CITATION:	*SH v McKinlay* [2019] NTSC 76
PARTIES:	SH
	v
	McKINLAY, Matthew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from the YOUTH JUSTICE COURT exercising Territory jurisdiction
FILE NO:	LCA 7 of 2019 (21810321)
DELIVERED:	9 October 2019
HEARING DATE:	3 October 2019
JUDGMENT OF:	Mildren AJ

CATCHWORDS:

CRIMINAL LAW – Youth Justice Court – appeal – twelve year old offender - manifestly excessive – detention backdated – suspended sentence forthwith on conditions – discharged without conviction – period held in suspense - operational period of the suspension – appeal relating to aggregate sentence imposed – clearly and obviously excessive – retributive aspect of sentencing - respondent concedes – special deterrence not required - progress towards reform – appeal allowed – good behaviour order

Youth Justice Act 2005 s 4; s 83(2)(b)(i)
Young Offenders Act 1994 (WA) s 120(2)

BB v The Queen [2014] NTCCA 13, *Simmonds v Hill* (1986) 38 NTR 31, *M v Waldron* (1988) 90 FLR 355, *P (a Minor) v Hill* (1992) 110 FLR 42, applied

P (a Minor) v Hill (1992) 110 FLR 42, *Yovanovic v Price* (1985) 33 NTR 24, *WO (a child) v Western Australia; RM (a child) v Western Australia* (2005) 153 A Crim R 352, *LA v Kennedy* [2007] NTSC 56, referred to

REPRESENTATION:

Counsel:

Appellant:	E Fenge
Respondent:	G Dooley

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Mil19555
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

SH v McKinlay [2019] NTSC 76
No. LCA 7 of 2019 (21810321)

BETWEEN:

SH
Appellant

AND:

MATTHEW McKINLAY
Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 9 October 2019)

[1] This is an appeal against the severity of a sentence imposed by the Youth Justice Court on the ground that the sentence imposed was manifestly excessive. On 3 October 2019 after hearing submissions by the parties, I allowed the appeal, and resentenced the appellant. I said then that I would deliver my reasons at a later time. These are my reasons.

Background

[2] The appellant in this matter is SH who was sentenced by a Judge of the Youth Justice Court in relation to a number of charges on various files which were dealt with together. In relation to nine counts on file 2181032, on 24 May 2019 the learned Judge imposed, without conviction, a sentence of eight months detention backdated to 7 February 2019 to take into account

time spent on remand. The sentence imposed was suspended forthwith on conditions.

[3] In relation to three counts on file 21813528 the learned Judge imposed an aggregate sentence of six months detention without conviction, also backdated to commence on 7 February 2019, suspended forthwith on conditions.

[4] In relation to a number of counts of breach of bail, the court ordered that the appellant be discharged without conviction, although the court noted that the appellant would be required to pay a victim levy of $50 on each charge.

[5] The end result was a total sentence of eight months detention backdated to 7 February 2019, with no convictions recorded, released forthwith on a suspended sentence for 12 months. This left four months and 13 days detention held in suspense. The operational period of the suspension was 12 months from 24 May 2019.

[6] The present appeal relates only to the aggregate sentence imposed in relation to the nine counts on file 2181032. In summary, there were three counts of aggravated unlawful entry with intent to steal; two counts of intentionally causing damage to property; two counts of stealing; one count of attempted unlawful use of a motor vehicle and one count of trespass on premises. These offences were committed between 25 and 27 February 2018. At that time, the appellant was aged 12, having been born on 22 April 2005 (and not 2004 as some of the documentation states).

The facts relating to the offending

[7] The following is a short summary of the offending.

[8] Between 9.30 am on Sunday 25 February 2019 and 9.56 pm on Tuesday 27 February 2018, the appellant and co-offenders entered four residences in Alice Springs, viz at 17 Lindsay Avenue, 2 Goyder Street, 1/2 Sturt Terrace and 34 Chewings Street.

[9] At 17 Lindsay Avenue, no items were stolen. A co-offender damaged a door handle and flyscreen. The premises were unoccupied. The damage was assessed at $2000.

[10] At 2 Goyder Street, the co-offender stole a laptop and damaged a flyscreen. The premises were occupied at the time. The laptop was valued at $1200 and the damage was estimated at $100. The offenders left the scene when disturbed by one of the residents. The laptop was not recovered.

[11] At 1/2 Sturt Terrace, a handbag containing $30, personal cards and car keys were stolen. A mechanism supporting the window louvres was damaged and an attempt was made to start the vehicle. The premises were occupied by three adults who were asleep at the time. One of the occupants interrupted the attempt to steal the car. The value of the property stolen was $1060 and the damage to the property amounted to $200. The handbag was since recovered but not its contents.

[12] At 34 Chewings Street, the appellant and a co-offender entered the property intending to steal items within. The occupant was alerted to a neighbour's dog barking. The offenders jumped over the back fence. No items were stolen or damaged.

[13] The main co-offenders were two youths aged 13 and 17. The appellant was arrested by police who caught him fleeing the Chewings Street property. The appellant participated in a formal record of interview with police on 28 February during which he made admissions.

The appellant's personal circumstances

[14] The appellant was born in Alice Springs on 24 April 2005. At the time of the offending he was 12 years of age. He has four siblings ranging in age from 22 years to seven months as at March 2019. His parents separated when he was two years old. The family are Aboriginal. He speaks Pitjantjatjara and Arrernte as well as English. It is not clear where the appellant was living in his early years. It could have been in Alice Springs or in a bush community. When he was aged six, his mother relocated to Ceduna with the appellant and his siblings to live with family. His mother obtained employment there and the appellant attended school.

[15] In November 2015 the appellant, then aged 10, and one of his older brothers were placed in the care of the Department of Child Protection in South Australia. At that time the family had moved to live in Elizabeth Park, South Australia. Concerns arose because of neglect, domestic violence, and

substance misuse. He was placed in “commercial care”. This involves carers employed on a rotational basis. In July 2015, the appellant had committed the offence of dishonestly taking property without consent which was dealt with by the Elizabeth Children’s Court in January 2016. He was given a formal caution.

[16] During 2016, the appellant ran away a number of times to be with his family. The appellant was angry that he had been placed in foster care and did not understand why he had been taken from his mother. He did not attend school. He committed a series of minor offences which were dealt with by the Adelaide Children’s Court in November and December 2016. In each case the court dismissed the charges without penalty. On 21 February 2017 the appellant and one of his brothers was placed under the guardianship of the Minister until they turned 18. He was then aged 11. Two other siblings were also placed under guardianship a week later. By this time the appellant had been placed in residential care, however he was consistently reported as missing. During 2017, the appellant and two of his brothers’ offending behaviour increased in activity resulting in all three being held in detention. The appellant appeared before the Adelaide Children’s Court on a number of occasions in 2017. He served 29 days in detention on remand. He was released without further penalty although in some cases convictions were recorded. He was also placed on a good behaviour bond.

[17] In November 2017, the Department started to make arrangements for the appellant and two of his brothers to be placed in the care of DB, an uncle of his father, who lived in Alice Springs. When the children arrived in Alice Springs in December 2017, it transpired that DB's wife had passed away and he was absent on sorry business. As a temporary arrangement, the boys were placed with the appellant's uncle MH and his partner, sharing them with DB. However, the appellant spent a lot of time with another child SW, a cousin brother, and another cousin AH. He soon moved into SW's home at Anthepe Camp, Alice Springs. AH was a regular client of the Youth Justice Court, and the appellant soon got into the trouble the subject of the counts on appeal, albeit with other co-offenders. Following his arrest, he was bailed to reside at Saltbush but absconded a number of times resulting in the breaches of bail and the other offending which took place between March and July 2018.

[18] The pre-sentence report and attached report from the Department of Child Protection (SA) indicate that the appellant has persistently requested to be returned to family in the Northern Territory and to resume the cultural lifestyle he had before coming to Adelaide and being placed in care. Eventually, after a lot of consultation with family members, the appellant was placed with family members at Mutitjulu in August 2018. He was enrolled at Nyangatjatjara College on 6 August. Since then, his attendance at the College has been satisfactory. He operates at a year 1-2 level and is not functionally literate. The report from the Department of Education shows

that he is trying to overcome his lack of confidence by working closely with his teachers on a one to one basis. Although he is struggling with some of the courses, he has achieved satisfactory results in others. The report concluded that "he was engaging extremely well and succeeding at [the] College and appears settled in his living environment".

[19] The pre-sentence report indicated that the appellant has settled in well with his family there and is playing football, soccer and other games in the community. He gets on well with his cousins and enjoys bush hunting and swimming with friends and family. He engages in specified youth activities on Fridays under the guidance of a youth worker. His uncle is planning for the appellant to attend traditional men's business before this coming Christmas. The appellant is unsure what to expect but is keen to attend. Due to his attitude at school, he was one of a small number of students chosen to travel to Cairns for a week and completed a module for a Rural Operations Certificate. He was the youngest participant and managed to be respectful and compliant. During the module he was taught to use power tools, to dissemble and assemble a chainsaw, how to operate it, and how to cut wood. He is eligible to attend at a farm in Mareeba, near Cairns, at the end of the year to complete the module. This will prepare him to become a Junior Ranger. There is a Junior Ranger program available to him when he completes his schooling which could offer paid employment. He also attended a school trip to East Timor in December 2018. The trip was part of an initiative to help a sister school and to learn the way of life in that

country. The Principal of the College reported that the appellant fully participated in the activities and was compliant throughout. The Principal reported that the appellant's progress came from his carers and the team from the College.

[20] A report from a psychiatrist dated 26 October 2018 stated that:

- He articulated well enough and engaged spontaneously;
- His range of emotion was appropriate and not overly intense;
- He had difficulty engaging with difficult tasks.
- His thinking was coherent but he had a slow processing speed;
- There was no suicidal ideation but there was anxiety at times when discussing his situation. There were no psychotic features noted.
- The result of testing showed that the appellant met the diagnostic criteria for complex post-traumatic stress disorder (C-PTSD) resulting from repetitive, prolonged trauma involving harm, or abandonment by a caregiver or other abuse or neglect. It results in distortion of a person's core identity, especially when it occurs in childhood, as in the appellant's case, and it significantly interferes with learning.
- A number of recommendations were made for treatment, which I will not set out here. Some related to his specific teaching needs. It was also recommended that he needed 'prolonged intervention over a three year

period'. It is not clear to me whether or not he is receiving psychological assistance, but it would appear that many of the other recommendations are being met, particularly by his family and by the College.

[21] The pre-sentence report indicated that the appellant was suitable for supervision in the community subject to a number of conditions.

The sentencing remarks of the learned Judge

[22] His Honour noted that the appellant appreciated the "bad choices" he had made and the "serious trouble' that the appellant was in. He stated that the appellant was "a young person that does have good prospects for your future, and boy, haven't you proved that since you've been living out at Yulara and Mutitjulu". He noted that the appellant had "some really good plans" and that he was "putting together all of those things that are going to give [him] the opportunity to do that". He said that he had engaged well with his carers and the education report was a positive one; and that the pre-sentence report and plan for the future too is a very positive one. He stated that he thought that the period of detention on remand was long enough for him to "say sorry for this trouble". His Honour stated that because of the appellant's pleas of guilty and the other matters placed before him, he would reduce all the penalties by 25%. His Honour then proceeded to impose the sentences stated previously, noting that "the most serious matter (sic) is on file ending 321". His Honour made no specific mention in his sentencing

remarks of why those matters were more serious than the offences on file 21813528 which included a charge of robbery in company, or why he considered that no sentence other than a sentence of suspended detention was necessary.

The submissions of the appellant

[23] Counsel for the appellant acknowledged that to succeed in this appeal it must be shown that the sentence imposed must be shown to be clearly and obviously, and not just arguably excessive. Reference was made to s 83(2)(b)(i) of the *Youth Justice Act 2005* which provides for a maximum sentence of 12 months detention for a youth under the age of 15. It was put that the starting point before a 25% discount for the sentences imposed was so close to the maximum sentence available as to disclose error.

[24] In *BB v The Queen*[1] the Court of Criminal Appeal, when dealing with a 12 year old youth who had been sentenced by the Supreme Court for similar offending, including robbery in company, observed that it is not to the point that the sentence was fully suspended. As has been said before many times, a suspended sentence of imprisonment is still a sentence of imprisonment and in my opinion the same may be said of a suspended sentence of detention. The appellant in this case could still be called upon to be dealt with if any further offending or breaches of conditions occurred during the period of suspension. Although the powers of the Youth Justice Court are

1 [2014] NTCCA 13.

very broad in such circumstances, there still remains the possibility that the appellant may be called upon to serve the balance of the sentence held in suspense, albeit by way of re-sentence under s 142(2)(c) of the Act.

[25] It was further submitted that detention was a punishment which should be imposed only as a last resort, when all other options are inappropriate and the need for deterrence and protection of the community must be given special prominence: see *P (a Minor) v Hill*,[2] citing *Yovanovic v Price*.[3] That principle is enshrined in s 4(c) of the Act. In *BB v The Queen*[4] the Court of Criminal Appeal observed, in relation to sentencing youths, that the relevant principles include:

> The principle of the use of custody as a last resort and for the shortest appropriate time, having regard to the youth's age and maturity and any history of offences previously committed, and whether the youth has taken steps to make amends with any victims.

[26] It was submitted that the learned sentencing Judge did not appear to have considered any other options. It was put that in the absence of any reference to other sentencing options, the sentencing remarks were deficient. The authority relied on for this proposition is the decision of the Court of Appeal of Western Australia, *WO (a child) v Western Australia; RM (a child) v Western Australia*.[5] Although in Western Australia, there is a statutory requirement for a Court imposing a sentence of detention upon a child to

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2 (1992) 110 FLR 42, at 48.

3 (1985) 33 NTR 24.

4 [2014] NTCCA 13 at [19].

5 (2005) 153 A Crim R 352 at 354.

record its reasons in writing why it considers that there is no other appropriate way for it to dispose of the matter[6] the Court of Appeal observed:[7]

> However, s 102(2) is puzzling. Every Court sentencing an offender is required to give reasons for that sentence. The reasons need not be elaborate but must, in every case, be sufficient to enable the offender, and the public, to understand why that sentencing disposition was chosen and to preserve to the offender the right to appeal. In a context where a sentence of imprisonment is a last resort (as it is both for children and adults, although the principle has greater weight in respect of the former) those sentencing remarks will always be deficient if it is not possible to discern from them why a sentence of detention or imprisonment, as opposed to some other disposition, was selected.

[27] It was put that in this case, there had been findings that the appellant had good prospects of rehabilitation which he had demonstrated whilst he was living at Mutitjulu, that he was engaging well with his carers and had been progressing satisfactorily at school and had good plans for the future, the appellant's circumstances strongly pointed in the direction that a finding should have been made that a sentence other than detention was appropriate. It was also submitted in oral submissions that there was no need for special deterrence in this case, having regard to the fact that the appellant had already spent over three months in detention.

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6 *Young Offenders Act 1994* (WA) s 120(2).

7 At para [8].

Submissions by the respondent

[28] Counsel for the respondent, Mr Dooley, (who is a very experienced criminal lawyer), submitted that the sentence was clearly excessive, and intrinsically manifests error.

Disposition

[29] Despite Mr Dooley's concession, it is still necessary for me to be satisfied that the ground of appeal has been made out. In criminal appeals, it is very rare for a Court to make consent orders. The Court will not interfere unless it is satisfied that there was error by the court below. In any event, even if the appeal is allowed, the Court will not impose a new sentence by consent.

[30] The other sentencing principles set out in s 4 of the Act which are particularly relevant to this appeal include:

- The youth must be held accountable and encouraged to accept responsibility for his behaviour;
- The youth should be dealt with in a way that acknowledges his or her needs and will provide him or her with the opportunity to develop in a socially acceptable way;
- A youth must be dealt with in a manner consistent with his or her age and maturity;
- A youth who commits an offence should be dealt with in a way that allows him or her to be reintegrated into the community;

- Family relationships should be preserved and strengthened;
- A balanced approach needs to be taken between the needs of the youth, the rights of the victim and the interest of the community;
- There should be no unnecessary interruption of a youth's education;
- A youth should have the opportunity to maintain his or her sense of racial, ethnic or cultural identity;
- If practical, an Aboriginal youth should be dealt with in a way that involves the youth's community;

[31] As was said by Maurice J in *Simmonds v Hill*[8] the retributive aspect of sentencing is, at best, of secondary importance. General deterrence is even lower on the scale. That is not to say that it never has any relevance.[9] In cases involving very young children, I do not consider that it has any role to play at all, except perhaps in cases of the most serious kind. In cases involving first offenders committing minor offences little or no weight is given to general deterrence.[10] In the case of children as young as 12, even if the child has committed offences in the past, it is only in a very bad case that a court could find that the child has come to the end of the road so far

8 (1986) 38 NTR 31 at 33.

9 *LA v Kennedy* [2007] NTSC 56 at [15].

10 *LA v Kennedy* [2007] NTSC 56 at [16].

as non-custodial penalties are concerned.[11] I accept the submission of the appellant's counsel that special deterrence was not required in this case.

[32] I am satisfied that the sentence imposed is manifestly excessive. The appellant had a most unfortunate start in life which hardly needs to be further elaborated. The consequences to him are well documented in the opinion of the psychiatrist. The offending itself was not so serious as to warrant a sentence of detention. He was by far the youngest of the co-offenders, and was clearly a follower rather than a leader. His offending history is explicable by a combination of factors resulting from being subjected to domestic violence, neglect and drug misuse which led to him being taken into care. It is not difficult to understand how, when placed in the care of the Minister, he resorted to truancy and getting involved in petty crime. It is always a difficulty for very young children to be taken from their families and placed in care, despite the good intentions of those who are responsible for his welfare. Most importantly in this case, is the fact that he has good prospects of rehabilitation which are more than merely theoretical, but proven by his present placement with his family in Mutitjulu and his attendance at College. There is therefore little reason to be concerned about community protection.

[33] I am aware that all too often, and despite the fact that there may be programs designed to assist young children to reform, whether those

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11 *M v Waldron* (1988) 90 FLR 355 at 360; *P (a Minor) v Hill* (1992) 110 FLR 42 at 46.

programs involve ministerial care or not, there are some young children (and by that I mean children under 15) who present constantly before the Youth Justice Court in circumstances where diversion, strict bail conditions, good behaviour bonds and other like dispositions have failed to bring about any positive change in their behaviour, let alone rehabilitation. It is also a fact that many such young offenders are generally unimpressed by what they are told, whether by courts or by others concerned for their welfare, and learn from the consequences of their behaviour rather than from being told how to behave. They are often encouraged to participate in criminal activity by older youths. Many have no parental or other suitable supervision at home. Often, they live in crowded conditions where the adults are up all night consuming alcohol and other drugs. There is a real risk that many such offenders learn from their visits to the courts that when you offend, you go to court, people talk to you and you have to promise to behave, but nothing else happens. Not infrequently, this leads to a small number of youthful offenders who have long histories of the imposition of and breaching of supervision orders, bail orders and other court orders. They have learned that there are no serious consequences for their offending, which only entrenches their offending behaviour. Dealing with such offenders is a significant problem for which there are often no easy answers, although sometimes extensive and careful consideration of the child's legitimate needs, particularly the needs as the child himself or herself perceives them, may lead to an answer. Often, this is difficult to achieve in courts with long

lists and limited resources, but as this case shows, patient perseverance by the courts and by the authorities can sometimes achieve satisfactory outcomes. Where, as in a case such as the present, there is real reason to be optimistic that a young child is well on the road to reform, I find it difficult to understand why, in the case of relatively minor offending, it was necessary in the interests of community protection to impose a suspended sentence of detention on a child as young as 12 years of age in these circumstances.

[34] In this case, the Court was provided with very detailed and important information about the appellant's background, needs and progress towards reform. A great deal of effort was made by the Department of Child Protection (SA) to locate the right family to care for the appellant. Despite early disappointments, the Department persevered and ultimately a wise choice was made. The appellant's carers have proved to be caring and supportive. The right school has been chosen for the child's future education and he is doing well. Territory Families, which produced the pre-sentence report also made a real contribution to producing the right outcome for the child and for the community. All are to be congratulated for their sterling efforts.

Resentence

[35] In all the circumstances, I consider that the appeal should be allowed and that the matter should be disposed of by, without recording a conviction,

making a good behaviour order, pursuant to s 91 of the Act, for a period of 12 months from 24 May 2019 subject to the following conditions:

1. To be of good behaviour and not to commit another offence (whether in the Territory or elsewhere) during the period of the order.

2. To follow the reasonable directions of a Community Youth Justice Officer (CYJO), Caseworker and/or carer.

3. To reside at Mutitjulu with his present carers and not leave that address to reside elsewhere without the permission of a CYJO.

4. To participate in any support services as directed by a CYJO including:

    - Assessment;
    - Counselling/and or therapeutic treatments;
    - Education, training or employment;
    - Diversion program or restorative activity/community service; and
    - Any other programs that are deemed appropriate.

5. Not to consume alcohol or an illegal drug and to submit to testing for the same as required by a CYJO.
