PARTIES:	MCCUE, Jamie
	v
	LLEWELLYN, David John
TITLE OF COURT:	SUPREME COURT OF THE NT
JURISDICTION:	ALICE SPRINGS
FILE NOS:	63/64/65/66/67 of 1994
DELIVERED:	Darwin, 6 March 1995
HEARING DATES:	22 February 1995
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Criminal Law - Sentencing - Factors to be taken into account - Totality principle - Application where offences of the same nature - Approach to sentencing -

The Queen v Tait and Another (1979) 46 FLR 386 at 388, considered.
Mill v The Queen (1988) 166 CLR 59 at 62, followed.

Appeals - Justices - Appeal against sentence by Magistrate - Cause unlawful damage to motor vehicle - Attempt to unlawfully use a motor vehicle - Error of sentencing application - totality principle must be taken into account - Just and appropriate.

Justices Act 1928 (NT)

REPRESENTATION:

Counsel:

Appellant: Ms Fraser
Respondent: Mr Georgiou

Judgment category classification: B
Judgment ID Number: mar95004
Number of pages: 15

DISTRIBUTION: LOCAL

mar95004

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 63-67 of 1994

BETWEEN:

JAMIE MCCUE
Appellant

AND:

DAVID JOHN LLEWELLYN
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 6 March 1995)

Appeal against sentence.

On 4 October last, the appellant was convicted by Mr Hook SM, in the Court of Summary Jurisdiction at Alice Springs, upon his pleas of guilty in relation to criminal conduct in respect of five separate motor vehicle incidents. On each of four occasions, namely 13 May, 12 July (twice) and 6 August, he had, whilst wandering around the streets of Alice Springs, damaged four separate motor vehicles whilst breaking into and then attempting to drive them. On the last occasion he was detected whilst in the attempt and taken into custody. For each incident he was charged with causing unlawful damage to the motor vehicle and attempting to unlawfully use it. Those matters were

before the Court on 19 August on which date his Worship adjourned, having ordered a pre-sentence report to be prepared. But that was not the end of the offending, and on 20 August the accused committed the same offences in respect of another motor vehicle. He entered pleas of guilty to those charges at the commencement of the resumed proceedings concerning him on 4 October.

The maximum penalty for attempting to unlawfully use a motor vehicle is imprisonment for one year and for unlawful damage, imprisonment for two years. In respect of the offences committed on each of 13 May, 6 August and 20 August, the effective sentence was six months imprisonment each cumulative upon the other. For the two sets of offences committed on 12 July, the effective sentence was six months imprisonment, also to be served cumulatively upon the others. The total sentence, therefore, in respect of the motor vehicle offences, was 24 months imprisonment.

On 12 August 1993 the appellant had been convicted of similar motor vehicle offences for which he had been sentenced to 12 months detention, as a juvenile, but which was to be suspended upon his entering into a bond to be of good behaviour for two years. Proceedings were brought for breach of the bond in conjunction with the convictions for the matters presently under consideration, and in respect of that, it was ordered, at the same time, that he be committed to prison for a period of 12 months. That period was also made cumulative upon the

sentences imposed, bringing a total period of imprisonment to three years. His Worship ordered that the sentence be suspended after 18 months upon condition that the accused enter into a bond, in his own recognizance in the sum of $5,000, upon conditions that he be of good behaviour for two years from the day he entered into the bond, and that he place himself under the supervision of a delegate of the Director of Correctional Services and obey all reasonable directions as to employment, residence, associates and reporting. His Worship also directed that the period during which the appellant would not be eligible to be released on parole be fixed at 20 months. (The question as to whether it is competent to make orders partially suspending a sentence of imprisonment and fixing a non-parole period as well does not arise for consideration in this matter).

In summary, the grounds of appeal are that the sentence imposed ignored the totality principle; in relation to the motor vehicle offences, that each sentence was manifestly excessive; in relation to the committal for the breach of bond, that the period of committal was manifestly excessive; in respect of all matters the total of three years imprisonment to be partly suspended after 18 months upon the conditions specified, was manifestly excessive and likewise in respect of the period fixed as a non-parole period. It was also a common ground of appeal that his Worship erred by failing to give sufficient weight to the particular background and circumstances of the appellant, including his age.

As to the offences themselves, each was committed under similar circumstances, the appellant being inebriated, walking along a street, noticing a motor vehicle, gaining entry by causing some damage to it, such as smashing a window, and then attempting to start the engine. It appears that the extent of the damage to each vehicle was of the order of $200. After his attempt to unlawfully use the vehicle on the 13 May, he was spoken to by police near the scene, arrested and taken to the police station, but no charge was then laid. On 12 July he was disturbed whilst in the process of this criminal conduct, but managed to run away, and on 6 August a security guard chased and caught him and placed him in the hands of the police. On 20 August the owner of the vehicle arrived at the scene, chased the appellant, and the police later found him nearby. Obviously he was not deterred from his conduct by fear of detection nor had he been deterred by his previous experiences before the Courts. Because of some overlap in his records of conviction kept in the Territory and Queensland, it is difficult to be certain as to just how many times the appellant has been dealt with for various offences. He seems to have been first before a Children's Court in New South Wales in July 1991, and last before the Holland Park Court in Queensland on 27 April 1994. There were five occasions in the intervening period when he was before Courts in New South Wales and the Northern Territory. His convictions were for a variety of offences, including unlawful entry into buildings, stealing, unlawful use of motor vehicles, causing damage, trespass and drink driving. It

appears the appellant was first convicted for stealing a motor vehicle in September 1992 in Burwood New South Wales when he was fined $300 and placed on a bond to be of good behaviour for two months. He next came before the Courts for similar offences, in August 1993 at Alice Springs, when he faced a series of charges in relation to unlawful use of motor vehicles, unlawful entry into buildings, causing damage and trespass. Upon conviction he was sentenced to various terms of imprisonment of up to six months suspended upon his entering into a bond to be of good behaviour for two years. It was the breach of that bond that was dealt with by his Worship on this occasion. He had been brought before the Court of Summary Jurisdiction at Katherine in October 1993 for breach of the bond upon his conviction of offences of unlawful entry and stealing, but no action was taken arising from that breach.

The evidence before his Worship as to the circumstances of the appellant disclosed that born on 10 September 1976, he was aged between 17 and 18 when the offences, the subject of this appeal, were committed. He is an only child, originally from Sydney where he lived with both parents until five years of age. They moved to Alice Springs in approximately 1981 and back to Sydney in 1989, and about two years thereafter separated. His mother remained in Sydney and his father moved back to Alice Springs. During 1992 he returned to Alice Springs to be with his father and until recently resided with him and his de facto wife. Although he does not appear to have been a satisfactory

student at school, he entered into an apprenticeship with his father as a painter during 1992. He claims to have taken to excessive use of alcohol consequent upon his parents separation, and it seems to have been a factor in all of his offending. His father also has an alcohol problem. It was the opinion of the Juvenile Justice officer in August 1993 that the appellant required professional assistance with his problems and a suitable deterrent to help prevent him from re-offending. It was then noticed that he had not previously had the option of supervised recognizance to be of good behaviour, and the sentence imposed in August 1993 would appear to have been arrived at after taking into account the report then available. An alcohol and drug assessment was prepared whilst he was under that supervision which concluded that he had very little true understanding of his alcohol misuse and where it could take him. Tests indicated he had a medium low dependency on alcohol, and it was thought that because of his commencing drinking at the age of about 13, it has probably hindered his maturity. Shortly prior to his appearance before the Court on 19 August, a psychological assessment was carried out and a report prepared. As to his education, the psychologist was of the view that he may still suffer impaired social learning, probably for three reasons - his alcohol affected intellect, personality issues and some residual attention deficit disorder effects. He was still drinking heavily at that stage, described as being "at hazardous levels" at weekends, and the psychologist was of the opinion that he had suffered organic brain impairment from his drinking.

The psychologist was of the opinion that the appellant definitely needed intensive treatment for his alcohol addiction and high external motivation to attend and meet all the required conditions of that treatment. Facilities were said to be available in Alice Springs for that purpose.

His Worship also had before him a pre-sentence report, prepared specifically for the occasion, when he came to sentence the accused on 4 October. It disclosed that his response to supervision consequent upon the sentences of August 1993 was poor, including leaving Alice Springs to go to Katherine without permission. Despite being informed of his obligations pursuant to the bond into which he had entered, there were other breaches of those conditions, particularly as to reporting and obtaining permission to move from one place to another. In the meantime he had transferred his training to Mr Spahic, a painter in Alice Springs, when his father went to Darwin. The report was prepared whilst the appellant was in gaol on remand consequent upon his arrest for the offences of 20 August. During that period he claimed to have reflected on his past behaviour and had expressed himself to be sorry for his actions, and said that since he had been in gaol he realised that that was a waste of time. He said that he wanted to make positive changes in his life. He had made some efforts to attend alcohol awareness sessions whilst in gaol, but before that Court, and this, he claimed through his counsel that he was unable to attend as many sessions as he would have liked because they were full.

Although his present employer, through a reference, speaks highly of the appellant in his work, it was clear to him that the appellant suffered from some difficulties, and he took steps in discussions with the appellant about how he should behave himself and respect other people. Mr Spahic was aware of the appellant's general background and was prepared to assist him further, both through employment, when he was able to rejoin him, and by providing him with some of the attention which Mr Spahic believed he needed. The appellant has not done well at trade school, leaving before the course was completed and attending for less than half of it.

The Community Corrections officer who prepared the later pre-sentence report was of the opinion that although the appellant had expressed a desire to change his attitude and lifestyle, that taking into account his past attitudes and conduct, the officer was not convinced that he was genuine. It was noted that Departmental records had indicated that supervising officers had put enormous effort into counselling, guiding and assisting the appellant wherever possible, but it had been repeatedly rejected and concluded that the Court must be considering a term of imprisonment. The officer was at a loss to offer a practical recommendation, saying that the merits of a suspended sentence were restricted by the appellant's lack of ability to comply with any form of supervision, but observed that the benefits of a short term of imprisonment may serve to remind him of his responsibilities towards society. The officer

noted, however, that a term of imprisonment could have a further detrimental effect on the appellant's present and future attitudes.

In his address, counsel for the appellant reiterated that his client had had the opportunity to feel the impacts of being in gaol for some weeks and that it had given him an opportunity to seriously consider his future, particularly in regard to his alcohol problem, and that he would attend further counselling in that regard. "He acknowledges that he really needs to come to grips with that before he deals with his problems in an effective manner".

In sentencing, his Worship very briefly expressed his views, with particular emphasis on the appellant's failure to comply with conditions of the good behaviour bond. He referred particularly to the fact that he had been before the Court on 19 August, was then bailed, and committed offences the following day "... I don't know, but something has got to be done about it". He then proceeded to impose the sentences, concluding: "You've had your last chance, Mr McCue. You can’t go on and on ..... It is up to you. You either make something of your life or you will be back and you will be going back in. Is that clear?"

As to the grounds of appeal, it was not contended that the individual sentences of six months imprisonment out of a

maximum of 12 months which might be imposed for attempting to unlawfully use a motor vehicle, nor that a three months imprisonment out of a maximum of two years for causing unlawful damage (in each case made concurrent), was exceptional. As to the breach of bond, it was noted that the appellant was committed to prison for the whole of the period of the original sentence of 12 months, notwithstanding substantial compliance with his undertaking to be of good behaviour. The thrust of the argument upon appeal was predictable, the total sentence of 36 months imprisonment and the order that it not be suspended until 18 months had been served, were individually and together disproportionate to the offending; the aggregate sentence was not just in all the circumstances; his Worship particularly fell into error in failing to take into account the totality principle.

I am mindful that a Court of Appeal does not interfere with a sentence imposed merely because it is of the view that the sentence is excessive. It must be shown that either the sentencer was in error in acting on a wrong principle or in misunderstanding, or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing Judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such an error, per Brennan, Dean and Gallop JJ. in *Tait* (1979) 46 FLR 386 at 388. In this case the sentence is so excessive as to manifest an error. The paucity of his Worship's remarks on sentence means

that all kinds of undisclosed error might be sought to be attributed to him. But it is sufficient to resolve the appeal on the ground that the totality principle was not observed. It is closely related to the concept that a sentence may be manifestly excessive, but in its application it may most often be shown by looking at the way in which a total sentence in respect of a number of individual offences was arrived at. The High Court has described the principle in the following well known passage from *Mill v The Queen* (1988) 166 CLR 59 commencing at 62:

> "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):
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> > "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".

The reference to "single sentencing court" is explicable by the fact that in that case the offender had committed a number of offences within a short space of time in more than one State. It is arguable whether the sentences had been properly made consecutive in accordance with the principles governing consecutive sentences. The offences were of the same nature, but apart from the two committed on the same day, they were widely separated in time and were directed at the property of different people in different places. Assuming that they were properly all made cumulative, along with the committal for breach of the bond, it is manifest that his Worship failed to review the aggregate sentence and consider whether it was "just and appropriate". There was nothing to suggest that his Worship paused after totting up the individual punishments and arriving at the total. Had he done so, he may well have felt that it looked wrong. He erred.

It is now necessary for this Court to consider what the appropriate sentence should have been. It is not denied that the appellant has an unsatisfactory record of offending including in relation to offences of the type here under consideration. Suspended sentences of imprisonment imposed in

August 1993 had no significant affect upon his behaviour, either as to his drinking or what he did when affected by liquor. He did not respond in any meaningful way to the conditions attached to the bond into which he entered, either as to supervision or as to good behaviour. There was a period of nine months or thereabouts during which he did not re-offend. Notwithstanding his youth and the great difficulties which he had encountered, and which may well have contributed to his abuse of alcohol, a term of actual imprisonment was nevertheless justified. Such a course is appropriate, bearing in mind particularly the need to deter the appellant and others. As against that, there is an overriding requirement in a case involving somebody such as the appellant to look to rehabilitation as the best means by which the community might be ultimately protected. That objective runs a real danger of being obstructed if the punishing sentence imposed was permitted to stand.

It was indicated during the course of argument on appeal that the appellant's present plans are to return to Sydney to be with his mother when he is released. He no longer has any parental guidance in Alice Springs and thus the move may be in his best interests. But, it is important in the interests of the community that when he is released he be subjected to supervision for some time so that efforts may be made with a view to tackling his alcohol abuse problem, and, if it be possible, to ensure that his apparent successful training in the practical skills of painting be encouraged and enhanced so

that he may be better equipped to establish himself as a worthwhile member of society.

An appropriate sentence to imprisonment coupled with the fixing of a proper period during which he would not be eligible to be released upon parole would not provide for the period of supervision which I consider is required in his case. That supervision would expire at the completion of the term for which he was sentenced. However, by suspending the sentence, it is possible to provide for a longer period of supervision than that and as already indicated that is the course which I think ought to be pursued.

The individual sentences in respect of the attempts to unlawfully use motor vehicles and causing unlawful damage to motor vehicles are confirmed. All of those sentences are to be served concurrently producing an effective sentence in respect of those series of offences of six months in all. For breach of the bond, the penalty imposed by the Court of Summary Jurisdiction is quashed and there is substituted for it a penalty of 9 months imprisonment to be served cumulatively with the six months in respect of the offences. The total of 15 months is, in my view, an appropriate penalty in all the circumstances taking into account the totality principle. That sentence will be suspended upon the expiry of seven months upon the appellant entering into a bond that he will be of good behaviour for a period of two years from that date, that bond to be in his own

recognizance in the sum of $2,000 and upon condition that he be subject to the supervision of the Director of Correctional Services or a person appointed by him and to obey all the lawful directions of that person.

The sentence is to date from 20 August 1994.