Sharpe v Eaton [2011] NTSC 99

PARTIES:	SHARPE, LEROY v EATON, DONALD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA-AS 37 OF 2011 (21120329), JA-AS 38 OF 2011 (21122760), JA-AS 39 OF 2011 (21120332), JA-AS 40 OF 2011 (21122758) AND JA-AS 41 OF 2011 (21122770)
DELIVERED:	30 NOVEMBER 2011
HEARING DATES:	7 SEPTEMBER 2011
JUDGMENT OF:	KELLY J
APPEAL FROM:	J NEILL SM

REPRESENTATION:

Counsel:

Appellant:	T Collins
Respondent:	J Tierney

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service Inc
Respondent:	Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Sharpe v Eaton [2011] NTSC 99
No. JA-AS 37 OF 2011 (21120329), JA-AS 38 OF 2011 (21122760),
JA-AS 39 OF 2011 (21120332), JA-AS 40 OF 2011 (21122758)
and JA-AS 41 OF 2011 (21122770)

BETWEEN:

LEROY SHARPE
Appellant

AND:

DONALD EATON
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 30 November 2011)

[1] On the night of 11 January 2011 the appellant, Leroy Sharpe and a co-offender climbed onto the roof of the Heavitree Gap Hotel in Alice Springs and broke into the building through the roof. Once inside, they stole numerous cans of premixed drinks and bottles of spirits taking them away in a plastic bin.

[2] On 8 June 2011 Mr Sharpe was in his home community of Haasts Bluff. At 11:00 p.m. he walked into the kitchen area of his house where his wife was lying on a mattress with their 11 month old baby asleep beside her. Mr Sharpe asked his wife to cook him a feed as he had just returned from

hunting, and then hit her on the right side of her face with a clenched fist. This caused her pain and she immediately got up and ran to the police station to get help.

[3] On 23 June 2011 Mr Sharpe was back in Alice Springs. He and a co-offender again climbed onto the roof of the Heavitree Gap Hotel, where one of them kicked in the roof and the ceiling and they again entered the hotel and stole bottles of spirits and cans of premixed drinks, then left the hotel through the holes in the roof. Afterwards Mr Sharpe and his co-offenders drank the stolen alcohol together. Mr Sharpe was arrested later that morning and charged with all three of these offences.

[4] He appeared in court later in the day on 23 June 2011 and was bailed to appear in Papunya Local Court on 30 June 2011 in relation to all three offences. He failed to appear in court on that day and a warrant was issued for his arrest.

[5] While in breach of his bail, at 3:30 a.m. on 13 July 2011 Mr Sharpe and some co-offenders drove to the Gap View Hotel, climbed onto the roof and kicked in an air vent in order to gain access to the building causing $750.00 damage in the process. This time, Mr Sharpe waited on the roof while a co-offender went inside and stole two bottles of rum and three packets of cigarettes. Mr Sharpe fell asleep on the roof while he was waiting, and at about 3.50 am police found him up there and arrested him.

[6] The total value of all goods stolen during all of these offences, an assortment of pre-mixed alcoholic drinks, bottles of spirits and cigarettes, was approximately $987.00.

[7] Following his arrest Mr Sharpe participated in an electronically recorded interview with police, in which he gave a false name.

[8] During that interview, he was asked why he had broken into the Heavitree Gap Hotel on the first occasion, and he said, “Too many blokes waiting outside for grog.”

[9] He was asked why he had hit his wife, and he said, “Didn’t cook dinner, injury small.”

[10] When he was asked why he had entered the Gap View Hotel in the third break in he said that he was ‘battling for smoke, no money’ and that he ‘only take one bottle’.

[11] Mr Sharpe appeared in court on 14 July 2011 and was remanded in custody. On 27 July 2011 he pleaded guilty to the charges that arose as a result of all of the above offences.

[12] The learned magistrate sentenced Mr Sharpe to a total of 10 months imprisonment. The sentence was backdated to 13 July 2011 when he was arrested after having been found asleep on top of the Gap View Hotel. Mr Sharpe now appeals against this sentence. No issue has been taken with the

appropriateness of the head sentence of 10 months imprisonment. The grounds of appeal are:

(a) that the learned sentencing Magistrate erred in failing to consider partially suspending the period of prison imposed;

(b) that the Magistrate erred in failing to consider ordering an assessment of Mr Sharpe's suitability for supervision under s 103 of the *Criminal Code*; and

(c) that the Magistrate erred in giving insufficient weight to the personal circumstances of the appellant and his future prospects for rehabilitation.

Ground (c) was not argued on the hearing of the appeal.

[13] The principles governing appeals are well known. A court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing Judge or Magistrate was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence.[1] The sentence is presumed to be correct.[2]

[14] Counsel for the appellant submitted that error had been shown because the learned Magistrate failed to consider (as he was obliged to do) whether or

1 *R v Tait* (1979) 24 ALR 474 at 476.

2 *Van Toorenburg v Westphall* [2011] NTSC 31.

not to suspend, or partially suspend Mr Sharpe's sentence. If that were the case, then that would amount to an error of principle and I would be obliged to remit the matter to the learned Magistrate to re-sentence according to law; to re-sentence Mr Sharpe myself; or, if I were of the opinion that, notwithstanding demonstrated error, there had been no substantial miscarriage of justice, to dismiss the appeal.

[15] If the Magistrate did consider whether to suspend or partially suspend Mr Sharpe's sentence, and determined that he would not do so, then it would not be open to me to interfere with that exercise of the learned Magistrate's decision unless it was shown to be so unreasonable that no reasonable magistrate could have arrived at it.[3]

[16] The first question, therefore, is whether the learned Magistrate did fail to consider whether to suspend all or part of Mr Sharpe's sentence. I do not think that he did.

[17] It is not to be assumed that the failure to mention a sentencing principle means that it has been overlooked.[4] In particular, magistrates are working under pressures which mean that they are simply unable to give the kind of detailed reasons which might be expected of a court delivering a reserved judgment, and sentencing remarks delivered in such circumstances should

3 *House v The King* (1936) 55 CLR 499 at 509 and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

4 *Van Toorenburg v Westphall* at [23].

not be subjected to the same degree of critical analysis as the words in a considered reserved judgment.[5] An appellant court is entitled to assume that a magistrate has considered all matters which are necessarily implicit in any conclusions which he has reached.[6]

[18] In this case, before passing sentence, the learned Magistrate said:

> "You're 20 years old, and its been suggested that you have a problem with alcohol and that these matters can, in part, be dealt with by suspending sentences to be imposed to enable you to undertake some rehabilitation. Its been suggested that these were impulsive acts, or some of them were, in other words, you didn't think about them, you just did them on the spur of the moment, and you're a naive young person who doesn't really appreciate the seriousness of your offending. I am not convinced."

[19] This indicates that the defence submission that the sentence ought to be suspended was in the Magistrate's mind at the time of sentencing, and it is implicit in the sentence he delivered that he rejected that submission. Indeed, if the words, "I am not convinced," are seen as referring to all of the submissions he had just referred to, then the learned Magistrate expressly rejected the submission that the sentence should be suspended. So far as the failure to order a s 103 report is concerned, I do not see that as an indication that the Magistrate failed to consider whether to suspend Mr Sharpe's sentence, but as a natural consequence of his decision not to do so.

[20] The next question is whether the Magistrate's decision not to suspend all or part of Mr Sharpe's decision is unreasonable in the requisite sense – ie so

5 *Jambajimba v Dredge* (1985) 33 NTR 19, at 22 per Muirhead ACJ.

6 *Bartusevicvs v Fisher* (1973) 8 SASR 601.

unreasonable that no reasonable magistrate could have arrived at it. Notwithstanding Mr Sharpe's youth, I do not think the decision not to suspend his sentence was unreasonable. That decision was well within the proper exercise of the learned sentencing Magistrate's discretion. Mr Sharpe was being dealt with for repeat offending of the same nature, as well as for an unprovoked assault upon his wife while she was lying with their 11 month old baby. In relation to the repeated break-ins, the third such offence was committed while he was in breach of his bail for the first two offences and the assault upon his wife. His entire course of conduct demonstrated an attitude of refusal to abide by the law and an unwillingness to comply with an order of the court, making it entirely reasonable for the Magistrate to place particular emphasis on personal deterrence.

[21] For the same reasons, if the learned Magistrate had in fact failed to consider whether or not to suspend or partially suspend Mr Sharpe's sentence, I would nevertheless have dismissed the appeal on the ground that there had been no substantial miscarriage of justice.

[22] The appeal is dismissed.