Wilson v Verity [2011] NTSC 56

PARTIES:	CALLUM JACK WILSON
	v
	BRETT JUSTIN VERITY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 8 OF 2011 (21010773)
DELIVERED:	29 JULY 2011
HEARING DATES:	14 JULY 2011
JUDGMENT OF:	MILDREN J
APPEAL FROM:	MR D TRIGG SM

CATCHWORDS:

CRIMINAL LAW – Justice Appeal – excessive sentence – whether findings made which were unsupported by evidence – whether insufficient weight given to plea and police cooperation – whether timing of plea is early – appeal allowed

Criminal Code (NT), s 210
Youth Justice Act (NT), s 136(2)(b)

R v Cartwright (1989) 17 NSWLR 243; applied

Cameron v The Queen (2002) 209 CLR 339; considered

Atholwood v The Queen (1999) 109 A Crim R 465; referred to

REPRESENTATION:

Counsel:

Appellant:	L M Bennett
Respondent:	S Lau

Solicitors:

Appellant:	NT Legal Aid Commission
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

Wilson v Verity [2011] NTSC 56
No. JA 8 of 2011 (21010773)

BETWEEN:

CALLUM JACK WILSON
Appellant

AND:

BRETT JUSTIN VERITY
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 29 July 2011)

[1] This is an appeal from the Court of Summary Jurisdiction.

[2] On 15 February 2011, the appellant pleaded guilty to the offence of stealing contrary to s 210 of the *Criminal Code (NT)*. On 4 March 2011, the appellant was sentenced by the learned Magistrate to 30 months imprisonment to be suspended after serving six months with an operational period of three years.

Grounds of appeal

[3] The grounds of appeal as set out in the Notice of Appeal are as follows:

1. The learned Magistrate erred in failing to give adequate weight to the appellant's youth.

2. The learned sentencing Magistrate erred in that he failed to give adequate weight to the appellant's prospects of rehabilitation.

3. The learned Magistrate erred in that he accorded insufficient weight to both the appellant's cooperation with police and his guilty plea.

4. The learned Magistrate erred in making findings which were unsupported by evidence in sentencing the appellant in accordance with those findings.

5. That the overall sentenced imposed by the learned sentencing Magistrate was manifestly excessive.

Agreed facts

[4] The agreed facts were as follows. On Thursday 18 February 2010, the appellant and an unknown number of co-offenders entered a dwelling at 15 Stuckey Court, Howard Springs, to steal firearms from the house. The appellant and his co-offenders attended the premises at approximately 1:30 pm, parking their vehicle at the rear of the property on the fire service track. The appellant and his co-offenders entered the house and made their way to the master bedroom of the house.

[5] The appellant and his co-offenders entered a wardrobe which was closed off at the end by a locked wooden door behind which was stored two gun safes.

The appellant and his co-offenders stole the gun safes by 'jemmying' and rocking the gun safes back and forth, ripping the concrete bolts anchoring the safes out of the concrete. The appellant and his co-offenders removed the safes, carrying them out of the house to the rear of the property where they loaded the safes onto their vehicle before leaving the property.

[6] Contained in the safes were the following firearms: a Remington .45 semi-auto pistol; a Walther P38 semi-auto pistol; a Walther Sestalade P38 semi-auto pistol; a 9mm semi-auto Luger pistol; a Browning 9mm semi-auto pistol; a Colt .455 semi-auto pistol; an Enfield 30.06 bolt action rifle; a Winchester pump action .22 rifle; and a Lithgow .22 long rifle. The total value of the guns was $15,000.

[7] The appellant and his co-offenders drove to a location in a pine forest area near Gunn Point, where they broke open the safes and removed the firearms.

[8] An examination of the scene was carried out by forensic crime scene members. During that examination a number of swabs were taken of the wardrobe area for testing. As a result, a DNA analysis profile of the appellant was obtained.

[9] On Monday 29 March 2010, the appellant was arrested at his home address and conveyed to the Darwin Watch House where he took part in an electronic record of interview.

[10] When asked if he had stolen the guns, he replied, “No”. At no time did the appellant have permission to steal any property from the residence. The Crown sought an order for restitution for the cost of the firearms and safes to the value of $15,980.

[11] The appellant had no prior convictions.

[12] A Victim Impact Statement from the owner of the weapons was tendered by the Crown. According to the Victim Impact Statement, the owner of the home reported that the crime disturbed his whole family and particularly his youngest son who for many months was scared to walk around in his own home and had difficulty sleeping. The owner of the home also suffered from stress which required him to take 10 days off work, which resulted in a loss of holiday pay.

[13] The stolen pistols were mostly rare and irreplaceable. They had been legally collected over a period of 20 years. It was the intention of the owner to keep the collection until his retirement and then sell the pistols to assist in his retirement. Further, as a result, the owner has abandoned his lifelong interest in firearms. The stocks on two of the rifles had been handcrafted by the owner’s father and therefore had sentimental value.

[14] However, it was later disclosed to the Court that the weapons were insured. The insurer paid out a total of $14,755.50 in relation to the claim.

[15] None of the pistols were recovered, but the three rifles were in fact recovered. One of the weapons was located in the owner's home in a damaged condition and two other rifles were recovered by a search warrant conducted by the Drug Enforcement Section.

[16] The appellant originally faced charges of two counts of aggravated criminal damage and one count of aggravated unlawful entry. These charges were withdrawn upon the appellant's plea of guilty to the charge of stealing. I mention this because it is relevant to ground 3.

Matters put by defence counsel

[17] The following matters were put to the learned Magistrate on the appellant's behalf. At the time of the offending the appellant was 18 years and 24 days old. As noted before, he had no prior convictions. The learned Magistrate was informed that on 10 February 2009, the offence of driving a motor vehicle whilst unlicensed was proved in the Youth Justice Court and he was discharged without proceeding to a conviction.[1] The prosecutor conceded that the appellant was not in any way the ringleader or instigator, but rather a person who joined in the offending. The Court was informed that the appellant was generally a responsible young man who had been raised in the Northern Territory. He lived at home with his parents. He finished school in Year 10 and then commenced an apprenticeship as a refrigeration mechanic. After a couple of years he left that employment and commenced

[1] Section 136(2)(b) of the *Youth Justice Act (NT)* enables a finding of guilt, where there has been no recording of a conviction, to be taken into account where the youth was over the age of 15 at the time of the offence. This applied in that case.

working for a welding company. A reference was tendered from his current employer which indicated that he had been employed for just over 12 months and that he had obtained a good reference from his previous employer. His employer indicated that he had been a punctual and reliable worker who consistently showed a very good work ethic and was a leader in his team. The employer was fully aware of the charge against the appellant and indicated that he continued to support him as he "regarded him highly as a person". References were also tendered from each of his parents who indicated that the offending was out of character and that he had expressed extreme remorse for his behaviour.

[18] It was put that almost immediately after the first interview with the police when he denied being involved in the stealing, the appellant gave an "induced statement" to the police. The statement was in writing. He provided the names of the other people involved in the offending. On a number of occasions he made pretext phone calls with one of those persons which were tape recorded in order to obtain admissions. As it turned out, no admissions were obtained. The appellant had expected a letter of comfort to be provided to him by the police, but this did not eventuate.

[19] However, the appellant had indicated an unwillingness to give evidence against the nominated co-offenders. The Crown accepted that there were good reasons for this. Although useful intelligence was given, the Court was informed that none of the other co-offenders named were charged.

[20] As to the offending, it was put that the appellant was aware that there was some guns on the property which he understood to be collector's items. The source of his knowledge came from a person within the victim's family who had shown the appellant one of the guns. The appellant understood that this gun was not capable of being fired. He had no knowledge of whether or not the co-offenders were aware of the existence of other guns.

[21] There was a delay of almost a year before the matter was resolved by way of a plea. As noted above, the matter eventually resolved as a plea on the first day of what was intended to be a contested hearing. The only admissible evidence against the appellant was the DNA evidence found at the crime scene. It may be inferred from the fact that the Crown accepted the plea to the stealing that the Crown case was not strong.

Ground 4 – The learned Magistrate erred in making findings which were unsupported by evidence

[22] During the course of his Honour's sentencing remarks, his Honour said:

> When someone actually goes with others to a residence and knowing that some of those people they are going with are associated with the Hells Angels and goes there specifically to steal firearms knowing that those firearms are going to end up in the hands of Hells Angels and other serious criminals, that raises the bar from being schoolboy immature offending to being criminal offending of almost the highest level. The Hells Angels are not fun people. They are not nice people. Outlaw motorcycle gangs such as the Hells Angels are seriously and actively involved in serious criminal activity. They have been linked over many years with assassinations, murders, major drug deals. Having and putting guns, and particularly pistols, into the hands of people who are on the wrong side of the law and who are violent criminals is so inherently dangerous as to call for, in my view, serious punishment.

[23] Counsel for the appellant submitted that there was no material upon which the Court could have found that the appellant knew at the time he took part in the stealing that the co-offenders were connected or associated with the Hells Angels; nor was there any evidence to show that the appellant knew that those firearms were going to end up on the hands of Hells Angels or other serious criminals.

[24] I consider that this ground of appeal is made out. No such concession was ever made by counsel for the accused. What was put by the prosecutor was that one or more of the suspected persons whom the appellant claimed to have been involved in the offending were "suspected as having Hells Angels connections". There was police intelligence that the person in whose possession the two rifles were found was "connected with the Hells Angels". It was never suggested that appellant knew this at the time of the offending. The purpose of informing the Court of that information was simply to explain why the Crown accepted that there were good reasons why the appellant was fearful about giving evidence against his co-offenders. For all the learned Magistrate knew, any connection which any of the co-offenders had with the Hells Angels may have been information which came to the appellant's attention after he was arrested by the police and took part in the induced statement. In order for this to be relied on as an aggravating feature of the offending, this needed to be proved beyond reasonable doubt.

[25] Ms Lau, for the Crown, submitted that learned Magistrate had indicated prior to being so informed by the prosecutor that he regarded the matter as a

very serious one. Certainly, his Honour remarked that the appellant should have realised that his co-offenders were "not nice people and dangerous if they want to steal guns" and the potential for misuse of those weapons in serious crime.

[26] However, I think that the learned Magistrate took a particularly serious view of the stealing offence because of his understanding that the appellant knew that his co-offenders had Hells Angels connections. I would uphold the appeal on that ground.

Ground 3 – The learned Magistrate erred in that he accorded insufficient weight to the both the appellant's cooperation with police and his guilty plea

[27] His Honour certainly characterised the plea as a late plea of guilty principally because, so far as the Court was concerned, the matter did not resolve until the day when a two day hearing was due to commence on 15 February 2011. His Honour indicated that he had reduced the head sentence from three years to two years six months in relation to his plea. So far as the cooperation with the authorities is concerned, his Honour said that the appellant had given "some limited assistance to the police"; "he has only given them information or intelligence"; "he had not been willing to give evidence. He has not apparently done a signed statement that I'm aware of and any offer if he is not prepared to give the evidence then is not of much value. As a result, the principal offenders and the co-offenders have never been charged, never faced court. The appellant therefore must take some responsibility for that."

[28] It was submitted by Ms Lau that the learned Magistrate had not erred in the exercise of his discretion, but in my opinion the learned Magistrate should have accorded a greater degree of discount than he did.

[29] So far as the cooperation with the authorities is concerned, in *R v Cartwright*,[2] Hunt and Badgery-Parker JJ said[3] that is in the public interest that offenders should be encouraged to supply information to the authorities which will assist them to bring other offenders to justice and then to give evidence against those other offenders in relation to whom they have given such information. Their Honours said that in order to ensure that such encouragement is given, the appropriate reward for providing assistance should be given regardless of whether the motive of the offender may be genuine remorse or simply self interest. The extent of the discount will depend, to a large extent, upon the willingness with which the disclosure is made. The offender will not receive any discount where the disclosure reveals only information which the offender knows is already in the possession of the authorities and will rarely be substantial unless the offender discloses everything which he knows. To this extent, the enquiry is into the subjective nature of the offender's cooperation. If the motive for giving the information is one of genuine remorse or contrition, that may well warrant even greater leniency being extended because that it part of normal sentencing principles and practice. Their Honours continued that:

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2 (1989) 17 NSWLR 243.
3 At 252-253.

> ... the reward for providing assistance should be granted if the offender has genuinely co-operated with the authorities whether or not the information supplied objectively turns out in fact to have been effective. The information which he gives must be such as could significantly assist the authorities. The information must, of course, be true; a false disclosure attracts no discount at all. What is relevant here is the potential of the information to assist the authorities, as comprehended by the offender himself... The circumstance that objectively the information subsequently turned out to be effective may perhaps demonstrate that the information possessed such a potential if it is not otherwise obvious upon the face of the information itself, but such effectiveness is not a requirement. As we have already pointed out, the offender will not lose the discount because in fact (unknown to him) the authorities are already in possession of that information. Nor should he lose it if the authorities do not in the end act upon his information, because (for example) they subsequently receive or they have already received more cogent information from another source — or if the offender does not in the end give evidence as promised, because (for example) the person who is the subject of his information has pleaded guilty.

[30] Applying these principles to the appellant's case, it seems to me that it must be inferred from the submissions made without any objection by the Crown that the appellant believed that he was giving information which could significantly have assisted the authorities. He had named the co-offenders and he had also attempted to take part in a pretext recorded telephone conversation. The fact that he chose not to give evidence was because he feared for his safety, a fact which the prosecutor accepted.

[31] The other matter concerns the timing of the plea. First, as I observed earlier, apart from the DNA evidence found at the scene of the offending, there was no other evidence to prove the appellant's criminality. DNA evidence does not by itself always establish the commission of a crime by the person whose DNA is found at the scene. There may well have been

other reasons or explanations as to how that came about, particularly if the appellant had been to the house on a previous occasion with a member of the victim's family.

[32] In *Cameron v The Queen*,[4] Gaudron, Gummow and Callinan JJ approved of what fell from Ipp J in *Atholwood v The Queen*,[5] as follows:

> "It is particularly important [where after a process of negotiation the prosecution withdraws a number of charges and the offender pleads guilty to one of the remaining charges] to establish the time when it could first be said that it was reasonably open to the offender to plead guilty to the offence of which he was convicted. Regard should be had to the forensic prejudice that the offender would have suffered were he to have pleaded guilty to counts persisted in by the prosecution while others (that were subsequently withdrawn) remained pending against him. During the period that the prosecution maintains counts that are ultimately abandoned, there is a strong incentive for a person who recognises his guilt on other counts ... to persist in a not guilty plea to all counts. In such circumstances it should not be assumed, mechanically, that the offender has delayed pleading guilty because of an absence of remorse, or that, reasonably speaking, he has not pleaded guilty at the earliest possible opportunity.

[33] Their Honours went on to observe:[6]

> The remarks of Ipp J in *Atholwood* reflect what has earlier been said in relation to the rationale for the rule that a plea may be taken into account in mitigation, namely, that, leaving aside remorse and acceptance of responsibility, the operative consideration is willingness to facilitate the course of justice. And once that rationale is accepted, the respondent's suggestion that the extent to which a plea of guilty may be taken into account in mitigation may vary according to whether it was or was not a "fast-track" plea must be rejected. Rather, the issue is to what extent the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate

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4 (2002) 209 CLR 339.
5 (1999) 109 A Crim R 465 at 468.
6 *Cameron v The Queen* (2002) 209 CLR 339 at 345-346 [22].

> the course of justice. And a significant consideration on that issue is whether the plea was entered at the first reasonable opportunity.

[34] The facts in this case are somewhat different from the situation which had occurred in *Cameron v The Queen*. In that case the original charge was wrongly particularised and the Court accepted that the appellant in that case should not have been expected to acquiesce in procedures which might result in error in the court record or indeed his own criminal record. The present case can therefore be distinguished factually, but nevertheless the question remains, as their Honours said, to what extent the plea was indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice. It is not uncommon for a sentencer to give a bigger discount where the Crown case is weak and probably would not have succeeded without, for example, the perpetrator's confession or plea of guilty. I do not think that the appellant can be blamed for the fact that his counsel did her best to negotiate a plea which had the result that three charges were ultimately not pressed by the Crown. By his plea, the appellant did facilitate the course of justice and there was ample evidence that he was remorseful.

[35] In those circumstances, I think a much bigger discount than only about 12.5 per cent was warranted. In my opinion, the proper discount in all the circumstances should have been in the order of 20 per cent.

Conclusions

[36] I do not think it is necessary to consider the other grounds of appeal. These two grounds having been made out, I am satisfied that the sentence imposed by the learned Magistrate cannot stand and it will be necessary for the appellant to be re-sentenced.

[37] I think I should explore either a Home Detention Order or a supervised fully suspended sentence, although all other options less than the sentence actually imposed remain open.

[38] The appeal is allowed and the sentence imposed by the learned Magistrate is set aside. I will call for a home detention report and also a report as to the appellant's suitability for supervision and hear further submissions of re-sentence when these reports become available.
