(tho94017)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

JUSTICES APPEAL

SC No. 41, 42, 43 of 1994

(9408885, 9403824
9403817)

BETWEEN:

STEVEN GOREY
Appellant

AND:

LEONARD PRYCE
Respondent

CORAM: THOMAS J

REASONS FOR DECISION

(Delivered 18 August 1994)

This is an appeal against sentences imposed by the learned Stipendiary Magistrate sitting in Alice Springs on 16 June 1994.

On 16 June 1994 the appellant entered a plea of guilty before the learned Stipendiary Magistrate to the following charges:

On 28 January 1994

at Santa Teresa in the Northern Territory of Australia

1. unlawfully used a motor vehicle, namely, the Santa Teresa Progress Community tractor.

Contrary to s218(1) of the Criminal Code.

On 28 January 1994

at Santa Teresa in the Northern Territory of Australia

2. drove a motor vehicle, namely Santa Teresa Progress Community tractor, on a public street, namely unnamed roads in Santa Teresa town area, whilst under the influence of

intoxicating liquor to such an extent as to be incapable of having proper control of that motor vehicle.

Contrary to s19(1) of the Traffic Act.

On 28 January 1994

at Santa Teresa in the Northern Territory of Australia

3. drove a motor vehicle, namely, Santa Teresa Progress Community tractor on a public street, namely, unnamed roads in Santa Teresa town area whilst not being the holder of a licence to do so.

Contrary to s32(1)(a)(i) of the Traffic Act.

On 27 January 1994

at Santa Teresa in the Northern Territory of Australia

4. consumed liquor namely, beer and Moselle, in a restricted area, namely, Santa Teresa.

Contrary to s75(1)(c) of the Liquor Act.

On 25 February 1994

at Alice Springs in the Northern Territory of Australia

5. unlawfully damaged property, namely, a front glass window the property of Piggly Wiggly's supermarket

AND THAT the said unlawful damage involved the following circumstances of aggravation:

(i) that the loss caused by such damage was greater than $500, namely, $1823.70.

Contrary to s251 of the Criminal Code.

On 7 May 1994

at Alice Springs in the Northern Territory of Australia

6. unlawfully damaged property, namely, a motor vehicle the property of Carmen Teresa Barnes.

Contrary to s251(1) of the Criminal Code.

On 7 May 1994

at Alice Springs in the Northern Territory of Australia

7. attempted to commit the simple offence of unlawful use of motor vehicle.

Contrary to s277(1) of the Criminal Code.

The undisputed facts in support of the offences committed on 27 and 28 January 1994 as stated by the Prosecutor, are as follows:

> ".... the defendant was at the Santa Teresa community. He consumed alcohol late into the night on the 27th and early into the morning of 28 January when he decided - he was drinking beer and moselle, Your Worship, within the restricted area. He decided to walk home. As he was walking home he saw the Santa Teresa Progress community tractor by the side of the road. He made a key with an empty beer can, and using the vehicle's downhill momentum he was able to start the tractor. He then drove towards the east-side community at Santa Teresa.
> ....
> .... the defendant ... liked riding in the tractor, so he decided to take the tractor for a drive ... near by the community. The defendant drove around in the tractor, sharply steering in an attempt to make the vehicle slide. His enjoyment came to an abrupt halt when due to his intoxicated state he ran over a tree with he had not seen, causing damage to the tractor of about $800.
>
> The defendant then left the Santa Teresa area and was arrested in Alice Springs on 25 February 1994 when he was questioned about the offences. The defendant was asked his reason for drinking in the restricted area. He said, "There was just them blokes there." Asked why he had taken the tractor, he said, "It was too far to walk home." Asked why he had driven into the tree, he said, "I was too drunk. I didn't see the tree."
>
> Police carried out checks and revealed that he had not been the holder of a licence at the time. ..."

The facts found by the Magistrate in respect of the offence committed on 25 February 1994 and as stated by the Prosecutor, are as follows:

> " In relation to the damage at the Piggly Wiggly supermarket, Your Worship, that offence occurred at about 10.20 pm on 25 February of this year. The defendant went to the supermarket on Gap Road. Stood in the car-park in front of the

supermarket. Picked up several rocks and threw them at the supermarket, smashing a front glass window, approximately 3 metres by 4 metres.

And also he also smashed the glass on the left-hand side of the front door causing damage of about $1823. The matter was reported to police. The police attended a short time later and spoke to the defendant who was still standing in front of the store. He was identified by a witness. He was then arrested, Your Worship, and taken into custody. He was asked why he had smashed the window. He said, "I wanted the grog."

The facts found by the Magistrate in support of the charges on 7 May 1994 as stated by the Prosecutor, are as follows:

" .... Early during the morning of Saturday, 7 May of this year the defendant was in a very intoxicated condition. He went to a yellow Mitsubishi van parked outside flat number 8 at 107 Bloomfield Street. He grabbed each of the windscreen wipers and bent them at right angles to the car causing about $50 damage to the windscreen wipers. He then entered the van through an unlocked door; sat in the driver's seat.

He attempted to start the vehicle but couldn't find the correct controls. He sounded the horn and turned on the headlights; tried to find the controls to start the vehicle. The sound of the horn woke the owner of the vehicle who contacted police. Police arrived and spoke to the defendant who was still sitting in the driver's seat. Asked what he was doing, he said, "I was just sitting here. I was going to take that car back to Santa Teresa. I want to go home." He was arrested, Your Worship. ...."

The Magistrate imposed the following sentences:

" .... On the first count you are convicted and sentenced to 2 months' imprisonment. On the second count you are convicted. You will pay a fine of $500 plus $20 levy, in default 11 days' imprisonment. You will be disqualified from driving. You will be disqualified from holding or obtaining a driver's licence for a period of 6 months. I warn you, if you drive during that time, you're convicted, you will go to prison.

On the third count you are convicted. You will pay a fine of $200 plus $20 levy, in default 5 days' imprisonment. On the fourth count you are convicted. You will pay a fine of $200 plus $20 levy, in default 5 days' imprisonment.

Turning to the matters of 25 February [count 5]. You caused some $1823 worth of damage. I don't intend to make an order for restitution because I don't believe it's capable of being enforced against you. Again, wanton damage to property, as I have already mentioned. And in addition to that, this is your sixth criminal damage since 1991. You are convicted and sentenced to 6 months' imprisonment cumulative on the 2 months already imposed.

Turning to the matters of 7 May [count 6]. Again on the first count, what you did was vandalism. You are convicted and sentence to 4 months' imprisonment cumulative. On the second count [count 7] you are convicted and sentenced to 2 months' imprisonment concurrent. Now, that's a total of 12 months' imprisonment and that is to date from 9 June 1994.

I am going to order that you be released after serving 6 months of that sentence, upon condition that you enter into a bond in the sum of $1000 in your own recognizance on condition that you be of good behaviour for 12 months; upon a further condition that you place yourself under the supervision of a delegate of the Director of Correctional Services and obey all reasonable directions as to employment, residence, associates and reporting. And they can consider whether you need counselling for alcohol abuse. I am going to set a non-parole period of 6 months."

The grounds of appeal are as follow:

"(1) That the total term of imprisonment imposed by the Learned Stipendiary Magistrate was manifestly excessive in all the circumstances.

(2) That the Learned Stipendiary Magistrate erred in failing to take into account all practicable sentencing alternatives.

(3) That the Learned Stipendiary Magistrate erred in that he gave undue weight to the prior convictions of the Appellant.

(4) That the Learned Stipendiary Magistrate erred in that he gave insufficient weight to the totality principal in directing that all sentences be served cumulative upon each other.

(5) That the Learned Stipendiary Magistrate erred in failing to give sufficient weight to the youth and prospects of rehabilitation of the Appellant."

I adopt with respect the principle to be applied on the hearing of an appeal against sentence as expressed by Kearney J in Salmon v Chute & Anor 94 NTR 1 @ 24:

> "(a) **The general principles applicable to appeals against sentence**
>
> I venture to repeat certain comments I made in Ragget, Douglas and Miller v R (1990) 50 A Crim R 41 at 42:
>
> > It is fundamental that a trial judge's [or magistrate's] exercise of his sentencing discretion is not to be disturbed on appeal, unless error in that exercise is shown: Griffiths v R (1977) 15 ALR 1; 137 CLR 293 at 308-9, per Barwick CJ. The presumption is that there is no error.
>
> See also R v Anzac (1987) 50 NTR 6 at 11-12.
>
> In R v Tait (1979) 24 ALR 473 at 476; 46 FLR 386 at 388, the Full Court of the Federal Court, citing from Cranssen v R (1936) 55 CLR 509 at 519, set out the fundamental rule on appeals against sentence as follows:
>
> > "The jurisdiction to revise such a discretion must be exercised in accordance with recognised principles. It is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe ..."
> >
> > ...
> >
> > An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error ... [emphasis added]."

The main arguments put forward by counsel for the appellant are that the learned Stipendiary Magistrate imposed sentences outside the normal tariff range. Secondly, that in accumulating those sentences he arrived at a total sentence that was excessive and which does not accord with the totality principle.

I accept the principle that where there is a normal range of sentences for a particular offence, sentences imposed by different Magistrates should fall within that range, unless there are exceptional circumstances (Clair v Brough 37 NTR 11).

Counsel for the appellant referred to the previous penalties imposed by the court on this appellant following convictions for criminal damage.

It is not in dispute that the prior convictions of this appellant, which were before the Magistrate at the time of sentence, are as follows:

"Date	Offence	Sentence
22/10/92	Consume liquor in restricted area criminal damages	Convicted - $100 VAFL $20 I.D. 3 days Convicted - $400 VAFL $20 I.D. 9 days - ex parte
13/02/92	Criminal damage (Summons)	Convicted - $800 costs $20 I.D. 17 days - restn. $250
25/03/91	Criminal damage (2 counts)on each	Convicted - $300 I.D. 3 days
22/02/91	Criminal damage	Convicted - 1 mth imp
08/09/88	Assault with weapon	Convicted - released GBB $500 O/R 12 mths"

A photocopy of an affidavit, prepared by James Stewart Brown legal practitioner sworn 24 August 1992 attaching a list of penalties imposed by the Court of Summary jurisdiction at Alice Springs for offences of criminal damage between 13 February 1991 and 1 May 1992, was tendered and marked Exhibit P1. This prepared list of tariffs, forming part of Exhibit P1, was accepted by counsel for the appellant and for the Crown. This list indicates penalties for the offence of criminal damage ranged from a fine of $150 to fines plus an order for restitution, community service orders, suspended terms of imprisonment, to a sentence of 2 months imprisonment in respect of an offender who committed this offence while on a bond for a similar

offence. The list also includes a sentence of 3 months imprisonment for an offence of criminal damage with the aggravating circumstance being that damage is greater than $500. This last matter being a conviction recorded on 22 February 1991 in respect of Simon Jambajimpa Bush who had two similar priors.

Under the provisions of s251 of the Criminal Code the maximum penalty is 2 years imprisonment. The maximum penalty increases to 7 years imprisonment where the loss caused or intended to be caused by such damage is greater than $500. The maximum penalty for an offence of criminal damage irrespective of whether there are aggravating circumstances is 2 years imprisonment when the offences are dealt with summarily.

I note that the list of names, set out in the annexure to affidavit of James Stewart Brown sworn 24 August 1992, refer to defendants who had no prior convictions for a similar offence, or at the most, two prior convictions for a similar offence.

In this particular matter, the appellant has five prior convictions for criminal damage between 22 February 1991 to 13 February 1992.

Counsel for the appellant and the respondent referred me to the text Fox and Freiberg on sentencing at p 461:

> "... The theory is that an adverse record should not operate to increase the sentence beyond limits set by an appropriate response to the current offence, however, it can serve to deprive the offender of any credit which he would otherwise have received for having a good character and record. A first offender, or an offender with an insignificant record, is usually regarded by sentencers more sympathetically and leniency is extended by imposing a non-custodial sentence in place of a custodial one where such choice is open to the court, or by directing a shorter period of incarceration. Recidivism precludes lenient sentences if it is persistent and reveals that earlier sanctions have proven ineffective in preventing criminal behaviour. Failure to respond to unsupervised and supervised release, to fines, or to short custodial sentences, allows a court to conclude that the offender's prospects for rehabilitation are poor and that the deterrent effect of more moderate sanctions is negligible. The offender's record is

> used as a predictor of how he will react to similar sentences in the future. Past failures lead inexorably to more severe penalties, not for the purpose of renewing the earlier punishment, but as a further step in the search for a measure which will have some effect in bringing about law abiding behaviour. ..."

I accept this establishes the principles I should apply with reference to the prior convictions.

The appellant is not to be penalised again for his prior convictions. However, his offending by acts of criminal damage is persistent and reveals that earlier sanctions have proved ineffective in preventing criminal behaviour.

The submission made to the learned Stipendiary Magistrate on the question of sentence was that the appellant is a 23 year old man who usually resides at Santa Teresa. He lives there with his wife and two young sons. The Magistrate was informed that the appellant was under the influence of alcohol when he committed each of the offences. The appellant indulges in binge drinking and continues to have a problem with alcohol. It was submitted that the appellant be assessed for his suitability to undertake an alcohol rehabilitation program as part of the condition of a partially suspended sentence.

During the course of address to the Magistrate, counsel for Mr Gorey made this submission (transcript p 6):

> " I might say, Your Worship, in relation to the charges themselves - so far as the incident with the tractor at the Santa Teresa community is concerned, he has had to put up with some - certainly the community wasn't happy with his behaviour with respect to the tractor, probably quite justifiably, and certainly they made known to him themselves the fact that they didn't appreciate his behaviour and that he was drinking too much they thought, and that he should really try to address some of his problems."

Counsel for the appellant submitted that this court apply the totality principle enunciated in R v Holder and R v Johnston

(1983-84) 13 ACR 375 @ 389. I accept the principle that, should the aggregation of sentences appropriate for each individual offence considered separately lead to a total that exceeds what is called for in all the circumstances, the Judge may, pursuant to what is conveniently called the principle of totality, adjust that aggregate downwards to achieve an appropriate relationship between the totality of the criminality and the totality of the sentences.

In respect of the sentence of 6 months imprisonment for the offence of criminal damage that occurred on 25 February 1994, I note the offence of criminal damage involved a circumstance of aggravation in that the loss caused by such damage was greater than $500, namely, $1823.70. This means the list of cases referred to as a comparison of tariffs is not of great assistance because those are a list of penalties for offences of criminal damage simpliciter, as were the appellant's previous convictions for criminal damage. The only matter on the list of tariffs submitted to the court for an offence of criminal damage with circumstances of aggravation was the matter of Simon Jambajimpa Bush who had two similar priors and was sentenced to 3 months imprisonment.

I agree with the submission made by Mr Roberts, that the offence of criminal damage with circumstances of aggravation must be regarded as a more serious offence than criminal damage simpliciter. In view of that and having regard to the appellant's prior convictions, 6 months imprisonment cannot be said to be outside of any range or tariff and does not amount to a wrong use of the learned Stipendiary Magistrate's discretion and is not manifestly excessive.

With respect to each of the offences, the learned Stipendiary Magistrate was entitled not to mitigate the offences given the nature of the offences and the offenders prior criminal history.

> "Propensity may inhibit mitigation but in the absence of statutory authority it cannot do more . . . Apart from mitigating factors it is the circumstances of the offence alone that must be the determining of an appropriate sentence." (Baumer v The Queen 166 CLR 51 @ 58)

I consider, in this matter, the aspect of specific and general deterrence is an important factor.

The learned Stipendiary Magistrate was dealing with offences arising from three separate incidents on 28 January 1994, 25 February 1994 and 7 May 1994. I agree with the submission of counsel for the Crown that the Magistrate was entitled to make the sentences cumulative, his discretion has not miscarried because he failed to make the sentences concurrent. I note the sentences of imprisonment for the two offences committed on 7 May 1994 have been made concurrent.

Counsel for the appellant argued that 4 months imprisonment for the offence of criminal damage on 7 May 1994 is manifestly excessive.

I note the total effective sentence for the two offences committed on 7 May 1994, i.e. criminal damage and unlawful use of motor vehicle, is 4 months imprisonment. I am not persuaded this is manifestly excessive.

I am not persuaded that a total sentence of 12 months imprisonment, in respect of the offences arising from three separate incidents, offends the totality principle. The learned Stipendiary Magistrate fixed a non-parole period of 6 months and also made orders releasing the appellant at the completion of 6 months imprisonment on a bond to be of good behaviour for 12 months.

I consider the sentences to be at the top of the range of sentences available to the learned Stipendiary Magistrate and do not necessarily reflect the sentence I would have imposed. However, I do not consider it can be described as manifestly excessive or that the appellant has demonstrated any error on the part of the sentencing Magistrate.

Accordingly, I do not consider I should interfere with the orders made by the learned Stipendiary Magistrate and the appeal against sentence is dismissed.