Owens v Young [2013] NTSC 49

PARTIES:	**OWENS, Wesley**
	v
	YOUNG, Ian
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 4 of 2013 (21218668)
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JUDGMENT OF:	HILEY J

CATCHWORDS:

CRIMINAL LAW – sentencing - appeal against sentence – young offender - proportionality - objective seriousness of offences - imprisonment last resort – alternatives to be considered – manifestly excessive - appeal allowed – discharge without penalty - *Youth Justice Act* (NT)

CRIMINAL LAW – sentencing - first offence - young offender – further offending before sentence

Criminal Code (NT) s 210, s 213.
Youth Justice Act (NT), s 4, s 52, s 81, s 83.

R v Aston (No 2) [1991] 1 Qd R 375; *R v Kirby* (2009) 193 A Crim R 357; *Lalara v Malogorski* [2012] NTSC 53; *Dinsdale v The Queen* (2000) 202 CLR 321; *Hampton v The Queen* [2008] NTCCA 5, applied

Griffiths v The Queen (1977) 137 CLR 293; *Veen v The Queen (No 2)* (1988) 164 CLR 465; *Baumer v The Queen* (1988) 166 CLR 51; *Weininger v The Queen* (2003) 212 CLR 629; *Amado v The Queen* [2011] NSWCCA 197; *R v F* [2000] 2 Qd R 331; *Ryan v Malogorski* [2012] NTSC 55, referred to

REPRESENTATION:

Counsel:

Appellant	Anthony Pyne
Respondent:	Marilyn Lester

Solicitors:

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

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

Owens v Young [2013] NTSC 49
No JA 4 of 2013 (21218688)

BETWEEN:

WESLEY OWENS
Appellant

AND:

IAN YOUNG
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 22 August 2013)

Introduction

[1] This is an appeal under s 144 of the *Youth Justice Act* against a sentence imposed upon the appellant for two offences committed by him on 1 October 2011 ("the 1 October 2011 offences"). They were: (i) unlawfully entering a school to commit an offence, namely stealing, contrary to s 213 of the *Criminal Code*, and (ii) stealing, contrary to s 210 of the *Criminal Code*.

[2] The appellant was born on 30 December 1994 and was therefore 16 years old at the time of committing these offences.

[3] The main facts were that on 1 October 2011 the appellant and others unlawfully entered Borroloola Primary School and stole a black Ipad, a

black Iphone, a Sony mobile phone, a dictaphone, four carving knives and a quantity of foodstuffs, and a football, valued at approximately $1400.

[4] On 19 February 2013 the Youth Justice Court convicted the appellant of the two offences and sentenced him to two months imprisonment, backdated to 9 February 2013 on account of time spent in custody in relation to the offences. It is that sentence that is the subject of this appeal.

[5] The amended grounds of appeal challenge the sentence on grounds that the learned magistrate failed to properly apply the principle that imprisonment is a punishment of last resort[1] and failed to consider properly the principle of totality, and that the sentence was manifestly excessive.

Relevant background

[6] As noted the offences were committed on 1 October 2011. At that time he had no criminal record.

[7] The appellant was arrested at Borroloola on 16 May 2012, in connection with another offence alleged to have occurred on 1 May 2012. I shall refer to this as "the May matter". He was taken to the local police station and participated in a recorded interview, during which he made full admissions in relation to the 1 October 2011 offences. He was granted bail to appear at the Borroloola Youth Justice Court.

[1] Cf ss 4(c) & 81(6) *Youth Justice Act*.

[8] The appellant was charged on information with the 1 October 2011 offences on 7 July 2012, and he appeared at the Borroloola Youth Justice Court on 10 July 2012. Those matters and the May matter were adjourned until 11 September 2012 for a case management inquiry, and his bail was continued.

[9] On 13 September 2012 he pleaded guilty to the 1 October 2011 offences but the further hearings of those matters, and of the May matter (in respect of which he had pleaded not guilty), were adjourned to the next day. He failed to appear at the hearings the next day, 14 September 2012, and the matters were all adjourned to 15 November 2012.

[10] On two separate occasions on 15 September 2012, the appellant and others committed further offences, also involving unlawful entry of premises and stealing. On 19 September the appellant committed two further offences, involving the stealing of two motor vehicles, alcohol and fuel. I shall refer to these as "the September 2012 offences".

[11] The appellant was located and arrested on 21 September 2012, and participated in police interviews concerning the new offences. He was then remanded in detention.

[12] The appellant appeared in custody at the Borroloola Youth Justice Court on 15 November 2012. He pleaded guilty to the September 2012 offences, and was found not guilty of the May matter.

22 November 2012 proceedings

[13] On 22 November 2012 the appellant appeared in custody. The Court had been provided with a report pursuant to s 51 of the *Youth Justice Act* and also a pre-sentence report.

[14] The Court sentenced the appellant to 6 weeks detention for the offences committed on 15 September 2012, 2 days detention for unlicensed driving on 19 September, and 2 months detention for the other offences committed on 19 September 2012. The Court did not proceed to convict the appellant for any of those offences, and ordered the sentences to be backdated to 21 September 2012 (being the date when the appellant was taken into custody for those offences). This meant that the appellant had already served his time in relation to the September 2012 offences.

[15] In relation to the 1 October 2011 offences, the Court granted the appellant bail, on conditions, and adjourned the matters to 26 February 2013 for sentence. Her Honour's orders were that: (i) he be released (on bail) at 9 am the following day; (ii) he be under the supervision of the Department of Community Corrections for the period of bail and obey all reasonable directions as to reporting, counselling, residence and rehabilitation; (iii) he attend and participate in the CAAPS residential rehabilitation program and successfully complete that program; and (iv) he cooperate with Top End Mental Health Services in relation to treatment and medication.

[16] Those orders are commonly known as Griffiths Remand orders,[2] and are permissible under s 83(1)(d) of the *Youth Justice Act*.

[17] Her Honour's comments on 22 of November 2012 indicate that she wanted to dispose of all of the charges against the appellant as soon as possible but that she wished the appellant to undergo the CAAPS program, a residential rehabilitation program, and put him on bail under the supervision of the Department of Community Corrections, before sentencing him. In order to achieve this she sentenced him for all of the September 2012 offences, and imposed the Griffiths remand order in relation to the 1 October 2011 offences.[3]

[18] Unfortunately it would seem that her Honour was under the impression that the 1 October 2011 offences were in fact committed on 3 October 2012 - that is, that they were the latest of the offences committed by the appellant (and part of the same series of offences as the September 2012 offences). This is apparent from various comments on pages 8 and 9 of the transcript (of 22 November 2012) including her references to "the final lot of offences on 3/10", "that last break and enter at the school" and her remarks that (all of the offences) "go over a little period of time, the first ones happened on 15 September and the last ones happened on 3 October" and that " in relation to the offences that occurred on 3 October … you'd already been in

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[2] The description "Griffith Remand orders" follows from the High Court's decision in *Griffiths v The Queen* (1977) 137 CLR 293.

[3] Transcript 22/11/12 pp 8-9.

trouble with the police for the other ones and I'm obviously satisfied you knew you were doing the wrong thing in relation to this."

[19] It seems that that was the reason why she chose to use the 1 October 2011 offences as a mechanism for imposing the Griffiths Remand orders, rather than one or other of the (much later) September 2012 offences.

[20] In the course of sentencing the appellant on 22 November 2012, her Honour took into account the totality of the appropriate sentences, and the amount of time he had already served in custody. She then said: "when you look at the dates … when he's committed those offences as well and then the final lot of offences on 3/10, I had intended to give him more than he has currently served, but suspend it from tomorrow." She appears to have proceeded to sentence the appellant for the September 2012 offences on the assumption that they were "the first lot of offences you've come to court for", apparently forgetting that the appellant had in fact been to court in relation to the 1 October 2011 offences earlier that year, including on 10 July and 13 September 2012 (when he pleaded guilty to them).

[21] Despite this error, it is clear that her Honour took the 1 October 2011 offences into account when structuring the sentences, albeit under the mistaken belief that they occurred in October 2012. It is also clear that her Honour's overall objective was to sentence the appellant in such a way that he should serve no additional time in detention for any of the offences (particularly in light of the fact that he had already spent some months in

custody following his arrest in September), but that he not be finally sentenced in respect of one of the matters until he had successfully undergone the CAAPA residential rehabilitation program.

[22] The appellant has (correctly in my view) not challenged the making of the Griffiths remand order. Indeed it seems to be accepted that her Honour was imposing that order so as to maximise the appellant's prospects of rehabilitation.

[23] However, the appellant does rely upon the comments that her Honour made on 22 November to the effect that the appellant should serve no additional time in actual detention for any of the offences, as a basis for this court to conclude that her Honour erred when on 19 February 2013 she in fact ordered additional time in actual detention.

Events between 22 November 2012 and 19 February 2013

[24] The appellant turned 18 on 30 December 2012. Unfortunately, he absconded from the residential rehabilitation program on 2 January 2013. He was arrested on 12 January 2013, and was remanded in custody to appear at the Darwin Youth Justice Court on 15 January 2013. On 18 January 2013 the appellant was granted bail so he could re-attend the residential rehabilitation program. But, on 25 January 2013, he absconded again, and he returned to Borroloola. He was arrested on 16 February 2013 and remanded in custody to appear at the Darwin Youth Justice Court on 19 February 2013, when he was sentenced.

19 February 2013 hearing

[25] It is clear from perusing the transcript of the proceedings of 19 February 2013, that her Honour was aware of, and took into account, the fact that these offences had been committed in October 2011. She also had to deal with his breaches of bail, committed when he absconded from the residential rehabilitation programs. (She referred to this as the "adult file" as those breaches occurred after he had turned 18.)

[26] At that hearing, counsel for the appellant submitted that the appellant should not have to serve any further time in custody, because he had not re-offended since he had been convicted of the other offences in November 2012, and because he had already spent another 11 days in adult custody since then after being arrested for absconding from the residential rehabilitation programs. Rather, counsel contended that he should return to Borroloola and live with his grandmother and look for work there.

[27] Her Honour adjourned the matter briefly in order to re-read the previous reports and files concerning the appellant. In the course of sentencing the appellant her Honour noted that the appellant has "issues in relation to mental illness" and "health".

[28] She described the offending as an "annoying kind of offending for people in small towns, where somebody breaks in to one of the facilities that's built there for the good of the town, the school and takes things that don't belong to them. He was with other people at the time and it would seem as though

he is from all of the information before me relatively easily led in relation to this kind of offending."

[29] She considered that that a lengthy supervision order would not assist him at this stage, and expressed the hope that as he gets a bit older should he commit any further offences he would be old enough to "grab the assistance of a supervised order and work with it."

[30] She then proceeded to convict him of the (1 October 2011) offences and sentenced him to 2 months imprisonment backdated to 9 February 2013 (reflecting the fact that he had been in custody for 11 days). For the breach of bail she convicted him and sentenced him to 2 days imprisonment backdated to 16 February 2013.

Consideration

[31] The general principles and considerations that are to apply to the sentencing of a youth are set out in s 81 of the *Youth Justice Act*. These include:

- the general principles of youth justice set out in s 4 – s 81(1)(b);
- the nature and seriousness of the offences, any history of sentences previously committed by the youth, the youth's cultural background, his age and maturity and the extent to which any person was affected as a victim of the offence – s 81(2);
- proportionality to the seriousness of the offence – s 81(3);

- rehabilitation – s 81(4);

- detention or imprisonment only as a last resort, and imprisonment only if there is no appropriate alternative – s 81(6).

[32] Section 83 of the *Youth Justice Act* sets out a range of sentencing options. These include:

- not recording a conviction (as her Honour did in respect of the September 2012 offences) – s 83(1); and

- discharging the youth without penalty – s 83(1)(b);

- ordering the youth to participate in a program (for example a youth diversion program), be of good behaviour for a period, pay a fine, participate in a community work project – s 83(1)(e) – (h); or

- ordering a term of detention or imprisonment that is wholly or partly suspended – s 83(1)(i).

[33] Despite the fact that by the time he was convicted and sentenced for the 1 October 2011 offences the appellant had committed several other offences (namely the September 2012 offences) and had breached bail on several occasions, the 1 October 2011 offences were the first in time.

[34] This would have been more obvious had he been sentenced on 13 September 2012 when he pleaded guilty (and before he had committed any other offences). Indeed, had he been sentenced then he would have been a "first

offender" in every sense of that phrase, not (yet) having committed the September 2012 offences or any other offences.

[35] Moreover, had he been sentenced on 22 November 2012 when he was sentenced for the other (September 2012) offences it seems that her Honour would not have sentenced him to serve any additional time in actual detention for the 1 October 2011 offences.

[36] The existence of the September 2012 offences, although committed subsequent to the 1 October 2011 offences, are matters which her Honour was entitled to take into account, particularly in assessing questions of leniency, risks of recidivism, and prospects of rehabilitation.[4] However, the commission of offences at a time subsequent to a particular offence ordinarily should be given less weight than offences committed prior to such an offence.[5]

[37] Most importantly, "subsequent offences cannot justify the imposition of a penalty that is severer than the offence itself merits. An offender is not to be penalised for an offence other than that for which the sentence is imposed."[6]

[38] When her Honour sentenced the appellant (on 19 February 2013) she was obliged to sentence him by having regard to the factors set out in s 81 and

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4 *R v Aston* (No 2) [1991] 1 Qd R 375.
5 *R v Kirby* (2009) 193 A Crim R 357 at [24].
6 *R v Kirby* (2009) 193 A Crim R 357 at [26] citing *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477-478, *Baumer v The Queen* (1988) 166 CLR 51 at 57, and *Weininger v The Queen* (2003) 212 CLR 629 at [32].

noted in [31] above and the sentencing options noted in [32] above. This is so notwithstanding that by this time the appellant had turned 18.[7]

[39] The main principle to be applied was the requirement in s 81(3) for the court to "dispose of the matter in a way that is in proportion to the seriousness of the offence."

[40] The nature and circumstances of the offence were such that the offending was at the lower end of the scale of objective seriousness. This was accepted by the respondent during the hearing of the appeal.

[41] I understand that the school was deserted at the time of the offences, much of the stolen property was recovered, and the appellant was easily led into the offending. I was informed that infringements like this are often dealt with by referral to the Police Diversion Process, without going to court, particularly in the case of first offenders.

[42] I consider that the offences were not sufficiently serious to warrant imprisonment (or detention). Imprisonment was neither an "appropriate alternative" nor "a last resort" to other sentences that were available.[8]

[43] Moreover, the appellant had made full admissions and had pleaded guilty when the offences came to court on 13 September 2012. The appellant had mental health issues. By the time he was sentenced (in February 2013) he had already spent 63 days in custody, mainly on account of his September

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[7] Sections 52(2), 81 and 83 of the *Youth Justice Act*.
[8] Cf ss 81(6) and 83 of the *Youth Justice Act*.

2012 offences, and another 11 days in custody in relation to these (October 2011) offences. Also, he did spend some time undergoing the CAAPS programs, although he did not complete them. I was informed that he had not re-offended for a significant period.

[44] Further, apart from rejecting counsel's submissions noted in [26] above and indicating why she did not consider a further supervision order would assist the appellant, her Honour does not seem to have considered other sentencing options available to her.

[45] In *Lalara v Malogorski*[9] Mildren J said:

> "The principle that imprisonment should be imposed only as a last resort is well established. Except in very obvious cases, before imposing an actual sentence of imprisonment where other sentencing options might be reasonably available, the sentencer should have then indicated that he or she is contemplating that course, particularly if there is no submission from the prosecution that an actual sentence of imprisonment is required."

[46] Moreover, apart from indicating why a supervision order would not be appropriate, her Honour should have expressed reasons why she considered no other disposition appropriate.[10]

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9 *Lalara v Malogorski* [2012] NTSC 53 at [13].
10 *Amado v The Queen* [2011] NSWCCA 197 at [71] – [76] applied in *Ryan v Malogorski* [2012] NTSC 55.

[47] Of course, as her Honour pointed out, by the time the appellant was sentenced his conduct since he committed the 1 October 2011 offences indicated that there was probably not much to be gained by imposing supervisory conditions. Understandably this did have the effect of limiting the range of sentences that might otherwise have been appropriate.[11] But I do consider that a number of the other sentencing options noted in [32] above should have been considered.

[48] As I have already said, this did not justify the imposition of a sentence that was harsher than the circumstances of these particular offences justified. The objective circumstances of this case did not warrant an actual sentence of imprisonment (or detention).

[49] I consider that the objective circumstances of these offences coupled with his good character prior to then, his age at the time, and the other factors noted in [30] above, did not justify a sentence more severe than one of those set out in s 83(1)(e) to (h) of the *Youth Justice Act* despite his later transgressions in September 2012. I consider that her Honour should have imposed one of those sentences if she was not prepared to discharge the appellant without penalty pursuant to s 83(1)(b) of the *Youth Justice Act.*

[50] In my opinion the sentence imposed was "so very obviously excessive that it was unreasonable or unjust".[12] In short it was "manifestly excessive".

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[11] Cf *R v F* [2000] 2 Qd R 331 at 333.

[12] *Hampton v The Queen* [2008] NTCCA 5 at [14] applying *Dinsdale v The Queen* (2000) 202 CLR 321 at 325-6.

[51] Even if some detention was appropriate, for example to punish the appellant and to deter him and others from committing similar offences, I do not consider that he should have had to serve any actual detention, particularly in light of the fact that he had already served some time in detention, albeit following his arrest in relation to other offences and the May matter.

[52] Indeed, his sentence was more severe than detention, because by the time he was sentenced he was an adult and he was sentenced to imprisonment rather than detention. This was partly due to the fact that so much time had elapsed since the offences were committed, including the period of the Griffths Remand order, notwithstanding the exhortation of s 4(m) of the *Youth Justice Act* that "a decision affecting a youth should, as far as practicable be made and implemented within a time frame appropriate to the youth's sense of time".

[53] I consider that her Honour erred in failing to consider and impose a less severe sentence than imprisonment and also in imposing a sentence that was manifestly excessive.

[54] I do not consider it necessary to say much about the ground alleging that her Honour failed to consider and apply the principle of totality. She does seem to have considered the principle when she sentenced the appellant for the September 2012 offences and said: "when you look at the dates … when he's committed those offences as well and then the final lot of offences on 3/10, I had intended to give him more than he has currently served, but

suspend it from tomorrow." However, I agree that she does not seem to have had fresh regard to those considerations when she sentenced him on 19 February 2013 and effectively gave him another 7 weeks of imprisonment to serve.

[55] Accordingly I allow the appeal.

Disposition

[56] Section 147 of the *Youth Justice Act* enables this court to exercise the same powers and make any order that could be exercised or made by the Youth Justice Court.

[57] As I have already said (in [40] – [42] above), I do not consider that the objective seriousness of the offences warranted detention.

[58] Moreover, I take into account the fact that the appellant was a “first offender” at the time when he committed those offences, he made full admissions to the police in May 2012 after he was arrested, and he pleaded guilty on 13 September 2012.

[59] The appellant has spent a significant period of time in custody since he committed the October 2011 offences and should now be fully aware of the consequences of him re-offending. He has also been subject of restrictions imposed as conditions of his bail, including compulsory attendance at the CAAPS residential rehabilitation program (albeit not completed).

[60] I consider that he has already been sufficiently punished for these offences and that the requirements for specific and general deterrence and expression of community disapproval have already been met. Furthermore, his convictions are significant acts of legal and social censure.

[61] In light of those things, and the time that has elapsed since he committed these offences, I consider that he should be discharged without penalty, pursuant to s 83(1)(b) of the *Youth Justice Act*.

Orders

[62] Accordingly I order that the appeal be allowed and that the sentence of imprisonment be quashed and replaced with an order that the appellant be discharged without penalty. His convictions remain.

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