Ryan v Malogorski [2012] NTSC 55

PARTIES:	RYAN, Anastasia
	v
	MALOGORSKI, Mark
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 38 of 2011 (21115656)
DELIVERED:	8 August 2012
HEARING DATES:	17 May 2012
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Court of Summary Jurisdiction

CATCHWORDS:

APPEAL – CRIMINAL LAW – imprisonment is punishment of last resort – manifestly excessive – appeal allowed – re-sentence

Criminal Code (NT) s 210, s 251,
Misuse of Drugs Act (NT)
Sentencing Act (NT) s 6A, s 7, s 40,
Youth Justice Act (NT)

Amado v The Queen [2011] NSWCCA 197; *Bukulaptji v The Queen* (2009) 24 NTLR 210; *Cranson v The King* (1936) 55 CLR 509; *Dinsdale v The Queen* (2000) 202 CLR 321; *Forster v Cornford* [2010] NTSC 58; *Gumurdul v Reinke* (2006) 161 A Crim R 87; *Joran v Westphal* [2010] NT(SC) 55; *Parker v The Queen* (1992) 28 NSWLR 282; *R v Mills* [1998] 4 VR 235; *R v*

Palliaer (1983) 35 SASR 569; *R v Serra* (1997) 92 A Crim R 511; *Salmon v Chute* (1994) 70 A Crim R 536; *Turner v Trenerry* [1997] 1 NTSC 21; referred to

REPRESENTATION:

Counsel:

Appellant:	Mr Pyne
Respondent:	Ms McNamee

Solicitors:

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

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

Ryan v Malogorski [2012] NTSC 55
No. JA 38 of 2011 (21115656)

BETWEEN:

ANASTASIA RYAN
Appellant

AND:

MARK MALOGORSKI
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 8 August 2012)

Introduction

[1] This is an appeal against a sentence imposed by the Court of Summary Jurisdiction on 20 November 2011.

[2] The appellant pleaded guilty to two counts involving offences that occurred on 17 May 2011 at a store in the Casuarina Shopping Centre.

[3] The first count was that the appellant stole clothing valued at $99.90 from the store contrary to s 210 of the *Criminal Code*. The second count was that

the appellant unlawfully damaged clothing, the property of the store, valued at $496.86.[1]

[4] The learned Magistrate convicted and sentenced the appellant to an aggregate sentence of 14 days imprisonment, to be suspended forthwith. A 12 month operational period was fixed. It was ordered the conditions be the same as those on a good behaviour bond previously imposed in relation to a possess cannabis charge. The Court file also reveals a restitution order was made in the sum of $260; the co-offender having been ordered to pay restitution in the sum of $199.[2]

The Facts of the Offending and the Subjective Circumstances of the Appellant

[5] The appellant was in the company of family, friends and a co-offender. She walked into the store, pushing a trolley. There were two toddlers in the trolley she was pushing. She walked behind the co-offender. In the store the appellant stood and watched while the co-offender selected various items of clothing, removed security tags and in the process of removing security tags damaged most of the items of clothing. The co-offender placed the clothing on the handle of the trolley. The appellant left the store and went back to family and friends. The incident was captured on CCTV. Police attended. Not all of the items were recovered. Those goods that were recovered had been damaged, necessitating destruction. The appellant was

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1 *Criminal Code*, s 251.
2 Transcript, 29 November 2011 at 10.

issued with a Notice to Appear. The appellant did not participate in a record of interview with police.

[6] The Court was told the appellant was twenty two years of age. The previous convictions recorded against the appellant were primarily for traffic offences for which she had received fines. In one instance in 2007 she was disqualified from driving. There were no previous convictions for dishonesty. At the time of this offending (17 May 2011), she was on a good behaviour bond for one count of possess cannabis in a public place. That bond was imposed on 23 March 2011 for a two year period. The recognisance was in the sum of $500. The breach of the bond was admitted and found proven. No action was taken by the learned Magistrate on the bond.

[7] In submissions on the appellant's behalf it was put the offending was opportunistic; the appellant did not go to the shopping centre with any intention to steal; the offending came about when the co-offender began removing items; and the appellant was acting as a look out. None of these matters were challenged and appear to have been largely accepted by the Court.

[8] The Court was told the appellant was a single mother with a young child and she was also caring for a young nephew. She had previously worked in Nhulunbuy in a hostel and in Melbourne in a child care agency. Although she had worked most of her adult life, she was unemployed at that time. The

appellant's intention not to re-offend and her insight into the problems further offending would cause her employment prospects were also the subject of submissions. The Court was told the co-offender was a youth who had been dealt with in the Youth Justice Court.

General Principles Applicable

[9] On an appeal of this type, the onus lies on the appellant to demonstrate error on the part of the learned Magistrate. The sentence is presumed to be correct. The Court does not interfere with a sentence merely because it is of the view it would have imposed a different sentence. It interferes only if it is demonstrated that the learned sentencing Magistrate was in error, by acting on a wrong principle, or in misunderstanding or in wrongly assessing a salient feature of the evidence. The error may appear in what the learned Magistrate said in the proceedings, or the sentence itself may be so excessive, in the circumstances, as to manifest error.[3]

Ground 1 - That the learned Stipendiary Magistrate failed to consider properly the principle that imprisonment is a punishment of last resort

[10] The respondent submits the principle of imprisonment as a last resort is implied or "semi encapsulated"[4] in the *Sentencing Act* (NT). The Northern Territory case law supports the principle that imprisonment is a sanction of last resort, however the respondent submits the authorities are all directed to cases where there has been a term of actual imprisonment imposed, not a suspended term as here.

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3 *Cranssen v The King* (1936) 55 CLR 509; *Salmon v Chute* (1994) 70 A Crim R 536.
4 Respondent's Written Submissions para 6.

[11] The principle that imprisonment should be imposed as a last resort is a well entrenched principle,[5] notwithstanding it is not specifically stated in the *Sentencing Act*. In *Turner v Trenerry*[6] Kearney J confirmed the principle that the imposition of an actual term of imprisonment "is rightly termed a last resort". His Honour there referred to the ascending order of dispositions in s 7 of the *Sentencing Act* where imprisonment appears as the last of the specific dispositions. His Honour also referred to the common law on sentencing to the extent that it is not affected by the *Sentencing Act*. This approach has been confirmed on other occasions.[7]

[12] I adopt the views expressed in a number of decisions that the structure of the *Sentencing Act*, and the common law on the point, (unless displaced by statute), supports the principle of imprisonment as a punishment of last resort. The content of the principle undoubtedly includes suspended sentences. As was made clear by Riley J (as he then was), in *Bukulaptji v The Queen*,[8] s 40 of the *Sentencing Act* permits a court to make an order suspending a sentence "where it is satisfied that it is desirable to do so in the circumstances". The Court is not however to impose a suspended sentence unless the sentence of imprisonment, if unsuspended, would be the appropriate sentence. The Court proceeds by determining what is a proper term of imprisonment to be imposed and then deciding whether it would be appropriate or inappropriate to suspend the term of imprisonment in whole

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5 *Gumurdul v Reinke* (2006) 161 A Crim R 87.
6 [1997] 1 NTSC 21 at [43].
7 eg see *Gumurdul v Reinke* (2006) 161 A Crim R 87.
8 (2009) 24 NTLR 210 at 217.

or in part.[9] This is the type of approach that was endorsed by Kirby J in *Dinsdale v The Queen*,[10] in the following terms:

> The starting point … is the need to recognise that two distinct steps are involved. The first is the primary determination that a sentence of imprisonment, and not some lesser sentence, is called for. The second is the determination that such term of imprisonment should be suspended for a period set by the court. The two steps should not be elided. Unless the first is taken, the second does not arise. It follows that imposition of a suspended term of imprisonment should not be imposed as a 'soft option' when the court with the responsibility of sentencing is 'not quite certain what to do'.

[13] I agree with the submission that the learned Magistrate needed to have arrived at the opinion that a custodial sentence was appropriate in all of the circumstances before he determined that it was to be served as a suspended sentence. A determination that a case calls for imprisonment is a serious determination.[11] A conclusion that imprisonment is the appropriate penalty requires an adequate explanation as to how such a determination was made.[12] Often the reason why imprisonment is imposed is self evident and the reasoning is not required to be disclosed in that manner. It is not self evident in this case.

[14] I agree also with the submission made on behalf of the respondent that it is not the law that a sentencing court needs to give reasons for not entertaining particular non-custodial options. It will largely depend on the individual

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9 Riley J in *Bukulaptji v The Queen* (above) at 217; see also *R v Palliaer* (1983) 35 SASR 569.
10 (2000) 202 CLR 321, 346.
11 *Sentencing Act* (NT), s 40(3).
12 *Amado v The Queen* [2011] NSWCCA 197 (2 September 2011].

circumstances of the case and whether it is an obvious case for imprisonment.

[15] If a custodial sentence is plainly just,[13] there is no automatic error in not disclosing the full reasoning process behind the disposition. Here however, it is not clear that imprisonment was plainly just or that no lesser alternative would have served the purposes of sentencing.

[16] I accept also the proposition that when sentencing youthful offenders, particularly first time offenders, the benchmark for crimes justifying a custodial sentence is higher.[14] In this case the appellant was 22 years old at the time of offending. As the respondent points out, she was an adult. In my view however her age means she is still a young person for sentencing purposes. I acknowledge she does not have the same protection as a person under 18 years of age being dealt with under the *Youth Justice Act*. Age is still however relevant. Although not a first offender, her previous matters were traffic matters and one count of possession in a public place against the *Misuse of Drugs Act*. There is no previous history of dishonesty.

[17] Consistent with the *Sentencing Act,* His Honour took account of the fact that this was offending committed in company.[15] Given the co-offender was a younger offender, His Honour commented in exchange with counsel that the

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13 *Amado v The Queen* [2011] NSWCCA 197 (2 September 2011], 71-7; *Parker v DPP* (1992) 28 NSWLR 282, 296-7.
14 *R v Mills* [1998] 4 VR 235, 241.
15 S 6A(a) *Sentencing Act*.

appellant had a '*supervising*' role,[16] although that comment was modified to either approving or encouraging the co-offender but no conclusion appears to have been drawn about that. The appellant conceded that being in company in these circumstances is an aggravating feature, however, it was submitted that the offence was not a particularly planned or organised operation. There was no suggestion the appellant instigated the offending or procured the co-offender's involvement, but clearly it was aggravated as the co-offender was a youth, although the age of the co-offender is not apparent. His Honour also noted that '*there is not a lot of money*' in relation to the charges and noted this was the appellant's first conviction for stealing.[17]

[18] The learned Magistrate did not highlight any particular feature of the offending in the reasons as to why a custodial sentence was warranted in this instance. To arrive at the conclusion a custodial sentence is warranted, the non-custodial dispositions under s 7 *Sentencing Act* would need to be excluded.[18]

[19] His Honour considered a fine inappropriate as the appellant was not at that time working and owed sums for previous traffic fines. His Honour found a bond was inappropriate as the appellant was in breach of a bond. His Honour was critical of what he perceived as a general sentencing approach taken in cases of this kind.

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16 T6, 29/11/2011.
17 T6, 29/11/2011.
18 *Joran v Wilson* (2006) NTSC 46 at [51]; *Turner v Trenerry* (1997) NTSC 21; *Gumurdul v Reinke* [2006] NTSC 27.

[20] His Honour reasoned:

> There seems to be some tradition that stealing from a shop is regarded less importantly by the courts. It is rare that you can do anything other than a slap on the hand and a small fine … It seems to me we have taken a wrong direction.

[21] His Honour appeared to accept by these remarks that imprisonment was not the usual disposition. A sentence outside of a generally accepted sentencing standard or range needs to be justified,[19] especially here as a term of imprisonment was ordered. His Honour's reasons for departing from the general approach were as follows:

> In relation to the file for stealing and unlawful damage of property, I have decided to take those things as an aggregate thing and whilst I wouldn't necessarily although sometimes I think it is appropriate that for shop stealing people should go to gaol. In this case I wouldn't have done you for that, but also when I take in an aggregate with the stealing and the unlawful damage it seems to me appropriate that a sentence of imprisonment is not inappropriate and what I propose to do is this. [His Honour then sentenced the appellant].

[22] In my view, with respect, the approach taken discloses error. It is not clear, either from the facts of offending or the circumstances of this particular appellant why His Honour considered that only imprisonment would suffice. It is the case there were two counts to be dealt with, being stealing and the criminal damage, but they were closely connected and effectively represent one course of conduct. In these cases general and specific deterrence are significant considerations, but it is important not to sentence beyond what is

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19 *Forster v Cornford* [2010] NT(SC) 58; *Long v Westphal* [2010] NT(SC) 55.

proportionate to the circumstances; imprisonment being the sanction of last resort. I will re-sentence the appellant.

Ground 2 – That the sentence of the learned Stipendiary Magistrate was manifestly excessive in all of the circumstances

[23] On behalf of the respondent it was argued the sentence was not manifestly excessive given the offences were committed in company with a younger offender, some items were not recovered and some were damaged, there were no extenuating circumstances and the appellant was on a good behaviour bond. The respondent argued that imprisonment was warranted when considering the prevalence of this type of offending and that general deterrence was a significant sentencing principle. It was submitted that the learned Magistrate balanced this against the appellant's personal circumstances by not ordering the term be actually served.[20]

[24] Further, it was argued that by suspending the custodial sentence His Honour gave the appellant another chance to reform and prove herself as a law abiding citizen by taking no action on the breach of bond file.[21] Thus the respondent contends that this ground of appeal should fail on the basis that the learned Magistrate took into account the principles of totality and imposed a sentence that was not excessive.

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20 T9, 29/11/2011.
21 T11, 29/11/2011.

[25] The appellant relies on the matters argued under the first ground of appeal. The principles governing manifestly excessive sentences, have been described as follows:

> "Manifest inadequacy of sentence, like manifest excess, is a conclusion. A sentence is, or is not, unreasonable or plainly unjust; inadequacy or excess is or is not, plainly apparent. It is a conclusion which does not depend on attribution of identified specific error in the reasoning of the sentencing judge and which frequently does not admit of amplification except by stating the respect in which the sentence is inadequate or excessive. It may be inadequate or excessive because the wrong type of sentence has been imposed (for example, custodial rather that non-custodial) or because the sentence imposed is manifestly too long or too short. But to identify the type of error amounts to no more than a statement of the conclusion that has been reached. It is not a statement of reasons for arriving at the conclusion."[22]

[26] The appellant contends that a term of imprisonment was plainly unjust in this case given there were non-custodial dispositions available to the learned Magistrate. Further, it was submitted the appellant had no relevant prior convictions for stealing or property damage; the offending did not involve a substantial amount of money; there was no premeditation involved prior to the offending; the appellant was a youthful offender with reasonable prospects of rehabilitation; she was looking for work and supported two young children and she had pleaded guilty to the offences charged.

[27] The appellant submitted the learned Magistrate was in error as the sentence imposed was unreasonable and unjust; it was not the only way to achieve the

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22 *Dinsdale v The Queen* (2000) 202 CLR 321, 325-6.

objectives of sentencing and went beyond what was required to achieve those sentencing purposes.[23]

[28] As discussed, in relation to ground 1, His Honour acknowledged it was unusual for a Court to sentence to imprisonment in cases of this kind. For the reasons identified in relation to ground 1, the sentence of imprisonment was excessive in that it was imposed in circumstances where other penalties would have met the objectives of sentencing. I would allow this ground for similar reasons to those given in relation to ground 1.

[29] As indicated, I will re-sentence the appellant. In my view either a fine or good behaviour bond would be appropriate in the circumstances and would be what is ordinarily expected as a penalty given the subjective circumstances of the appellant. As the appellant was already on a bond, albeit for very different offending, a fine is a more suitable penalty. A fine in part assists the punitive elements of sentencing and acts as a deterrent. Despite the troubling prevalence of this type of offending and the need for deterrence, given the appellant's age, she should in my view be given the benefit of not having a sentence of imprisonment imposed, especially given all of the disadvantages that having a record for a term of imprisonment may entail for a young person in the future. I note the appellant was looking for work and caring for two children. I understand from reading the transcript the appellant owes money for fines and is not of substantial means.

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[23] *Sentencing Act (NT)*, s 5; *R v Serra* (1997) 92 A Crim R 511, 525.

Nevertheless, arrangements should be made through the Fines Recovery Unit for outstanding fines to be paid.

[30] If not for the plea of guilty the appellant could expect to be convicted and fined around $500. Given the plea of guilty she will be fined $400.

Orders

[31] The Appeal is allowed.

[32] The sentence of imprisonment for 14 days and its suspension is set aside. The conviction is confirmed. The appellant is fined $400 and ordered to pay a victim's levy of $40.

[33] I confirm the order of the Court of Summary Jurisdiction for restitution to be paid in the sum of $260.

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