

Gamble v Nayda [2000] NTSC 75

PARTIES: GAMBLE, Norman Wayne

v

NAYDA, Wayne Kenneth

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY EXERCISING TERRITORY
JURISDICTION

FILE NO: No JA 6/2000 (9924385)

DELIVERED: 6 September 2000

HEARING DATES: 17 July 2000

JUDGMENT OF: MARTIN CJ

CATCHWORDS:

APPEAL

Evidence –generally – whether irrelevant considerations taken into account – whether adequate weight to mitigating factors – information obtained out of Victim Impact Statements.

APPEAL

Criminal law – particular offences – property offences – whether sentence manifestly excessive.

Criminal Code Act 1983 (NT), generally

REPRESENTATION:

Counsel:

Appellant: M Whelan

Respondent: T Austin

Solicitors:

Appellant: Michael Whelan & Associates
Respondent: DPP

Judgment category classification: B
Judgment ID Number: mar20026
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Mar20026

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gamble v Nayda [2000] NTSC 75
No. 6 of 2000

BETWEEN:

NORMAN WAYNE GAMBLE
Appellant

AND:

WAYNE KENNETH NAYDA
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 6 September 2000)

- [1] Appeal against sentenced imposed in the Court of Summary Jurisdiction at Katherine on 14 January 2000, when the appellant was sentenced to imprisonment for 12 months to be suspended after three months upon his pleading guilty to a charge of stealing a variety of goods from a property near Katherine, valued at \$16,692.60.
- [2] The agreed facts were that on the afternoon of Sunday 24 October 1999, the appellant consumed the contents of a bottle of rum, and at about 4.30pm went to the gateway of the property from which the goods were stolen. He entered the property by breaking a padlock and drove to the residence.

Noting there was nobody present, he then entered the dwelling and drove to nearby cattle yards. He saw two deceased cattle inside the yard and hitched a green 10 by 6 trailer onto his motor vehicle, undid the cattle yard panels and loaded the panels onto the trailer. He returned to the residence and removed a variety of tools and a computer and then returned to his property and unloaded the goods. He backed the trailer into the scrub and covered it with a large piece of cloth.

- [3] The following day he loaded most of the stolen goods, including the panels, into a horse float and drove out the rear of his property and parked the horse float at the entrance to the property from which the goods had been stolen. He returned to his place intending to pick up the box trailer and take it back, but the police were waiting. He had hidden the computer and overlooked it when returning the other goods, but it is undoubted that it was his intention that it should be returned.
- [4] It was not part of the police case that the appellant had returned the goods knowing that the police were on their way to see him to investigate the matter.
- [5] The grounds of appeal are that the sentence was manifestly excessive and that his Worship had taken into account irrelevant considerations in coming to his view as to the nature of the offence and had failed to give adequate weight to matters going to mitigation of penalty.

[6] There was material before his Worship in the form of Victim Impact Statements taken from the owners of the goods which indicated that in their belief the appellant was not alone. Mr Moriarty spoke of “the perpetrators” and Mrs Moriarty spoke about “the people who robbed us”. When the question of the appellant’s assistance to police arose, his Worship enquired as to how cooperative he had been. The prosecutor said that he had been quite cooperative, but his Worship enquired as to whether he had admitted other people’s involvement. The prosecutor said that no other names had been mentioned. Nevertheless, in his sentencing remarks his Worship expressed his belief that there must have been others. Indeed, there was evidence called upon the hearing of the appeal from the prosecutor who said that his Worship saw him shortly after the matter had been disposed of, and enquired as to whether the appellant had been involved with other named persons. The prosecutor replied that he had not. The prosecutor also informed this Court that there was no secret about the involvement of one other person, but that person had not been charged with any offence, and in the prosecutor’s submission given in evidence the appellant had been cooperative with the investigating police.

[7] The possibility that other people were involved in the commission of the offence and that therefore the appellant had not cooperated fully with police by disclosing their identity was not a matter which his Worship should have taken into account. It appears that the information in that regard was

conveyed by the victims to the crime in their statements, and it should have been totally disregarded. Its impression upon the mind of the learned Magistrate may well have been such as to operate adversely to the appellant.

[8] But that was not the only matter arising from the Victim Impact Statements which had an impression upon his Worship. The contents of those statements touching upon the physical, emotional and financial harm alleged by each of the victims was undoubtedly such as to excite sympathy for them, but they went beyond that which is envisaged by the legislation. In some respects, they amounted to pleas such as might be heard from a prosecutor urging that it was not a case deserving of leniency. Mr Moriarty talked of the theft as being sufficient to “destroy us”. Mrs Moriarty spoke of the robbery being “the most calculated attempt to cripple us and cause us harm to date” and she alleged that they “did not give our property back through any act of contrition on their part, but only because they were caught with our property”.

[9] When dealing with the Victim Impact Statements in the course of his sentencing remarks, his Worship disclosed that in the previous four years Mr Moriarty had come before him and satisfied him that he had had other goods stolen and that his property had been burned out on a couple of occasions which he suspected arose from other than natural causes. Whilst acknowledging that those were not matters that should influence him, his

Worship went on to say that he suspected that the action by the appellant and any others who may have been with him has been pretty much “a classic case of a straw and the camel’s back”. His following remarks indicate that his Worship was conjecturing upon a number of matters which were not before him as part of the plea, but which had probably come to his attention whilst he was serving as a Magistrate in Katherine.

[10] His Worship spent considerable time in dealing with the effect of the stealing as such, and I would not quibble with his remarks concerning how serious it was for the goods in question to have been stolen from a farm. On the facts known to his Worship the stealing had no effect whatsoever upon the operations of the farm, but no regard was had to that. Although acknowledging that the goods had been returned, it does not appear from the way his Worship framed his remarks that that circumstance was seen as an act of contrition on the part of the appellant, but I can well understand why his Worship would be anxious to use the sentencing process as a means of endeavouring to protect the public, particularly those involved in the primary industry, from those who steal or who are minded to steal their farming equipment, that is, the means by which they make their livelihood. There are many people who put a great deal of hard work into developing farming properties, large or small, they do not necessarily return substantial incomes, and the loss of property of little monetary value can cause significant hardship. However, viewing the agreed facts as put to his

Worship going to the offence and the uncontested matters put to his Worship on behalf of the appellant, it seems to me that his Worship has allowed his general concern about this type of offending to play too great a part in the sentence imposed upon the appellant.

[11] The subjective circumstances were that the appellant had become very drunk, and although that is not an excuse, it does provide a reason for why he did what he did. There had been disagreements in the past between the appellant and the owners of the property, although that was not advanced as any reason for justifying what he did. The appellant's purpose in going to the property is not made clear anywhere, maybe he did not know himself. But it is clear on the agreed facts that he broke in through a gate, and once there, stole the property concerned. His stealing may have been prompted in part by his finding a number of deceased cattle inside the cattle yards whereby, under the influence of alcohol, he became "inflamed".

[12] The appellant was 37 years of age and was a butcher by occupation, operating a business in Katherine. He had the custody of two children aged 12 and 17 from a former marriage. The drinking problem which affected him at the time of the offending had arisen as a result of the devastating effects of the Katherine floods in early 1999 which led to great financial burden upon him, which in turn led to difficulties in the marriage which resulted in a breakdown.

- [13] He had almost a clean record, there being no convictions for dishonesty whatsoever and traffic matters in 1983 for which he was convicted and fined. Four days after committing the offences the appellant went to the Katherine Alcohol and Drug Association where he was shown to have a medium level of dependence on alcohol in what was described as “a textbook case of a client who has developed a drinking problem”. He committed himself to counselling and attendance at Alcoholics Anonymous meetings. References were also presented to his Worship on behalf of the appellant speaking highly of his honesty, hard work and his evident remorse for what he had done. They also spoke of the stress under which he had been since the flood and its consequences.
- [14] On the appeal, significant reliance was placed upon his decision to return the goods so soon after he took them, his cooperation with police, and guilty plea. Those matters along with the subjective circumstances of the appellant all should have weighed heavily in his favour.
- [15] I indicated at the conclusion of the argument that the appeal would be allowed and Mr Gamble would not have to face the prospect of returning to prison. He had spent 14 days in gaol which was required under the Sentencing Act.
- [16] The sentence imposed upon him is quashed. He is sentenced to 12 months imprisonment to reflect the seriousness of the offence, but taking into

account his present circumstances, voluntary intention to return the goods, largely carried into effect, cooperation with police, guilty plea and obvious remorse. Order that the sentence be suspended after he has served 14 days, the sentence being deemed to have commenced on 14 January 2000.
