabilitative effect. He observed:

> "In doing the best I can for Mr Kuiper and taking into account all the matters forcibly put to me by Mr McGorey and the other matters that I have enunciated, I do feel a gaol sentence is appropriate and some of it to be served."

[11] In relation to general deterrence his Honour noted that "these kind of burglaries on commercial premises in Winnellie are rife, rampant, prevalent". The prevalence of an offence is something that needs to be taken into account in the sentencing process, s 5(2)(g) of the Sentencing Act. The learned sentencing magistrate did not err in according weight to that consideration.

Grounds 4 and 6 – The gap in offending

[12] The appellant complained that the learned sentencing magistrate failed to give sufficient weight to the gap in offending for offences of unlawful entry. He also complained that too much weight was placed upon the criminal history of the appellant.

[13] The appellant had previously offended in this way in 1997 and then had not done so again until 2002. The prior criminal history of the appellant was before the Court and by reference to that I have counted some 17 convictions for stealing and 23 for unlawful entry between 9 December 1986 and 6 June 1997. In 1997 he was sentenced to imprisonment for two years and six months with a non-parole period of 15 months. As the appellant correctly submits, that was his last offending for an offence of unlawful entry prior to the offence the subject of these proceedings. However it is not correct to suggest there was a gap in offending from 1997 until 2006. He was before the courts for traffic offences, disorderly behaviour, resist police, indecent language and using objectionable words between the time of that sentence and the time that he came before the Court of Summary Jurisdiction. He was before the court in each of 1999, 2001, 2002, 2003, 2004 and 2005.

[14] In 2002 the appellant again offended in the same way as he had in the past. He did so despite the warnings he had been given and the increasingly heavy sentences that had been imposed upon him. He did so for reasons which do

not provide any adequate explanation for his conduct. His involvement demonstrated a continuing attitude of disobedience to the law and disregard for the rights of others. The criminal history of the appellant was lamentable and something which obviously had to be taken into account.

[15] His Honour acknowledged that there was a gap in offending of this particular kind and that this was relevant to determining an appropriate sentence. He correctly observed:

> "And I also note in the last few years he certainly hasn't been in any further trouble for dishonesty or burglary. But he hasn't been entirely on the right side of the law. He's been a regular customer in these courts over the last two or three years for unrelated matters to do with burglary."

[16] His Honour went on to say:

> "The difficulty … and even with all the matters put to me by Mr McGorey, is that what do I do with someone who has kept out of trouble in terms of at least dishonesty, until 2006, a period of some at least four years or more since the commission of the offence. I do have to take it into account because it's relevant and significant."

[17] His Honour then said that he considered a gaol sentence to be appropriate and that some of it had to be served. However he observed that because of the matters "subjective to him … and the fact that he has kept out of similar trouble the last three or four years, I am prepared to suspend a largish portion of (the sentence)."

[18] It is clear that his Honour gave due consideration to the relevant matter of the gap in offending and took that into account in determining an appropriate sentence.

Ground 5 – Delay in sentencing

[19] In a separate submission it was contended that his Honour erred in placing insufficient weight on the delay in sentencing. The offending occurred in June 2002 and the appellant was not sentenced until March 2006. The reasons for the delay were not fully developed before his Honour and neither was the impact of that delay upon the appellant addressed as a separate submission. Some of the delay resulted from the fact that the appellant was not implicated until May 2005. Thereafter further delay resulted from the illness of the partner of the appellant.

[20] On appeal it was submitted that his Honour should have taken into account the significant changes that occurred in the life of the appellant during that period and the lack of relevant offending during the period. His Honour expressly took into account the significant events that occurred in the intervening period, especially the death of the partner of the appellant and the impact that had upon his life. As to the submission that there was a lack of "relevant offending" in the period, the submission ignores the offending that did occur. There was further offending albeit not for offences of dishonesty. Nevertheless the appellant continued to offend throughout the period and that offending reflected an ongoing attitude of disobedience to

the law and was a matter to be considered in determining an appropriate sentence.

[21] His Honour observed:

> "It is always difficult in my experience in sentencing defendants several years after the crime has been committed. I have no doubt that Mr Kuiper is an experienced, indeed professional, burglar. If he had been caught very soon after the commission of the offence that he has pleaded guilty to today, (he) would have received a significant gaol sentence.
>
> …
>
> I have got no doubt that, as I say, had he been caught and been sentenced in the little while after the commission of that offence he would be facing a gaol term in my view of around 12 months.
>
> …
>
> I do take into account that his additional traumas by way of his family problems and the death of the mother of his children would have also impacted on him and for the good.
>
> …
>
> In doing the best I can for Mr Kuiper and taking into account all the matters forcibly put to me by Mr McGorey and the other matters that I have enunciated, I do feel a gaol sentence is appropriate and some of it to be served. Because of the matters (that) are subjective to him though, and the fact that he has kept out of similar trouble for the last three or four years, I am going to suspend a largish portion of it."

[22] In my view his Honour did not fall into error in dealing with the delay in sentencing.

Ground 7 – Rehabilitation and considerations of mercy

[23] It was submitted that his Honour fell into error by placing too much emphasis on the appellant's criminal history and insufficient emphasis on his rehabilitation. In this regard reference was made to observations by his Honour that the appellant had been to gaol on more than one occasion for this kind of offending and that:

> "You've just got too many convictions of burglary and you should just realise this, you get caught again and again and again, you will be going to gaol again and again and again, and almost certainly for longer and longer."

Those remarks are unexceptional. Indeed it would be surprising if something along those lines was not said to the appellant at the time of sentencing.

[24] Again the appellant emphasised the fact that there had been no offending for offences of dishonesty for several years but ignored the reality that the appellant continued to offend throughout the same period.

[25] There was no merit in this submission.

Ground 8 – Hardship

[26] The submissions made on behalf of the appellant informed the learned magistrate that the appellant was wishing to "focus" on his children and it was submitted that "if he is removed from his children, then there is no-one to care for them, well there is his in-laws who do provide support, but he

very much wishes to be in their life …". The submissions put to his Honour did not go beyond that point. He had been a carer for his three children during part of the period of the illness suffered by his wife. His parents-in-law were also involved. His Honour was not informed of the arrangements that had prevailed in relation to the children in the period leading up to sentence, nor what was to occur in the event of him being imprisoned. It was not submitted that his children would suffer any exceptional hardship in the circumstances.

[27] The hardship caused to an offender's family is not normally a circumstance which the sentencer must take into account. However there are exceptions to this policy including where the particular circumstances of the family are such that the degree of hardship is exceptional and considerably more severe than the deprivation suffered by a family in normal circumstances as a result of imprisonment. Such circumstances include where children may be deprived of parental care by virtue of imprisonment: *R v Nagas* (1995) 5 NTLR 45. In *Mawson v Nayda* (1995) 5 NTLR 56 Kearney J observed that for the exception to the usual rule to be established it is necessary for the defendant to produce cogent evidence to the sentencing court to establish that his imprisonment would impose exceptional hardship upon his family or that his imprisonment would effectively deprive the children of parental care. Although the imprisonment of the appellant will necessarily deprive the children of parental care from the appellant, the circumstances of the children were not addressed and there was no basis for his Honour to treat

hardship to the family as exceptional. This was not a case where it was submitted that the imprisonment would result in the children being left to fend for themselves without supervision or support: *Boyle* (1987) 34 A Crim R 202 at 205. Other sources of care such as from the parents-in-law of the appellant or from those who cared for the older children whilst the appellant was interstate were not addressed.

Ground 9 – Plea of guilty

[28] In sentencing the appellant the learned sentencing magistrate observed that the appellant pleaded guilty "at the last minute before a hearing and that is only after being found out by way of DNA". He acknowledged that the appellant had been co-operative when interviewed by the police, however his plea did not come until just before the hearing was due to commence. His Honour observed that he would get credit for "that last minute plea of guilty".

[29] The appellant complains that the learned sentencing magistrate failed to have regard to the fact that the last minute plea of guilty came at the same time that five other charges were withdrawn by the Crown. It was submitted that this was not a last minute plea but a plea at the first reasonably available opportunity. Those matters should have been taken into account in determining whether or not to wholly suspend the sentence of imprisonment.

[30] The learned magistrate dealt with the plea by stating:

> "I am told that he was co-operative when interviewed by the police with respect to this matter, by Mr Smith. However, I note that this matter was, no doubt on his instructions, was set for hearing today. So there has been a last minute plea of guilty. For all of that he does get, of course, due credit for that last minute plea of guilty."

[31] There was no explanation for the withdrawal of the other charges placed before his Honour but counsel for the appellant at the time frankly acknowledged that:

> "It is not an early plea, but it is a plea of guilt. There was the co-operation with police and he did make admissions to this matter. He has accepted the offence of entering a building with intent to steal is a serious one and he has a bad record on that front and that perhaps a gaol disposition is required in this matter."

The observations of the learned magistrate were in accordance with the information placed before him and I do not see any error on his behalf.

Ground 10 – Alternative dispositions

[32] The appellant complained that his Honour failed to give adequate consideration to alternative dispositions to a term of actual imprisonment. The submission of the appellant was that his Honour failed to adequately consider the imposition of a home detention order.

[33] A review of the transcript reveals that the issue of a home detention order was not raised with his Honour, however this does not mean that all sentencing options were not considered by him. The learned magistrate is a very experienced magistrate and is well aware of the sentencing options which are open to him. He delivered reasons ex tempore and it should not

be inferred that merely because he failed to specifically mention a particular sentencing option other than immediate imprisonment that he did not consider all options: *Blacksmith v Materna* (JA 21 and 22 of 1996 per Mildren J); *Murrungun v Peach* (JA 36 of 1997 per Bailey J); *Napper v Samuels* (1972) 4 SASR 63 at 74.

[34] In this matter the learned sentencing magistrate considered his starting point to be a period of actual imprisonment. In the passages set out at par [21] above his Honour indicated that had the appellant been dealt with shortly after the offending he would have received a significant gaol sentence, possibly in the order of 12 months. His Honour went on to say that in light of the mitigating factors placed before him on behalf of the appellant and "doing the best I can" for the appellant a gaol sentence with some time to serve was appropriate. He observed that in light of the subjective matters "I am going to suspend a largish portion of it". In those circumstances he imposed an actual period of imprisonment. His Honour identified his reasons for imposing an actual, albeit short, period of imprisonment. He has not been shown to be in error in so doing.

Ground 1 – Manifest excess

[35] The general principles applicable to an appeal against sentence on the ground that it is manifestly excessive are well settled. It is fundamental that the exercise of the sentencing discretion is not to be disturbed on appeal unless error is shown. The presumption is that there is no error. An

appellate court does not interfere with a sentence imposed merely because it is of the view that it would have imposed a lesser sentence. It interferes only if it is 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, although the sentence itself may be so excessive as to manifest such an error. In relying upon this ground it is incumbent upon the appellant to show that the sentence is not just excessive but manifestly so. The sentence must be clearly and obviously and not just arguably excessive: see *Liddy v R* [2005] NTCCA 8 at [15].

[36] The sentence is not, on its face, unreasonable. A sentence of imprisonment was obviously appropriate. The appellant does not contend otherwise. His complaint is with the failure to wholly suspend the sentence.

[37] The appellant in this case committed a serious offence. He had a lengthy criminal history and had been given the benefit of many different types of disposition including conviction without penalty, probation, juvenile detention, community service, suspended sentences, short periods of imprisonment and lengthier periods of imprisonment. Notwithstanding his history of offending and the penalties imposed he chose to offend again on this occasion. His involvement in the offending came as a result of his perceived criminal "expertise". His involvement was not the result of any compelling need but, rather, simply to assist a friend. Given his history and the serious nature of the offending for which he was before the court the

penalty imposed by the learned sentencing magistrate was moderate. No doubt that moderation was a consequence of the personal circumstances in which the appellant found himself.

[38] In my view the sentence could not be said to be manifestly excessive.

[39] The appeal is dismissed.

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