Russell v Littman [2006] NTSC 50

PARTIES:	DAVID WILLIAM RUSSELL
	v
	ANDREW KEVIN LITTMAN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 71 of 2005 (20420354)
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JUDGMENT OF:	SOUTHWOOD J

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Forrester v Dredge (unreported No JA 78 of 1996, 19 February 1997); *R v Jurisic* (1998) 101 A Crim R 259; *Nelson v Chute* (1994) 72 A Crim R 85; *Parmbuck v Garner* [1999] NTSC 108; *Simmonds v Hill* (1986) 38 NTR 31 - applied

REPRESENTATION:

Counsel:

Appellant:	C McGorey
Respondent:	R Brebner

Solicitors:

Appellant:	North Australian Aboriginal Justice Association
Respondent:	Office of the Director of Public Prosecutions

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

Russell v Littman [2006] NTSC 50
No. JA 71 of 2005 (20420354)

BETWEEN:

DAVID WILLIAM RUSSELL
Appellant

AND:

ANDREW KEVIN LITTMAN
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 30 June 2006)

Introduction

[1] This is an appeal against a sentence that was imposed on the appellant by the Juvenile Court on 16 September 2005. The appellant was convicted and sentenced to detention for a period of six months, wholly suspended upon him entering into a good behaviour bond in the sum of $200 for a period of 18 months, with conditions that he accept supervision from the Department of Correctional Services and comply with all reasonable directions as to residence, associates and employment for a period of 12 months from 16 September 2005. The appeal is brought pursuant to s 58 of the Juvenile Justice Act.

[2] The wholly suspended sentence of imprisonment was imposed by the Juvenile Court on the appellant after the appellant pleaded guilty to committing a dangerous act on 29 September 2004. The dangerous act was throwing a large rock and hitting a taxi that was travelling along Trower Road.

[3] The maximum penalty for the crime committed by the appellant is five years imprisonment. The maximum penalty that may have been imposed on the appellant by the Juvenile Court is 12 months detention.

Grounds of appeal

[4] On 26 June 2005 the appellant was granted leave to amend the grounds of appeal. The appellant has pleaded six grounds of appeal. They are as follows: the sentence imposed was manifestly excessive in the circumstances; the learned magistrate erred in treating this offence as prevalent; the learned magistrate erred in giving excessive weight to general deterrence; the learned magistrate failed to give adequate consideration to the personal circumstances of the appellant, in particular his youth, lack of prior convictions, involvement in the offending and prospects of rehabilitation; the sentence imposed on the co-offenders suggests that the sentence was manifestly excessive; and, the learned magistrate failed to give adequate consideration to a disposition of community service.

[5] The respondent concedes that there was no evidence before the Juvenile Court to establish that the offence committed by the appellant was prevalent or that such offences were becoming too prevalent.

Issue

[6] The principal issue in this appeal is whether the appellant's offending was of such a serious or dangerous nature that it required the Juvenile Court to impose a sentence of detention on the appellant. In other words, was the crime committed by the appellant of such a dangerous nature that the elements of general deterrence and protection of the community outweighed the fundamental principle that rehabilitation is paramount and imprisonment is a last resort when it comes to sentencing juvenile offenders?

The facts

[7] The facts and circumstances of the offending which is the subject of the appeal are as follows.

[8] The appellant is an 18 year old man of Aboriginal descent. At the time he committed the dangerous act which is the subject of this appeal the appellant was 15 years of age. The appellant has a brother who is one year younger than the appellant and a sister who is two years younger than the appellant. The appellant's mother and father separated when he was three years old. While he was growing up the appellant along with his brother and sister moved between Darwin and Jabiru with their father who was granted custody of his children after his separation from the appellant's mother.

Over short periods of time the appellant also lived with family relatives in Darwin. At the time of being sentenced he was residing with his aunt and young cousins in Jingili.

[9] At the time he was sentenced the appellant did not have anything to do with his mother. He did not know her whereabouts. He had a good relationship with his father. However, his father lived in Ceduna in South Australia. The appellant's father did not take him to South Australia with him. Instead the appellant's father had left him to live with his aunt. At the time he was sentenced the appellant had not heard from his father for a few months. The appellant found it very stressful when his father left him and went to Ceduna. He attempted suicide when he was 14 years of age by hanging himself from a tree. He stated that he tied a rope to a branch of the tree but the branch broke. The appellant did not have a stable home environment. As a result, at the time of the offending, the appellant was extremely susceptible to pressure from his peers.

[10] The appellant can read and write well but he did not like school and he did not wish to pursue further education. He would rather work than go to school. At the time he was sentenced the appellant was involved in the JPET Program at Darwin Skills Development Scheme and he had gained some work through them. At the time he was sentenced the appellant was not enrolled at any school. The appellant had shown an interest in gaining employment and steps were made through Darwin Skills Development Scheme for him to regain employment at the Darwin Turf Club where he had

previously worked as a labourer. The appellant was interested in wildlife and would one day like to pursue a career as a ranger.

[11] The appellant was in good health. He did not suffer any major illness during his early childhood. At the time he was sentenced by the Juvenile Court the appellant did not regularly consume alcohol. He admitted that he had done so in the past.

[12] On Wednesday 29 September 2004 the appellant was at Trower Road, Casuarina. He was in the company of a number of co-offenders. Between 2.00 am and 3.00 am the appellant and his co-offenders started to throw large rocks at passing taxis. Before doing so the appellant and his co-offenders had positioned themselves on the grounds of an apartment complex. Some of them hid in bushes and others climbed to the top of the apartment complex. This was done in an attempt to avoid being seen by the passing taxis drivers and to flee the area upon the arrival of the police.

[13] Four taxi drivers reported sustaining damage to their taxis because of the appellant's and his co-offenders' actions. One of the taxis that had rocks thrown at it was taxi no 36. The taxi sustained $440 damage to the front passenger door. Taxi no 195 was also damaged. The taxi sustained extensive damage including dents and paint chips to the bodywork of the vehicle and a smashed rear passenger window. The cost of repairs to the taxi was estimated at $823.28. At the time that taxi no 195 had rocks thrown at it a female passenger in the taxi was forced to duck to avoid being

struck by rocks and shards of glass. The taxi driver was forced to drive at speed in an attempt to avoid being struck by more rocks and she stated that she was scared and feared for her safety. As a result of her fear and the damage to her vehicle she was not able to complete her shift. Taxi no 202 was also damaged. It was damaged by the rock thrown by the appellant. The taxi sustained a large dent to the front of the taxi. The cost of repairing taxi no 202 was estimated at $220. Taxi no 308 was also damaged. The taxi sustained $1,271.98 damage to the front passenger side door as well as to the driver's side door.

[14] Uniform police officers were travelling in taxi no 308 when the rocks were thrown at the taxi. The police pursued the offenders and arrested the appellant and others.

[15] At the time the offenders threw rocks at the taxis it was dark and difficult for the passing taxi drivers to avoid being struck by the rocks. The speed limit for the stretch of road where the appellant and co-offenders threw rocks at the taxis is 70 kph. At the time of the offences the appellant and co-offenders were in a public place. The actions of the appellant had the likely potential to cause injury or death. At no time did the appellant have permission to damage any of the taxis or indeed throw rocks at passing taxis.

[16] At 4.30 pm on Saturday 4 December 2004 the appellant participated in a record of interview. When asked how far away from the taxi he was when

he threw the rock appellant replied, "About five or six metres". When asked why he had thrown the rock at the taxi he said, "We were all bored. Everyone wanted to get chased". When asked what could have resulted from him throwing the rock at the taxi the appellant replied, "The taxi driver could die".

[17] Prior to committing the dangerous act which is the subject of the appeal, the appellant had committed the crimes of unlawful entry of a building at night and stealing. At the time he committed the dangerous act he had not been dealt with by the courts for the other crimes that he had committed. On 22 December 2004 the appellant was released without conviction and given a good behaviour bond for each of the crimes of unlawful entry of a building at night and stealing.

[18] The appellant's offending was serious. The maximum penalty for doing a dangerous act contrary to s 154 of the Criminal Code is five years imprisonment. At the time the offenders threw rocks at the taxis it was dark and difficult for the passing taxi drivers to avoid being struck by the rocks. The speed limit for the stretch of road where the appellant and co-offenders threw rocks at the taxis is 70 kph. The actions of the appellant had the likely potential to cause injury or death. The appellant's act caused serious potential danger to the life of a taxi driver while he was travelling along a major public road. It was done in company and at night. Although the decision to throw rocks may well have been spontaneous, the offenders were organised in the manner in which they chose to throw the rocks at the taxis

and in the manner in which they tried to avoid being caught by the police. The appellant's act was a deliberate wanton act which involved some forethought. The taxi sustained damage. Rocks were thrown by the appellant's co-offenders at three other taxis.

The sentencing remarks of the Juvenile Court

[19] When sentencing the appellant the presiding magistrate made the following remarks:

> The charge before the court today is a very serious one, a dangerous act causing serious potential danger. And you are not the first young man that I have had to deal with for this type of offence. I have said a number of things on prior occasions and really the bottom line is that this type of activity is just so dangerous that it must not be repeated and I have had some concerns about the number of times that this type of activity has been engaged in by young people in Darwin.
>
> Although this court does not normally deal with young offenders with a view to discouraging other young people from engaging in this type of behaviour, this strikes me as a type of offence where I think it is appropriate for the court to address that particular issue, that is, to discourage other young people from engaging in this type of behaviour.
>
> However, as I said to the other offenders on charges of this type, rehabilitation is the primary objective of this court. And the court must do what it can to get you back on the right track. And, of course, sending a young person to a detention centre is always a measure of last resort, it should be avoided at all costs. And wherever possible, young offenders should be dealt with in a way that does not require them to actually undergo a period of detention.
>
> I do not intend to send you to Don Dale at this point in time and I had said that to the other co-offenders. However, in my view this is a matter that does warrant a conviction. I do consider that in this particular case it is necessary to do that in order to address the issue

> of rehabilitation. The conviction signifies the seriousness of this matter and it needs to be sheeted home to you just how serious this offence is and that is done through the vehicle of a conviction I record today.
>
> The other young offenders were sentenced to suspended period of detention. I really see no good reason why I should do anything different in your case. The fact that you do not have a prior record really, in my view, does not provide a basis for me departing from what I did in relation to the other offenders. I accept that they were on more than one charge. That is my memory in relation to at least one of those offenders. But I propose to convict you and sentence you to six months detention.
>
> I certainly did that in relation to each of the charges the other co-offenders were facing. In this court, of course, sentences cannot be accumulated, they must be concurrent. That is, they must be served at the same time and when I sentenced those other young men to six months detention on each charge, I had formed the view that each charge warranted six months and that is what I did there and that is what I am going to do today.
>
> I am going to impose some conditions which are very much the same as the conditions I imposed in relation to the other offenders. I consider that you should be treated the same way as they were and for the same reasons. I suspend that six month period of detention upon you entering into a recognisance in the sum of $200 to be of good behaviour for 18 months. The recognisance is a promise that you will pay $200 if you get yourself into trouble.
>
> …
>
> I am also making it a condition of the order today that you be placed under the supervision of Correctional Services for a period of 12 months. And during that time you are to obey all reasonable directions as to residence, associates, reporting, education training and counselling. Correctional Services are there to assist you in your rehabilitation….

[20] The presiding magistrate was of the opinion that the dangerous act committed by the appellant was so dangerous that it should not be repeated

by the offender or any other young people in the community. Consequently he gave maximum weight to the principles of general deterrence and protection of the community. He was also of the opinion that the ultimate sentence that was imposed on the appellant was such that it facilitated the appellant's rehabilitation. His Honour had regard to the appellant's age and antecedents and to the fundamental principles that rehabilitation was the primary objective of the Juvenile Court and that detention was a last resort that should be avoided at all costs.

[21] In determining that maximum weight should be given to the principle of general deterrence the presiding magistrate wrongly took into account a misconception that such offending was prevalent. There was no evidence before the Juvenile Court that the offence was prevalent or that the prevalence of the offence was increasing. The reason the presiding magistrate had previously sentenced a number of offenders for committing the dangerous act of throwing rocks at taxis was that a number of offenders had been engaged in a single group instance of such offending. However, this error does not vitiate the sentence that was imposed on the appellant. The prevalence of the offence was not the only factor that the presiding magistrate considered when deciding to give the weight that he did to general deterrence. His primary concern was the level of danger created by the dangerous acts that were committed by the appellant and his co-offenders.

The argument of the appellant

[22] On behalf of the appellant his counsel, Mr McGorey, frankly acknowledged that in no sense could the offending be considered trivial. However, he argued that when sentencing a juvenile offender the Juvenile Court was required to have regard to the following principles. Juveniles are less able to form moral judgments, less able of controlling their impulses and less aware of the consequences of their acts. It is accepted that juveniles should not be dealt with by the courts on the same basis as adults. Great emphasis is placed on the rehabilitative aspects of sentencing. Usually general deterrence is given little or no weight. Detention is a sentence of last resort and is to be avoided unless all other options have been excluded or have been tried unsuccessfully. The sentence that was imposed on the appellant should have been tailored to ensure that the appellant's employment could be unduly interfered with by a period of detention.

[23] Mr McGorey submitted that the cases in which the courts could give maximum weight to general deterrence and protection of the community and impose a sentence imprisonment on juveniles were cases involving very serious offending such as murder, violent sexual intercourse without consent or armed robbery. This was not such a case. Further, the decision to impose a suspended sentence is a two stage process. Prior to suspending a sentence of detention it was necessary for the Juvenile Court to first consider if a sentence of imprisonment was called for and secondly to determine whether that sentence of imprisonment should be suspended for a period by the court.

The presiding magistrate did not engage in such a process. He only considered if a suspended sentence of imprisonment was an appropriate sentence. Mr McGorey said that given the appellant's youth at the time he committed the offence and his prospects of rehabilitation, a community work order should have been considered. A properly structured community work order was an equally effective general deterrent as a six month suspended sentence of imprisonment.

The respondent's argument

[24] Ms Brebner who appeared on behalf of the respondent submitted that the principles that the overwhelming concern of the Juvenile Court is the young offender's development as a law abiding citizen and that detention is a last resort are general principles. General deterrence does have a role to play and the weight to be given to it must vary according to the circumstances of the case, including the nature of the charge. In some juvenile cases, deterrence and punishment as sentencing objectives may assume considerable significance. No error was demonstrated in the presiding magistrate's reasoning. The appellant committed a serious crime. The sentence imposed was proportionate to the crime. The crime was sufficiently serious to warrant a period of detention and the presiding magistrate addressed the issues concerning the appellant's rehabilitation.

Conclusion

[25] I accept the respondent's submissions. The principles that the overwhelming concern of the Juvenile Court is the young offender's development as a law abiding citizen and that detention is a last resort are fundamental principles for courts to consider when sentencing juveniles: *Simmonds v Hill* (1986) 38 NTR 31 at 33. When sentencing juveniles the court is trying to find the best means of turning the juvenile into a responsible and law abiding adult: *Nelson v Chute* (1994) 72 A Crim R 85 at 90. However, I agree with Mildren J that general deterrence does have a role to play even in the sentencing of juveniles and the weight to be given to general deterrence must vary according to the circumstances of the case, including the nature of the charge: *Forrester v Dredge* (unreported No JA 78 of 1996, 19 February 1997) at 12.5; see also *Parmbuck v Garner* [1999] NTSC 108 per Bailey J at par [27]. This is so even in cases where the offender's behaviour is explicable by reference to difficult personal circumstances, immaturity and the growing-up process.

[26] This was an appropriate case in which to have given significant weight to general deterrence. Although the offending is not as serious as the offences to which Mr McGorey referred to as being appropriate for considerations of general deterrence, the potential danger created by the offences committed by the appellant and his co-offenders was very serious indeed. It is not unusual for general deterrence to be given significant weight by the courts in cases concerned with offending by young people that endangers the safety

of road users: *R v Jurisic* (1998) 101 A Crim R 259 per Spigelman CJ at 274. The potential danger to users of the road created by the dangerous acts committed by the appellant and his co-offenders was such that there was a need for public deterrence. The authorities referred to by Mr McGorey do not preclude a court from giving significant weight to general deterrence in cases such as this. They merely underscore the importance of the general principles referred to above. The wholly suspended sentence of imprisonment that was imposed by the Juvenile Court was proportionate to the offending and was tailored to turning the juvenile into a responsible and law abiding adult.

[27] The learned magistrate did engage in a two step process in considering the sentence to be imposed on the appellant. This is established by the overall structure of his sentencing remarks. He firstly determined that a sentence of imprisonment should be imposed. He then considered whether the sentence of imprisonment should be suspended. It cannot be said that he did not take into account both the subjective and objective elements of the offending at both stages. It is apparent from the sentencing remarks of the presiding magistrate that he had both the issues of general deterrence and rehabilitation at the forefront of his mind.

[28] As to the question of parity I accept the submissions of the respondent. The wholly suspended sentence of imprisonment that was imposed on the appellant was consistent with the principle of parity and proportional to his offending and subjective circumstances.

Order

[29] The appeal is dismissed and I will hear the parties as to the costs of the appeal.