Jongmin v McMaster [2004] NTSC 19

PARTIES:	GIOVANI JONGMIN
	v
	DEAN STEWART McMASTER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 165/2003 (20308581)
DELIVERED:	8 April 2004
HEARING DATE:	1 March 2004
JUDGMENT OF:	BAILEY J

CATCHWORDS:

Criminal Law – Appeal – Aggravated Criminal Damage – Whether sentence manifestly excessive – Whether Magistrate erred in failing to pay sufficient regard to personal circumstances – Whether Magistrate erred in imposing a sentence which was contrary to law – Whether period for Home Detention Order is to be the same as the term of imprisonment imposed by Court.

Criminal Code (NT) s 251
Sentencing Act 1996 (NT) s 44, 46, 47, 48

O'Brien v Quinn NTSC 99, Full Court of the Supreme Court of the Northern Territory, unreported, delivered 12 September 2003 – considered

REPRESENTATION:

Counsel:

Appellant:	S Barlow
Respondent:	R Brebner

Solicitors:

Appellant:	NAALAS
Respondent:	DPP

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

Jongmin v McMaster [2004] NTSC 19
No. JA 165/2003 (20308581)

BETWEEN:

GIOVANI JONGMIN
Appellant

AND:

DEAN STEWART McMASTER
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 8 April 2004)

Background

[1] This is an appeal against sentence pursuant to s 163 of the *Justices Act*.

The appellant pleaded guilty to one count of aggravated criminal damage.

The circumstance of aggravation was that the loss caused was greater than

$5,000, namely $23,846.

[2] The agreed facts were as follows:

> "On the afternoon of Wednesday, 23 October, 2002, the defendant [appellant] and a large number of other people were at the bottom oval in Port Keats Community. A large fight erupted at the oval, between two family groups, that lasted for some time.
>
> After the fight had ended and the people from the other family ran from the area, the defendant [appellant] and group of co-offenders

> walked to lot 290, the residence of Peter Cumaiyi and his family. A co-offender kicked a locked front door open and the defendant [appellant] and others entered and set about damaging the house.
>
> The victim's washing machine was completely destroyed, hand-basin ripped from the wall, the toilet bowl shattered to floor level, louvres destroyed in all windows, large pieces of roofing destroyed, and the power box ruined beyond working order. The total damage caused to this house was $23,846.
>
> Several other houses were damaged by co-offenders that the defendant [appellant] watched but did not participate in. The defendant [appellant] and co-offenders then went back to their own camps.
>
> The defendant was arrested on 5 June, 2003, where he participated in a record of interview and made full admissions to police regarding the damage. When asked his reason for participating in the damage, the defendant [appellant] replied: 'Just wanted to break louvres. Just because Peter Cumaiyi ran off in bush. Angry for what happened to that boy'. When asked who he thought should pay for the damage caused, the defendant [appellant] answered: 'Don't know'.
>
> The total value of the damage to housing caused that day in Port Keats Community was $208,098 with the defendant admitting to participating in $23,846 damage."

[3] In his reasons for sentence, the learned magistrate took into account that the appellant was at the time of the offending a 39 year old Port Keats family man of previous clear record and good rehabilitation prospects.

His Worship also took into account events leading up to the offence. There had been a history of trouble between the appellant's family and that of the victim, the Cumaiyis. The appellant's nephew (son, in an Aboriginal customary way) had been shot dead, allegedly by a police officer, after a

boy of the Cumaiyi family had produced a shotgun during the course of a confrontation between the two families.

[4] The learned magistrate expressly referred to the severe financial burden which had been forced onto the Port Keats community by the appellant's offence. His Worship stressed the seriousness of the offence while acknowledging the tragic circumstances which preceded it. The learned magistrate gave the appellant credit for his early plea and his decision to desist, of his own accord, from committing further acts of criminal damage after participating in the destruction at Peter Cumaiyi's home. The learned magistrate considered the offence was "far too serious" for the imposition of a community work order, while also concluding that sending the appellant away to serve a period of imprisonment "would … do more harm than good".

[5] The appellant was convicted and sentenced to a term of imprisonment of five months. The learned magistrate ordered that the sentence be suspended upon the appellant entering into a home detention order for a period of three months.

Grounds of Appeal

[6] The appellant relied upon the following grounds of appeal:

a) that the sentence was manifestly excessive;

b) that the learned magistrate erred in failing to pay sufficient regard to the personal circumstances of the defendant including his age, lack

of prior convictions and the unusual circumstances surrounding the commission of the offence; and

c) that the learned magistrate erred in imposing a sentence which was contrary to law.

[7] The first and second grounds of appeal were argued together.

Manifestly Excessive

[8] The appellant's offence is an "aggravated property offence" for the purposes of s 78B of the *Sentencing Act*. In the case of such an offence, s 78B(2) requires that a court which records a conviction against an offender must:

> "(a) order the offender to serve a term of imprisonment; or
>
> (b) order the offender to participate in an approved project under a community work order,
>
> unless there are exceptional circumstances in relation to the offence or the offender."

[9] Section 78B(3) provides that a term of imprisonment imposed in accordance with subsection (2)(a) may only be wholly suspended on the offender entering into a home detention order.

[10] Mr Barlow on behalf of the appellant, in both written and oral submissions emphasised the substantial mitigating factors in favour of the appellant: the early plea of guilty; the appellant's frank admissions to Police; the unprofessional and unsophisticated nature of the offending;

the appellant's relatively minor role in group offending; the appellant's lack of criminal history; the extraordinary circumstances leading up to the offence and the appellant's demonstrated good behaviour in the year following the offence.

[11] All of these matters were to a greater or lesser extent drawn to the attention of the learned magistrate and to a greater or lesser extent referred to by him in his reasons for sentence.

[12] Mr Barlow submitted that the "ordinary punishment" for property damage is non-custodial and referred me to *R v Alfie Rory* (1992) 64 A Crim R 134. There Kearney J had before him brief details of 31 cases of criminal damage which came before the Alice Springs Court of Summary Jurisdiction over a 15 month period commencing in February 1991. Kearney J noted that the penalties imposed ranged from compensation orders, good behaviour bonds, fines, community service orders, suspended sentences of imprisonment to immediate imprisonment ranging from seven days to three months. Kearney J observed: "Clearly, a very wide range of penalties".

[13] The case before Kearney J concerned an offender who had smashed a car window. Eleven of the 31 cases referred to in submissions before Kearney J similarly dealt with cases of smashed windows or windscreens. It is in that context that the following conclusions of Kearney J, at p 139, must be considered:

> "I consider that the 31 cases … sufficiently establish a current range of sentencing for this offence …. A sentence of the order of three months immediate imprisonment is about the top of the range …"

[14] In my view, *Rory* stands for no more than the proposition that Kearney J considered that a sentence of imprisonment of three months was the "top of the range" in the early 1990s for criminal damage upon the scale of smashed car windows or windscreens. I do not think that the case has any relevance whatsoever to a situation where an offender in company with others participates in causing nearly $24,000 worth of damage to a family home.

[15] Mr Barlow further submitted that the learned magistrate failed to examine properly whether "exceptional circumstances" existed in relation to either the offence or the offender or both in the appellant's case.

[16] In the court of summary jurisdiction, the appellant was represented by very experienced counsel, Mr Bryant. After submitting that there were "some fairly exceptional circumstances" surrounding the appellant's offending behaviour which might make a non-custodial sentence appropriate, the learned magistrate indicated that a home detention order "seems a sensible disposition". Mr Bryant's response was: "Well, I won't take the matter any further".

[17] In his reasons for sentence, the learned magistrate (who I note is a magistrate of great experience in dealing with the problems of Port Keats and Aboriginal communities generally), appropriately considered the circumstances of both the offence and the offender. His Worship took into

account the substantial mitigating factors in favour of the appellant, but rightly in my view, considered that the appellant's sentence needed to reflect general and specific deterrence. The learned magistrate was, I consider, at pains to strike an appropriate balance between the objective gravity of the offending and the subjective factors in favour of the appellant. It is not to the point, as Mr Barlow submitted in his written submissions, that a community work order was "within range". The issue is whether the sentence imposed was **manifestly** excessive. I am quite unable to agree that in all the circumstances of this case that a sentence of five months imprisonment suspended on a home detention order for three months is excessive, let alone manifestly excessive.

Contrary to law

[18] It was submitted on behalf of the appellant that the sentence imposed by the learned magistrate was contrary to law. In essence, Mr Barlow submitted that the *Sentencing Act* required the period of a home detention order to be the same as the term of imprisonment imposed by the court.

[19] For those familiar with the practice of the court of summary jurisdiction and the Supreme Court in relation to home detention orders since the commencement of the *Sentencing Act* (1 July 1996), this is a bold, even startling, proposition. It is commonplace for a Territory court to suspend a term of imprisonment upon an offender entering into a home detention order for a period shorter or longer than the term of imprisonment. In my

experience, it is comparatively rare for a term of imprisonment suspended on a home detention order to be for the same period the order is to remain in force.

[20] A court may not order that a home detention order is to remain in force for a period exceeding 12 months (see s 44(3), 46, 47(5) and 48(11) and (11A) of the *Sentencing Act*). If the submission on behalf of the appellant is correct, no sentence of imprisonment for a term exceeding 12 months can be suspended on a home detention order. Such a result would (again) overturn the practice of Territory courts dating back to the commencement of the *Sentencing Act* in 1996.

[21] In support of his submissions that the appellant's sentence was contrary to law, Mr Barlow referred me to the recent decision of *O'Brien v Quinn* NTSC 99, Full Court of the Supreme Court of the Northern Territory, unreported, delivered 12 September 2003. The Court's judgment examined in some depth the *Sentencing Act* provisions for fully and partly suspended sentences of imprisonment in subdivision 1 of Division 5 of the Act and home detention orders as provided for in subdivision 2 of Division 5 of the Act. The Full Court held that suspended sentences in subdivision 1 and home detention orders in subdivision 2 are separate and distinct dispositions under the Act. Accordingly, the Court held that a home detention order can only be made under subdivision 2 and is not available as a condition of a suspended (or partly suspended) sentence made under subdivision 1. Further, the Court held that a court has no power to make a home detention

order in connection with a partly suspended sentence under subdivision 2 of Division 5.

[22] Mr Barlow, correctly, submitted upon the basis of *O'Brien v Quinn* that a home detention order is a discrete sentencing option which is independent of, and different to, a suspended sentence under s 40 of the *Sentencing Act*. However, Mr Barlow also submitted that:

> "… the appellant received more than a three month home detention order. The appellant was effectively sentenced to 5 months imprisonment, suspended on a home detention order for 3 months. This is akin to imposing the home detention as a condition of a suspended sentence bond".

[23] The submissions on behalf of the appellant seem to proceed on the basis that the appellant's sentence of 5 months imprisonment was in effect partly suspended by allowing him unconditional liberty after service of 3 months of the sentence on a home detention order.

[24] With respect, the submission is misconceived.

[25] If the appellant was to complete his three months detention order without breach, he would have satisfied the condition under which his 5 month head sentence was (fully) suspended and be subject to no further restraint. On the other hand, if the appellant was to breach his home detention order, subject to s 48 of the *Sentencing Act*, the home detention order would either be revoked and the appellant imprisoned for the entire 5 month head sentence or the court might in prescribed circumstances vary the terms and conditions

of the order, including the period the order was to remain in force (subject to the 12 month maximum period for an order).

[26] The essence of the provisions for home detention orders under subdivision 2 of Division 5 of the *Sentencing Act* is to provide for a sentence of imprisonment to be **fully** suspended on a particular basis. If an offender breaches a home detention order, he is at risk of having to serve his entire head sentence (not part of it) in custody or in some circumstances of having the period of his home detention order (not his sentence of imprisonment) extended.

[27] Mr Barlow submitted that "it is implicit in s 44 and s 48 of the *Sentencing Act* that the term served on a home detention order is the only term that can be suspended". With respect, I cannot agree with that proposition.

[28] Section 44(1) and (2) provides that a court which sentences an offender to a term of imprisonment may make an order suspending the sentence on the offender entering into a home detention order for a period not exceeding twelve months. There is nothing express or implied in s 44 or the Act read as a whole to require that an offender's sentence of imprisonment and the period of his home detention order be the same duration, nor is there anything in s 44 which restricts the availability of home detention orders to offenders sentenced to 12 months imprisonment or less.

[29] Similarly, s 48 of the *Sentencing Act* (which deals with breach of a home detention order) provides no support for the submissions made on behalf of

the appellant. On the contrary, s 48(9)(c) makes express provision in specified circumstances for a court to vary the period a home detention order is in force. Significantly, no provision is made in s 48 to vary an offender's term of imprisonment. Such a variation might, in effect, be made by a court which revokes a home detention order pursuant to s 47(1)(b)(ii) – but significantly, again, separate provision is made by s 47(1)(c) to vary the terms and conditions of a home detention order, including the period it is to remain in force.

[30] Nothing in the *Sentencing Act* requires that the period a home detention order is in force to equate to the period of the sentence held in suspense. The *Sentencing Act* leaves the period in the discretion of the court. Accordingly, the appellant's sentence is not contrary to law.

Order

[31] The appeal is dismissed.

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