

PARTIES: THE QUEEN
v
DALE ROBERT TALBOT
AND
LEE ANTHONY KENNY
v
THE QUEEN

TITLE OF COURT: COURT OF CRIMINAL APPEAL OF THE
NORTHERN TERRITORY OF AUSTRALIA

JURISDICTION: APPEAL FROM THE SUPREME COURT
EXERCISING TERRITORY JURISDICTION

FILE NOS: CA 4 and 5 of 2003

DELIVERED: 30 December 2003

HEARING DATE: 12 December 2003

JUDGMENT OF: ANGEL ACJ, THOMAS & BAILEY JJ

REPRESENTATION:

Counsel:

Appellant (R v Talbot)/Respondent (Kenny v R): R Wild QC and R Brebner
Respondent (R v Talbot): G Bryant
Applicant (Kenny v R): M Powell

Solicitors:

Appellant (R v Talbot)/Respondent (Kenny v R): DPP
Respondent (R v Talbot)/Applicant (Kenny v R): NAALAS

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

R v Talbot; Kenny v The Queen [2003] NTCCA 13
Nos. CA 4 and 5 of 2003

BETWEEN:

THE QUEEN
Appellant

AND:

DALE ROBERT TALBOT
Respondent

AND

LEE ANTHONY KENNY
Applicant

AND:

THE QUEEN
Respondent

CORAM: ANGEL ACJ, THOMAS & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 30 December 2003)

THE COURT:

Background

- [1] These two matters arose out of the same incident and were heard together.
- [2] On 24 February 2003, upon his conviction following a plea of guilty to a charge of robbery (contrary to s 211 of the *Criminal Code*) with aggravating circumstances that he was in company with Lee Kenny and caused bodily

harm to Kenneth Nayda, Robert Talbot was sentenced to a term of imprisonment of three years. At the same time, Talbot was convicted upon his own plea of guilty to six counts set out in an ex officio indictment. The six counts comprised two counts of unlawful entry with intent to steal (with respect to two Darwin hotels), two associated counts of stealing and two of unlawful damage to property. With respect to these six offences, the learned sentencing judge imposed an aggregate sentence of imprisonment of six months. His Honour ordered that four months of this sentence was to be served concurrently with the sentence of imprisonment of three years, resulting in a head sentence of three years and two months imprisonment.

- [3] The learned sentencing judge backdated Talbot's sentence to 20 August 2002 and ordered that the balance of the sentence be suspended on conditions after Talbot had served 10 months. The conditions required Talbot to submit to the supervision of a probation officer for three years from the date of his release from imprisonment and, in particular, to obey all lawful and reasonable directions of his probation officer with regard to drug and alcohol treatment and rehabilitation.
- [4] On 17 March 2003, Talbot's co-offender, Lee Kenny, having been found guilty by a jury was convicted of robbery with aggravating circumstances that he was in company with Talbot and caused bodily harm to Kenneth Nayda. Kenny was also convicted of aggravated assault with intent to steal, contrary to s 212 of the *Criminal Code*, with respect to the same incident.

The aggravating circumstances were again that he was in company with Talbot and caused bodily harm to Kenneth Nayda. He was acquitted of unlawful entry to a building at night-time with intent to commit the crime of stealing, contrary to s 213(1) and (5) of the *Criminal Code*.

- [5] The learned sentencing judge (who was not the same judge who dealt with Talbot), imposed sentences of imprisonment of two years and six months on each of Kenny's two offences. His Honour ordered that the two sentences be served concurrently, fixed a non-parole period of 15 months and ordered that both the sentences and non-parole period be backdated to 6 March 2003 to take account of time already spent in custody.
- [6] In Talbot's case, the Crown appeals upon the ground that the sentence imposed for the aggravated robbery was manifestly inadequate both as to the term of three years and the period to be served prior to suspension.
- [7] Kenny applies for leave to appeal upon the sole ground that the learned sentencing judge erred in failing to give due weight to the principles of parity in dealing with the applicant. As will become apparent, the outcome of Kenny's application stands or falls on the outcome of the Crown's appeal in relation to Talbot's sentence.

Facts

- [8] In broad terms, the circumstances of the aggravated robbery committed by Talbot and Kenny were as follows.

- [9] In the early hours of 27 June 2002, Talbot and Kenny were separately refused entry to a Darwin nightclub. A third person then drove them a short distance to Shepherd Street. Talbot and Kenny left the vehicle and went to Frogshollow Backpackers Hostel in Lindsay Street. Talbot entered the kitchen of the hostel shortly before 3am. Kenneth Nayda, the night watchman was in the kitchen. Talbot said something to the effect of: “Where’s all the money? Where’s all the big notes?” and Mr Nayda replied: “We don’t keep that sort of money here”. Talbot ran towards Mr Nayda, tackled him around the waist and body, threw punches to his head and knocked him to the ground while continually demanding money.
- [10] Mr Nayda told Talbot that there was a safe in the office. Talbot grabbed Mr Nayda, pulled him to his feet and dragged him into the office. Along the way, Talbot pushed Mr Nayda in the back and he fell through some louvred windows, breaking the glass. Talbot demanded that Mr Nayda open the safe. Mr Nayda said that he did not have the keys and nor did he know the combination. In response, Talbot kicked and punched Mr Nayda to the head and body whilst on the floor.
- [11] At around this stage Kenny entered the scene and, at Talbot’s request, restrained Mr Nayda on the floor, whilst Talbot looked elsewhere for keys to the safe. He found some keys – which in fact belonged to Mr Nayda – and tried unsuccessfully to open the safe with them. Talbot returned to where Kenny and Mr Nayda were and again kicked and punched Mr Nayda.

He also held some unidentified object to Mr Nayda's throat, threatening to cut his throat.

[12] Mr Nayda was allowed up and told to remove the safe from the wall.

He was unable to move it. He sat down and was again punched and kicked by Talbot to the head and shoulder area. Mr Nayda began to call out for help. A rag was placed in his mouth and Talbot struck him on the back of the head with a heavy metal torch. Mr Nayda suffered a deep laceration which later required nine stitches.

[13] Guests at the hostel were awakened by the noise and disturbed Talbot and Kenny who attempted to flee. Talbot was apprehended almost immediately. Kenny surrendered to Police a day later. He participated in a record of interview in which he denied being an accessory, albeit admitting that he was present inside the hostel when the robbery and assault took place.

Reasons for sentence – Talbot

[14] The learned sentencing judge noted that Talbot was not entitled to a discount for assisting in the prosecution of his co-offender, Kenny. However, his Honour allowed a reduction in the sentence that would have otherwise been passed upon Talbot on account of his plea of 20% "of the time which you would otherwise have had to have served in custody". It is not entirely clear what the learned sentencing judge meant by this formulation. In our view, it is likely that his Honour intended, in accordance with customary practice, to reduce the offender's head sentence

by around 20% rather than the period which he otherwise would have ordered the offender to serve in (actual) custody. If this assumption is correct, it would suggest that the learned sentencing judge's starting point was a head sentence of around 4 years for the aggravated robbery and the 6 property offences set out in the ex officio indictment.

[15] The learned sentencing judge also took into account that Talbot was, at the time of the aggravated robbery on bail for other offences including aggravated dangerous act (driving a motor vehicle at a policeman while the offender was intoxicated), failure to stop after an accident and driving a motor vehicle whilst unlicensed. His Honour considered this was an aggravating circumstance. On the other hand, the learned sentencing judge took into account in Talbot's favour, his relative youth (20 years old) his deprived background and associated severe drug and alcohol abuse. His Honour considered the aggravated robbery "a very serious offence involving a continuing violence upon a man who was in no position to protect himself" at a time when he was in company with another person (Kenny). The learned sentencing judge considered that both personal and general deterrence were significant factors in determining an appropriate sentence for Talbot. His Honour took into account that while Mr Nayda had not suffered any long lasting physical effect, the psychological damage to him had necessitated treatment and caused Mr Nayda to seek less well paid employment.

[16] Immediately before passing sentence upon Talbot, the learned sentencing judge told the offender that he was going to give him "... an opportunity to show that ..." he is "... capable of becoming a worthwhile member of this society".

Reasons for sentence – Kenny

[17] The learned sentencing judge in the case of the 22 year old Kenny took into account the offender's convictions as a juvenile but also the fact that he had not previously served a sentence of imprisonment. His Honour accepted that the offending was out-of-character for Kenny. His Honour considered that the approach to be taken in sentencing in cases of robbery in company, further aggravated by the causing of bodily harm to the victim, was the same as that applicable to cases of armed robbery.

[18] The learned sentencing judge found that Kenny had played a much lesser role than Talbot. His Honour considered that prima facie, the sentence to be imposed on Kenny "ought to be significantly less than the sentences imposed on Talbot". However, his Honour considered that the sentences imposed on Talbot were manifestly inadequate. The learned sentencing judge considered that the circumstances of the offender Talbot and the offence of aggravated robbery called for a head sentence in excess of five years imprisonment, (with a consequential minimum non-parole period of at least 50% thereof). Accordingly, his Honour, in sentencing Kenny, ignored the actual sentence imposed on Talbot and imposed what he considered to be

an appropriate sentence having regard to all the circumstances of the offence and the offender.

Consideration

[19] The principles to be applied on a Crown appeal against sentence were stated succinctly by the Court of Criminal Appeal in *R v Goodwin* CA 8 of 2003, unreported, delivered 12 November 2003 at para [8]:

“[8] This Court on appeal does not interfere with a sentence merely because it is of the view that the sentence is insufficient. It interferes only if error is demonstrated. The Court of Criminal Appeal only interferes once it is demonstrated that the sentencing Judge erred in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence or if the sentence itself is so excessive or inadequate as to manifest error, i.e. that in some unspecified way the exercise of the discretion has miscarried: *Tate & Bartley* (1979) 46 FLR 386 at 388; *Raggett & Ors* (1990) 50 A Crim R 41 at 46, 47.”

[20] In *Goodwin*, supra at para [11], the Court of Criminal Appeal also observed:

“[11] There is a well established line of authority to the effect that in the case of serious offending the youth of the offender is not the prevailing consideration in sentencing. A number of the cases are collected in the judgment of this Court in *Serra* (1996) 92 A Crim R 511; see also *Bloomfield* [1999] NTCCA 137 at paras 21 and 34. It is well established that if a young offender commits a criminal offence like an adult then that justifies sentencing him or her in a fashion more akin to an adult. Where crimes of considerable gravity are committed the protective function of the criminal court would cease to operate unless denunciation, general deterrence and retribution are significant sentencing considerations even in respect of juveniles: *Pham & Lee* (1991) 55 A Crim R 128 at 135; *Nichols* (1991) 57 A Crim R 391 at 395; *Hawkins* (1993) 67 A Crim R 64 at 66; *Gordon* (1994) 71 A Crim R 459 at 465; *AEM, KEM and MM* [2002] NSWCCA 58 paras 95–102.

As the Director of Public Prosecutions submitted in the present case, the offence in this case is by its nature an adult crime. It must be denounced by the Courts by the imposition of appropriate penalties.”

[21] In *Goodwin*, the Director of Public Prosecutions submitted, as in the present case, that the offence in that case was by its nature an adult crime.

We agree unreservedly that was so in the present case. As Martin CJ observed in *Bloomfield*, supra, at para [21]:

“There is a point at which the seriousness of the crime overrides the mitigating factor of youth [*Braham* 1994 73 A Crim R 353 at 366, *Nichols* (1991) 57 A Crim R 391, *Pham* (1991) 55 A Crim R 128 at 135, *Hawkins* (1993) 67 A Crim R 64, *Gordon* (1994) 71 A Crim R 459].”

In our opinion, the offence committed by Talbot is such a case and must be denounced by the courts by the imposition of an appropriate penalty.

[22] This Court has on numerous occasions emphasised that in cases of armed robbery condign punishment is necessary; the main sentencing objectives are retribution and deterrence and the weight to be given to subjective factors is less than in the case of less serious matters (*Serra*, supra). In our view, these considerations apply equally to the offence of robbery in company, and particularly where, as in the present case, bodily harm is caused to the robbery victim.

[23] In the present case, Talbot repeatedly punched and kicked his victim to the head and body whilst defenceless on the floor. With respect, we agree with

the observation of Lord Taylor in *Attorney-General's Reference 35 of 1995*

[1996] 1 Crim App R (S) 413 at 415:

“To kick somebody on the ground, to kick him in the face and to kick him repeatedly is a very grave offence indeed. This court wishes to make it clear that anyone committing offences of that kind must expect a substantial sentence.”

The victim was pushed into glass louvres. At some point an object was placed against his throat and Talbot threatened to cut his throat. The victim was struck on the back of the head with a torch resulting in a wound requiring nine stitches. The victim suffered continuing psychological harm as a result of the robbery. He took up less well-paid employment. Talbot was on bail at the time of the offending.

[24] These aggravating factors combine to make Talbot's offence very serious indeed. In our view, personal and general deterrence were not merely “significant factors” (AB 48) for the learned sentencing judge to consider, but together with retribution, were the most significant factors in determining an appropriate sentence. While the subjective mitigating factors in favour of Talbot (his youth, deprived background, addiction to substance abuse) were not to be ignored, such factors could not justify Talbot's rehabilitation as the predominant sentencing objective.

[25] We agree with the learned sentencing judge who dealt with Kenny that the seriousness of Talbot's offending, notwithstanding the guilty plea and the

other available mitigating factors, called for a head sentence in excess of five years imprisonment.

[26] Section 40(1) of the *Sentencing Act* provides that only a head sentence of five years or less can be suspended, either wholly or in part. By virtue of s 54(1), any non-parole period fixed in respect of a head sentence of more than five years is required to be not less than 50% of the head sentence.

[27] The Director of Public Prosecutions has not sought to appeal the aggregate sentence imposed on Talbot with respect to the six property offences set out in the ex officio indictment. We consider that the sentence of six months imprisonment with four months to be served concurrently with the sentence imposed for the offence of aggravated robbery is itself manifestly inadequate. However, having regard to the Director's stance, we will not intervene in that aggregate sentence.

[28] We allow the Crown appeal, quash the sentence imposed upon Talbot in the court below and turn to re-sentence him. After reduction to take into account that this is a Crown appeal and that Talbot has been released from prison and shall have to return to prison, we sentence Talbot for the offence of aggravated robbery to imprisonment for a term of five years. We leave undisturbed the aggregate sentence for the six property offences.

[29] Accordingly, four months of the six month sentence of imprisonment for the six property offences is to be served concurrently with the sentence of five years imprisonment, resulting in a head sentence of 5 years and 2 months

imprisonment. We fix a non-parole period of 2 years and 7 months imprisonment. Talbot served a period of 10 months imprisonment and was released in accordance with the orders of the learned sentencing judge. The 10 month period of imprisonment is to count against the new sentence imposed by this court. Upon his incarceration, Talbot will be subject to an outstanding sentence of imprisonment of 4 years and 4 months. He will be eligible for parole after serving a further 1 year and 9 months.

[30] The sole ground of the application for leave to appeal by Kenny was the alleged disparity between the sentence imposed upon him (imprisonment of two years and six months with a non-parole period of 15 months) and that imposed by the learned sentencing judge on Talbot (imprisonment of 3 years and 2 months, suspended on conditions after service of 10 months).

[31] In the light of the new sentence imposed by us upon Talbot, and taking into account both the much lesser role played by Kenny in the robbery and the absence of a discount for a plea of guilty, Kenny could no longer maintain any sense of grievance at the severity of his sentence compared with that of his co-offender. In all the circumstances, we allow the application for leave to appeal by Kenny, but dismiss his appeal.
