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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

SC No. 33 of 1992

IN THE MATTER of the JUSTICES ACT

AND IN THE MATTER of an appeal from a sentence imposed by the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

ALFIE RORY
Appellant

AND:

TREVOR HOWARD BELL
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 28 August 1992)

The appeal

On 8 May 1992 the Court of Summary Jurisdiction at Alice Springs sentenced the appellant to three months imprisonment on a charge of criminal damage under s251(1) of the Criminal Code. The maximum sentence was 2 years

imprisonment. On 4 June the appellant appealed against the severity of that sentence on the basis that:-

1. it was manifestly excessive; and
2. when compared with sentences imposed in respect of like cases, it was manifestly excessive.

The appeal was argued before me on 24 August; I rule on it today.

The admitted facts

On the evening of 21 October 1991 the appellant had been drinking at the Borroloola Inn. At about 3 am he jemmied open the side door of the hotel and removed a 2 litre bottle of Bundaberg rum and 2 cartons of beer. He took the liquor to a friend's house, where it was all consumed. When spoken to by Police, he freely admitted what he had done; he was charged with unlawful entry and stealing, and bailed. He pleaded guilty before the Court of Summary Jurisdiction on 8 May 1992 and was sentenced to concurrent terms of 3 months imprisonment. Those sentences are not appealed.

On 4 May 1992 the appellant had once again been drinking at the Borroloola Inn. Later that day he went to the hotel carpark area. A Holden was parked there, with an

Esky on the rear seat. He tried to break the windscreen of the Holden. However, realising he had been seen, he decamped. That evening, he returned. The Holden was still there. He smashed the rear passenger window with a rock. The owner heard the noise, came out and found the appellant leaning against the vehicle with his arm inside. He was duly arrested and after an initial denial, made full admissions. He was charged with unlawfully damaging the Holden and attempting to steal the Esky. The cost of repairing the damage was $120. He pleaded guilty to the 2 charges before the Court of Summary Jurisdiction on 8 May 1992. He was sentenced to one month imprisonment for attempting to steal, to be served concurrently with the sentences already imposed for the crimes of 21 October 1991. He does not appeal against that sentence. For the offence of criminal damage he was sentenced to 3 months imprisonment, to be served cumulatively upon the earlier sentences; this is the sentence appealed. He was also ordered to pay $120 compensation.

The sentencing process

Mr Brown of counsel for the appellant/defendant, submitted that the appellant was 23 years old, an Aboriginal man from Robinson River, some 95 kilometres east of Borroloola and a "dry" area. There he was on CDEP work but had earlier worked as a stockman, on several cattle

stations. He was not married; he had been educated to year 9 and was able to speak and read English. He had spent 3 days in prison.

On 21 October 1991 he had had a lot to drink at the Inn, but wanted more. Hence the commission of the crimes.

Again, on 4 May 1992 he was again "full drunk" but "wanted more". Hence, again, the offences on that day: he smashed the Holden window to get the Esky and the "longed-for green cans within". Mr Brown submitted that these were all offences arising from "binge drinking"; the appellant did not "get the shakes", he was not an alcoholic.

Mr Brown stressed that Alice Springs was "a long way from home" for the appellant; serving a sentence in Alice Springs prison would be a more "traumatic experience" for him than for persons from the local area. The appellant felt very isolated and lonely.

He had a record of prior offending. He had appeared before courts in Katherine and Borroloola on 6 occasions over the 6 years between April 1985 (when he was about 16 years of age) and July 1991. He had been convicted of 10 offences for which he had been mainly fined. For an

unlawful entry and stealing he was sentenced on 12 April 1989 to 40 and 24 hours of community service respectively. He had been convicted of criminal damage on 27 June 1985 and again on 15 May 1986; on both occasions he had been fined and ordered to pay compensation. He had never been sentenced to a term of immediate imprisonment; Mr Brown submitted that he would be do any such sentence "very, very hard".

The appellant offered to pay compensation of $120.

The learned Magistrate observed when sentencing:-

> "- - I take into account what has been put to me. You had no real excuse for this. I accept the fact that you came from a remote area but you knew what you were doing and if you're going to do this sort of thing the fact that going to prison is maybe a little hard on you is really not something that should deter me from imposing a sanction which will bring home to you and to others of similar tendency that this is not going to be tolerated. You broke into the Inn. You stole the alcohol.
>
> You were drunk at the time and my own view is, on that, - - - that a sentence should be doubled if you claim drink as an excuse; and the same [on] the second occasion. You were after alcohol again and it's just not going to be tolerated, Mr Rory. It's not your first time. - - - You've got two prior convictions for criminal damage. You've got three prior convictions for unlawful entry and stealing."

His Worship then proceeded to impose the sentences for the offences of 21 October and continued:-

> "Turning to the matters of 4 May this year, on the first count, that's the attempt to [steal] you're convicted and sentenced to 1 month imprisonment concurrent. On the second count of criminal damage you're convicted and sentenced to 3 months imprisonment, cumulative on the sentence already imposed."

His Worship ordered restitution of $120, and allowed 9 months to pay.

The appellant's submissions

Mr Brown's submissions were directed to ground 2 (p2). He has culled the Alice Springs records of CAALAS. He placed before me, without objection, brief details of the circumstances of all the cases in which CAALAS appeared for Aboriginal defendants in the 15 month period between February 1991 and May 1992, on charges under s251 of the Code. There were 31 such cases.

The penalties imposed ranged from compensation orders under s393(1)(c) of the Code, release on good behaviour bonds pursuant to s5(1)(a) of the Criminal Law (Conditional Release of Offenders) Act, fines ranging from $150 to $500 sometimes coupled with restitution orders, community service orders of 24 hours, through suspended

sentences of imprisonment of 1 to 2 months, to sentences of immediate imprisonment ranging from 7 days to 3 months. Clearly, a very wide range of penalties. In general, fines were imposed where there had been no history of prior offending. In the 5 cases where sentences of immediate imprisonment were imposed all the defendants had a record of prior offending. In the single case where a sentence of 3 months immediate imprisonment was imposed, a rock had been thrown through a shop window causing damage of $1000, the defendant had 2 similar priors, and admitted that he had smashed the window "to get the money". This was clearly a serious case, in terms of a charge under s251; it involved a circumstance of aggravation under s251(2)(c), so the maximum punishment was 7 years imprisonment.

In 11 of the cases windows or windscreens of vehicles had been smashed. Six of these cases involved first offenders; fines were imposed on 5 of them, and a suspended sentence of one month's imprisonment imposed on the other, where camping gear had been stolen from the vehicle. A fine was also imposed in one case where there had been prior offending. In 2 other cases, where the offences had been committed by the same offender on the same day, he received community service orders; he had "hot wired" one car and tried to "hot wire" the other, and had similar priors as a juvenile. The most severe sentence was

2 months immediate imprisonment. It was imposed in October 1991 on a defendant with priors who had smashed a car window and tried to "hot wire" the vehicle; 10 days earlier he had been given a suspended sentence of 2 months imprisonment for a similar offence. Mr Brown submitted that cases of smashing a window for the purpose of "hot wiring" the vehicle were treated more seriously than the present case, due to the need to deter the high incidence of unlawful use of vehicles.

Mr Brown submitted that this material showed that there was an established current sentencing range for the offence of criminal damage, in the courts in the central desert area; a sentence of immediate imprisonment of 3 months represented the top of the range. In fact, I note that for offences under s251(1), the sentence of 2 months imprisonment mentioned earlier was the heaviest imposed. Mr Brown submitted that the circumstances of this case were such that the breaking of the window did not merit a punishment at the top of the range. He conceded that the appellant's prior record constituted a problem for him on his appeal; he conceded that it tended to negative mitigating factors. He submitted nevertheless that a sentence of 3 months imprisonment manifestly exceeded what was appropriate in the circumstances of this particular offence.

It is clear that the learned Magistrate's observation that a sentence should be doubled where intoxication is advanced as an excuse, was a passing expression of a personal view; it is not the law, but it played no part in the sentencing. Mr Brown rightly did not seek to rely on that observation in any way.

Mr Brown referred to certain general observations by Malcolm CJ in *Juli* (1990) 50 A Crim R 31 at 36-7. They are not applicable, in my opinion, in the circumstances of this case.

Observations

It is desirable that detailed sentencing statistical material be made available to this Court when it sits on appeal from sentences imposed by Courts of Summary Jurisdiction. That is because it is frequently difficult for this Court to assess what is appropriate by way of the exercise of the sentencing discretion, unless it knows the sentences currently imposed for similar offences by those courts; see the observations of Adam and Crockett JJ in *R v Williscroft* [1975] VR 292 at 301. There are at least two other reasons why such material should be routinely produced. First, counsel cannot intelligently advise whether a sentence should be appealed on the basis that it

is manifestly excessive, unless he is aware of the sentences imposed in other cases similar in character. Excessiveness of sentence is a relative concept, and knowledge of other sentences is essential to determine whether the sentence in question is significantly different. Second, such statistical information is also essential for sentencing magistrates to prevent, as far as may be, unjustified disparity of sentencing. The existence of such information is an essential first step towards attaining a desirable uniformity of approach; see the observations of Lord Lane CJ in *R v Bibi* [1980] 2 Cr App R (S) 177 at 179. Regrettably, suitable official sentencing statistics are not as yet available in this jurisdiction, despite the highly computerised systems used by the courts. The use of computer power should enable such statistical material to be readily produced.

In the absence of official statistical material the sentencing cases produced by Mr Brown, which were accepted by the respondent as accurate, are of utility in the disposition of the appeal.

The respondent's submissions

Mr Roberts of counsel for the respondent submitted that the sentence of 3 months imprisonment was within the

current range of sentencing for this offence, as disclosed by the CAALAS material. Therefore it was not a manifestly excessive sentence; it was not outside the range. Further, the appellant's prior record of offending was such as to warrant the sentencing court refusing to extend to him any leniency it would otherwise have extended for mitigating factors such as his acknowledgment of guilt; I accept that. There was also an aggravating feature: the offence represented the appellant's second attempt that day to smash his way into the same vehicle. This is correct. Further, when the appellant committed the offences on 4 May, he was then on bail for the offences of 21 October 1991 for which he was also sentenced on 8 May. His Worship was not precluded from taking the offences of 21 October into account, when sentencing for the offences of 4 May; see *Driver v The Queen* (1989) 70 NTR 9 at 13-15, per Asche CJ. I accept that. The appellant's prior record was such that the learned Magistrate was entitled to conclude that he had not learned a lesson from the non-custodial punishment which had been previously imposed upon him. I accept that.

Conclusions

This Court should not uphold an appeal against sentence unless the learned Magistrate erred in the exercise of his sentencing discretion; see *R v Tait and Bartley* (1978-79) 24 ALR 473 at 476. It is his Worship who is

charged with the duty of sentencing; the duty of this Court is to see that the sentencing discretion was not improperly exercised, and to prevent unjustifiable disparity in sentencing. On appeal, the assumption is that the sentence was correct; the appellant must show error.

I consider that the 31 cases on which Mr Brown founded his submissions, sufficiently establish a current range of sentencing for this offence. It can be safely concluded from a close examination of the facts and circumstances of those cases that the present sentence is manifestly excessive, when the factors mentioned by the respondent are also taken into account. A sentence of the order of 3 months immediate imprisonment is about the top of the range; the present case is not one which is properly classified as a 'top of the range' offence, bearing in mind the appellant's antecedents. The sentence of 3 months immediate imprisonment is manifestly excessive.

Further, the sentence appealed must be considered in the light of the fact that an effective sentence of 3 months imprisonment was earlier imposed on the appellant on the same day, for the offences of 21 October 1991. The appellant has now served that sentence. It was his first sentence of immediate imprisonment. If he is to learn a lesson from prison, he should by now have learned it. In

the light of that situation service of a sentence imposed for the criminal damage should be suspended for an appropriate period, to give the appellant an opportunity to show that he has in fact learned that lesson.

Accordingly, the appeal is upheld, and the sentence of 3 months imprisonment imposed on 8 May 1992 for criminal damage is quashed. In lieu thereof, I sentence the appellant to 2 months imprisonment. I direct that the appellant be released from serving that sentence upon giving security by Recognizance in the sum of $500 to be of good behaviour for a period of 12 months. The restitution order of 8 May is affirmed.

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