

RA v Nalder [2009] NTSC 7

PARTIES: RA
v
STEPHEN NALDER

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: JA 66 of 2008 (20800646)

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JUDGMENT OF: SOUTHWOOD J

APPEAL FROM: FONG LIM ASM

CATCHWORDS:

CRIMINAL CODE (NT) – JUSTICES APPEAL – appeal against sentence – aggravated assault – contrary to s 188(1) and s 188(2)(a), (d) and (m) of the Criminal Code – whether sentence imposed by Youth Justice Court manifestly excessive – appeal allowed – appellant re-sentenced

REPRESENTATION:

Counsel:

Appellant: T Opie
Respondent: K Ellson

Solicitors:

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

Judgment category classification: B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

RA v Nalder [2009] NTSC 7
No. JA 66 of 2008 (20800646)

BETWEEN:

RA
Appellant:

AND:

NALDER, Stephen
Respondent:

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 18 March 2009)

Introduction

- [1] Contrary to s 188(1) and s 188(2)(a), (d) and (m) of the Criminal Code (NT), on 8 September 2007 at Katherine, the appellant and five other youths unlawfully assaulted Mr Jacob Gray. The unlawful assault was an aggravated assault. The circumstances of aggravation were: Mr Gray suffered harm; he was threatened with a plaster cast and sticks; and he was unable to defend himself.
- [2] On 13 November 2008, the appellant pleaded guilty to the aggravated assault of Mr Gray; and on 12 December 2008, the Youth Justice Court convicted the appellant and sentenced him to four months detention. The

sentence of detention was wholly suspended by the Youth Justice Court and an operational period of 12 months was specified. The conditions of the suspended sentence were: the appellant was to be subject to supervision by Community Corrections; and he was to obey all reasonable directions of Community Corrections regarding his education, employment and counselling.

[3] The appellant appeals against his sentence. He does so under s 144 of the Youth Justice Act. The grounds of appeal are:

(a) The sentence was manifestly excessive; and

(b) The learned magistrate failed to adequately consider the principle of parity.

The issue

[4] The principal issue in the appeal is whether the sentence imposed on the appellant was manifestly excessive. In my opinion it is. The appeal should be allowed and the appellant should be re-sentenced.

The facts

[5] The facts of the offending are as follows.

[6] The appellant is an Aboriginal youth. He was born in Katherine on 21 July 1994. He is 14 years of age. He was 13 years of age when he assaulted Mr Gray.

- [7] The appellant is the third eldest of six siblings, who range in age from nine months to 19 years. Both the appellant's parents are alive. He resides with them in Katherine. He has a good relationship with his parents. His mother receives benefits from Centrelink. His father does casual work for local Aboriginal organisations.
- [8] At the time he was sentenced the offender was attending year eight at Katherine High School. He is an average student. He is able to read and write but does not enjoy reading. He would like to complete year 12 of high school but he does not want to do further studies. He had applied to attend St John's High School in Darwin and Nudgee College in Queensland.
- [9] A reference of Mr Charlie Shannon, who is a Director of the Katherine Football Academy, was tendered in evidence in the Youth Justice Court. Mr Shannon stated that the appellant is a keen sportsman and a valued member of the Katherine Football Academy. He puts in maximum effort with the team.
- [10] Prior to committing the aggravated assault on Mr Gray, the appellant had only once come into contact with the criminal justice system. In October 2006, he was charged with unlawfully damage property. The charge was dealt with under the Juvenile Diversion Scheme which the appellant successfully completed.
- [11] In the early hours of 8 September 2007, the appellant was at Katherine High School oval with Wesley Hector, Henry Braun, William Maroney and Troy

Gillett. At 3.00 am, the appellant and his co-offenders walked to the back of the Eastside shops where Mr Gray was talking on his mobile telephone. At that time Mr Gray was 27 years of age. The appellant and his co-offenders heard obscenities which they thought came from Mr Gray.

[12] Mr Gray walked to the other side of the Eastside shops and sat down on the gas tanks opposite the Friendly Hair Team Salon. Moments later the appellant and his co-offenders found Allan Dawson who was walking through Grevillea Park. The offender and the co-offenders told Allan Dawson that Mr Gray had verbally abused them. The appellant and his co-offenders then followed Allan Dawson who confronted Mr Gray with their allegations. Mr Gray did not respond. He walked away.

[13] A large fence separated the appellant and his co-offenders from Mr Gray and when Mr Gray started walking away, the co-offenders and the appellant ran around to the front of the Eastside shops. When the appellant got to the front of the shops he found Allan Dawson and William Maroney assaulting Mr Gray. Despite Mr Gray pleading for help, the appellant did nothing and continued to watch him being assaulted.

[14] At some point during the assault, Mr Gray managed to stagger to his feet and run towards the back of the Eastside shops. Allan Dawson tackled the victim to the ground and Allan Dawson and an unknown number of the other co-offenders repeatedly kicked and punched Mr Gray to the head and body. Some of the offenders, including William Maroney but not the appellant,

had sticks which they used to hit Mr Gray. Henry Braun had a plaster cast on his arm which he used to strike Mr Gray. During this assault the appellant punched Mr Gray to the head at least once.

[15] Mr Gray managed to stagger to his feet again and he ran across Grevillea Road toward the Katherine High School tennis courts. The appellant stood and watched as Allan Dawson and William Maroney caught Mr Gray at the tennis court fence.

[16] The appellant stood nearby and watched as Mr Gray was repeatedly kicked and punched in the head and then dragged by Allan Dawson to the back of the East Side Shops. Allan Dawson, William Maroney and Hector Braun continued to assault Mr Gray by repeatedly punching him to the head and body. Eventually, some passers-by intervened and the appellant left the area.

[17] On 3 December 2007, the appellant attended the Katherine Police Station where he was interviewed by the police. He admitted that he assaulted Mr Gray. When asked why he assaulted Mr Gray, the offender said: ‘Allan told us to hit him’.

[18] The learned sentencing magistrate expressly found that the appellant decided to join in the assault upon Mr Gray. She did not accept the appellant’s statements to the probation and parole officer, who prepared the pre-sentence report, that he had no choice other than to join in the assault of Mr Gray.

[19] At no time did the appellant have permission to assault Mr Gray.

[20] As a result of the assault, Mr Gray required treatment in hospital. He had CT scans of his head, cervical spine and face. The scans revealed a fractured nasal bone. Mr Gray also suffered lacerations to his top lip and swelling and bruising to his face and body.

[21] The appellant entered a late plea of guilty. He pleaded guilty on the morning of his trial after the sentencing magistrate had ruled against the appellant's objections to the admissibility of certain evidence.

Proceedings relating to the co-offenders

[22] The appellant's five co-offenders were also dealt with for their role in the assault upon Mr Gray. Four of the co-offenders were juveniles at the time of the offence.

[23] Allan Dawson was an adult at the time he assaulted Mr Gray. He was 19 years of age. He had a prior criminal record. Allan Dawson had been given juvenile diversion for four matters. He committed another assault while on bail for the assault upon Mr Gray. He initiated the assault on Mr Gray and he repeatedly punched and kicked Mr Gray to the head and body. He urinated on Mr Gray and he stole his mobile telephone. He was convicted and sentenced by Mr M Carey SM on 29 October 2008 for stealing and the aggravated assault. For the aggravated assault on Mr Gray, he was sentenced to 12 months imprisonment with eight months to serve. Mr Carey specified an operational period of two years. For the stealing, Mr Dawson

received one month to be accumulated upon the assault. Mr Dawson was dealt with on the basis that he was the main offender and he initiated the assault upon Mr Gray.

[24] William Maroney was 12 years of age at the time he assaulted Mr Gray. He turned 13 shortly after the offending. While on bail for assaulting Mr Gray he committed the following offences: unlawful use of a motor vehicle; stealing; enter an occupied dwelling at night; unlawful damage to property; and trespass. He had no prior convictions. Master Maroney struck Mr Gray five times with a tree branch causing him to lose consciousness and he repeatedly kicked and punched Mr Gray to the head and body on three occasions during the assault upon him. On 12 September 2008, he was sentenced by Ms M Little SM for multiple offences, including the aggravated assault upon Mr Gray. Master Maroney was sentenced to six months detention which was suspended after he had served three months in prison. He was also placed on a good behaviour bond for a period of 12 months with supervision. He was sentenced on the basis that he used a tree branch approximately one metre long and five cm in diameter and was 12 years of age at the time of the offence. He was 13 years of age at the time he was sentenced.

[25] Wesley Hector was 15 years of age at the time that he assaulted Mr Gray. While on bail for the assault on Mr Gray he committed the following offences: unlawful entry; and damage property while preparing to escape. He had no prior convictions. Master Hector repeatedly punched and kicked

Mr Gray and he filled an empty coke can with sand and threw it at Mr Gray's head while he was one metre away from Mr Gray. The can hit Mr Gray in the back of his head. Master Hector was originally charged with aggravated assault, stealing and aggravated robbery. On 17 September 2008, he pleaded guilty to aggravated assault and stealing. He was sentenced on the same day. He was convicted on both counts. For the aggravated assault he received three months detention, suspended after one month. An operational period of 18 months was specified by the Youth Justice Court. For the count of stealing, he received a good behaviour bond for a period of 12 months.

[26] Wesley Hector was dealt with on the basis that he kicked Mr Gray in the back an unknown number of times. He also admitted he threw a can filled with sand which hit Mr Gray in the back of his head.

[27] Henry Braun was 14 years of age at the time he assaulted Mr Gray. He did not have a prior criminal record. Master Braun repeatedly kicked and punched Mr Gray to the head and body. He also hit Mr Gray with his plaster cast. He was originally charged with aggravated robbery and aggravated assault. On 14 February 2008, he was sentenced for the charge of aggravated assault. Henry Braun was convicted by the Youth Justice Court and he was sentenced to one month of detention which was fully suspended for a period of 12 months.

[28] Henry Braun was dealt with on the basis that he kicked and punched Mr Gray in the back an unknown number of times, and also used his plaster cast to strike Mr Gray.

[29] Troy Gillett was 14 years of age at the time he assaulted Mr Gray. At the time the appellant was sentenced, he was on diversion in Borroloola. The facts and circumstances surrounding his sentence were not placed before the sentencing Magistrate.

The remarks of the sentencing magistrate

[30] The sentencing magistrate made the following remarks:

Now, I have had a good look at the pre-sentence report and I have heard what your solicitor has said on your behalf. I have also looked very closely at what the other co-offenders were given as penalty for this offending and the injuries that the victim sustained in this attack.

It cannot be ignored that the punch or punches that you gave him on that day was in the context of him being attacked by four people, some with weapons. He was helpless, he was on the ground and you decided, even though you were only 13, to join in. I do not accept that was your only choice, and even though you were only 13 I would have expected you to take the better road.

I have taken into account that you have pleaded guilty but you do not get too much credit for that, given you only decided to plead guilty after I decided to allow the evidence of the co-offenders in as recorded statements. I also take into account that there was an adult there who encouraged you to act in this way and, while that does not exclude your actions, I can see that may have influenced you.

I have looked at the sentences that your co-offenders have been given in relation to their offending, and it is my view that the sentence given to Master Braun is disproportionate to the seriousness of his offending, and I will take that into account. It is not a sentence that I would have given Master Braun on the limited knowledge that I have of his case and circumstances.

I do take into account that it has been 15 months since the offending and that you have shown to the court and the community that you are serious about your own rehabilitation; you are serious about getting yourself educated and keeping yourself out of trouble; and that it is paramount concern to the court and certainly a paramount consideration in relation to youth justice matters.

However, I am not in agreement with Ms Opie that this is a matter that does not require a custodial sentence. It is clearly serious offending that has to be discouraged of yourself and others youths like you. In other words if I do not give you a custodial sentence, my view is that kids out there who are involved in a similar situation will not make the right choice if they can see that the court is not taking this sort of offending seriously, taking into account all of your personal circumstances.

So, given all of that, you will be convicted and sentenced to a term of detention of four months. However, given your continued rehabilitation, and your continued demonstration to the court and the community that you are able to keep yourself out of trouble, the term of detention will be fully suspended. It will be fully suspended. It will be fully suspended for 12 months and you will be subject to supervision by Community Corrections regarding your education and employment, and counselling that Community Corrections thinks appropriate.

Now, Master RA, you can understand by the presence of the guard today in court, I was seriously considering that you would be serving and actual term of imprisonment or an actual term of detention. Subject to the submissions made to me by Ms Opie, I decided not to make you serve an actual term of detention. However, in the next 12 months and beyond, if you re-offend in a similar manner, you will most likely be spending four months in detention at Don Dale.

- [31] The sentencing magistrate's overriding considerations were the objective seriousness of the aggravated assault which all of the offenders perpetrated on Mr Gray, and general and specific deterrence. She gave much less weight to the very limited nature of the appellant's involvement in the crime and to his individual level of culpability. While she gave weight to the offender's prospects of rehabilitation, the sentencing magistrate seems to

have formed the opinion that the Youth Justice Court would fail to function as a protector of the community unless deterrence and retribution were significant sentencing considerations and a sentence of imprisonment was imposed.

The objective seriousness of the appellant's offending

[32] The aggravated assault on Mr Gray in which the appellant participated was a serious assault. Mr Gray was assaulted by an adult and five youths. He was assaulted at night. He tried to get away before the assault started but he was prevented from doing so. The assault involved the use of sticks, a plaster cast and a coke can filled with sand. It was a vicious and sustained assault. Mr Gray was kicked and punched to the head and body numerous times. Mr Gray was unable to defend himself and on three occasions he was prevented from getting away from his attackers. He sustained bodily harm. It is fortunate that Mr Gray was not more seriously injured.

[33] The essential elements of the appellant's involvement in the crime are: he, along with the other boys, complained to Allan Dawson, an adult, about Mr Gray verbally abusing them; he stood by and watched a vicious and sustained assault on Mr Gray, which was initiated by Allan Dawson and perpetrated by Allan Dawson and four other boys; he was encouraged to join in the assault by Allan Dawson and during the assault upon Mr Gray he punched Mr Gray once to the head with a closed fist.

[34] While the appellant's offending is aggravated by the fact he punched Mr Gray while in company with his co-offenders¹, the appellant's participation in the offending was at the lowest level. He played only a very minor role in the offending. He followed the other offenders and he only threw one punch after being encouraged to do so by Mr Dawson. The assault would have occurred in his absence and it would not have stopped if he left the scene. The appellant's culpability is of a lower level than all of his co-offenders save for, perhaps, Troy Gillett.

The subjective elements of the appellant's offending

[35] At the time he committed the assault the appellant was only 13 years of age and he was entitled to be dealt with as a first offender. He had committed no crimes of violence prior to the assault on Mr Gray and he committed no offences during the 15 month period between the offending and sentence. He was encouraged to participate in the assault on Mr Gray by an adult. He would have been under significant peer pressure. He was attending school and he was receiving average grades. He had a stable home environment and he had plans for his future education. He was a keen footballer who was valued by his club.

[36] While the appellant did not show a lot of remorse for his crime and he appears to have endeavoured to minimise his role in the offending rather than accept full responsibility for his conduct, these factors have to be

¹ Section 6A (a) Sentencing Act (NT)

considered in the context of his young age. The offending was out of character, and there were good prospects of the offender being rehabilitated.

Consideration

[37] In my opinion the sentence imposed on the appellant was manifestly excessive. The sentencing magistrate placed too much weight on general deterrence. She placed insufficient weight on the following factors: a sentence of imprisonment is a sentence of last resort when sentencing juveniles; the appellant's age; the offending was out of character; the low level of the appellant's participation in the assault on Mr Gray; the offender had committed no offences during the 15 months between the crime and his sentence; and the offender's prospects of rehabilitation were good. Protection of the community is also contributed to by the successful rehabilitation of youthful offenders.

[38] In *Lowe v The Queen*² Gibbs CJ said³:

It is obviously desirable that persons who have been parties to the commissions of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account.

[39] In this case there are real and substantial grounds for distinguishing between the offending of Allan Dawson, William Maroney, Wesley Hector and Henry Braun and the offending appellant. The offender was much less culpable

² (1984) 154 CLR 606

³ (1984) 154 CLR 606 at 609

and he had better prospects of rehabilitation than Allan Dawson, William Maroney and Wesley Hector.

[40] The primary purposes in sentencing the appellant should have been his rehabilitation and reintegration into the community and making him accountable for his conduct. He could be made accountable for his conduct without the imposition of a sentence of detention. As the offending was out of character and as the offender had committed no further offences for a period of 15 months considerations of specific deterrence did not require the imposition of a sentence of detention. The object of accountability could be achieved by recording a conviction, requiring the appellant to be of good behaviour and appropriate supervision.

Orders

[41] In the circumstances I make the following orders:

1. The appeal is allowed.
2. The suspended sentence of four months detention imposed on the appellant by the Youth Justice Court is set aside.

Re-sentence

[42] I re-sentence the appellant. His conviction of the aggravated assault on Mr Gray at Katherine on 8 September 2007 is confirmed. I make a good behaviour order under s 83(f) and s 91 of the Youth Justice Act in the following terms:

1. The appellant is released on his own security in the sum of \$500.
2. During the period of 12 months from today the appellant is to appear before the Youth Justice Court if called upon to do so.
3. The appellant is to be of good behaviour for a period of 12 months from today.
4. During the period of 12 months from today the appellant is to observe the following conditions:
 - (a) The appellant is to reside with his parents at their address in Katherine.
 - (b) The appellant is to be under the supervision of the Director of Correctional Services or his delegate and he is to report as reasonably required to a person nominated by the Director of Correctional Services or his delegate.
 - (c) The appellant is to obey the reasonable directions of the Director of Corrections or his delegate as to counselling, education and employment.
 - (d) The appellant is not to directly or indirectly associate with Allan Dawson, William Maroney, Wesley Hector and Henry Braun.
