Graham v Tudor-Stack [2004] NTSC 40

PARTIES:	COREY GRAHAM v PAUL TUDOR-STACK
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NOS:	JA 12-13, 15-20, 22-26 of 2004 20315939, 20315942, 20315944-20315948, 20315950-20315951, 20318032, 20318063, 20318073-20318074, 20320994
DELIVERED:	6 August 2004
HEARING DATES:	6 August 2004
EX TEMPORE JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	D. Woodroffe
Respondent:	J. Adams

Solicitors:

Appellant:	North Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	ril0419
Number of pages:	10

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Graham v Tudor-Stack [2004] NTSC 40
No JA 12 to 13, 15 to 20, 22 to 26 of 2004

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

COREY GRAHAM
Appellant

AND:

PAUL TUDOR-STACK
Respondent

CORAM: RILEY J

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 6 August 2004)

[1] On 10 March 2004 the appellant entered pleas of guilty to a series of offences of unlawfully damaging property contrary to s 251(1) and (2) of the Criminal Code. The learned Chief Magistrate sentenced the appellant to a total period of imprisonment of seven months to be suspended after two months upon entering into a good behaviour bond for an operational period

of two years. The appellant now appeals against that sentence on the following grounds:

1. The learned magistrate failed to properly consider the principle of parity.

2. The sentences were manifestly excessive.

3. The learned magistrate failed to properly consider a home detention order.

4. The learned magistrate gave insufficient weight to the appellant's offer to pay restitution.

5. The learned magistrate gave insufficient weight to the appellant's plea of guilty.

[2] The offences occurred on two separate occasions, being the night of 14 and 15 August 2003 and then the night of 18 and 19 August 2003. In the days leading up to the first offence the appellant and a co-offender, Nathan Wishart, purchased two slingshots and approximately 500 marbles. On the nights in question the appellant and his co-offenders were driving aimlessly around the streets of Darwin. Whilst doing so, and sometimes in turn and at other times together, they fired marbles at the windows of various business premises and at least one motor vehicle, causing them to break.

[3] On the night of 14/15 August the appellant was in the company of two other persons, Nathan Wishart and G, and caused damage to the value of $6054. On the second occasion Mr Wishart was not present and he was in the

company of G alone. The value of damage caused on that occasion amounted to $23,061.86.

[4] The learned magistrate dealt with the matter by convicting the appellant and imposing sentences of imprisonment for one month on each count. It was ordered that all of the sentences from the night of 14/15 August 2003 be served concurrently. In relation to the second group of sentences it was ordered that some of the terms of imprisonment be served concurrently and some cumulatively. The effective head sentence was one of imprisonment for seven months which was to be suspended after the appellant had served two months imprisonment. The suspension was conditional upon the appellant attending anger management counselling and making restitution in the sum of $13,549.05.

[5] The co-offender G has pleaded not guilty to the offences and is yet to be dealt with by the court. The co-offender Nathan Wishart pleaded guilty to five counts of criminal damage totalling $5444.31 and one count of possessing a controlled weapon, namely the slingshot. He was sentenced to 169 hours of community work and placed on a bond to be of good behaviour for a period of two years. He was directed to make restitution in the sum of $1795.12.

Appeal against Sentence

[6] The principles to be applied on an appeal against sentence are well known. It is fundamental that the exercise of the sentencing discretion by the

magistrate is not to be disturbed on appeal unless error in that exercise is shown. There is a presumption that there is no error. It is incumbent on the appellant to show that the sentencing discretion of the magistrate has miscarried. It is not necessary that some definite or specific error should be identified. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In the case of a submission of manifest excess the sentence must be shown to be not just excessive but manifestly so. It is not enough that the Court of Appeal may have imposed a different sentence.

Parity of Sentence

[7] The submission of the appellant was that there should be uniformity in sentencing of co-offenders and that the sentence imposed upon the appellant was disparate from that imposed upon the co-offender Nathan Wishart to such an extent as to "give rise to a justifiable sense of grievance": *Lowe v The Queen* (1984) 154 CLR 606 at 609.

[8] In sentencing it is clear that the parity principle is a matter for consideration by the court. In *Postiglione v The Queen* (1997) 189 CLR 295 Dawson and Gaudron JJ said (at 301):

> "The parity principle upon which the argument in this court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences, due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or

their different circumstances. If so, the notion of equal justice is not violated."

[9] In the course of sentencing the learned sentencing magistrate made reference to the penalty imposed upon Nathan Wishart. He distinguished the situation of Mr Wishart from that of the appellant. He pointed out that Mr Wishart was present on only one of the occasions and pleaded guilty to only five counts of criminal damage totalling some $5444.31. His Worship also noted that the appellant had a criminal history including nine different offences in relation to which he had been sentenced to terms of imprisonment totalling 14 months. Those sentences had been suspended. I note that included in those offences were prior convictions for damaging property. By way of contrast Mr Wishart was a first offender. The appellant's offending extended over two separate occasions and involved some 15 offences with a total damage bill in excess of $30,000. His Worship considered the whole of his offending and fashioned a sentence designed to reflect the total criminality involved.

[10] The learned magistrate was not provided with information as to the submissions placed before the court when Mr Wishart was sentenced. No basis for comparing or contrasting the circumstances of Mr Wishart and those of the appellant was identified in the Court of Summary Jurisdiction or before me. On the information that was available to his Worship there was a clear basis for distinguishing between the appellant and Mr Wishart and, in my view, the learned sentencing magistrate did not err in so doing.

The Remaining Grounds

[11] It is convenient to deal with the remaining grounds of appeal together.

[12] In relation to the submission that his Worship failed to properly consider a home detention order it is necessary to consider the attitude of the appellant to that sentencing option. At the time of the pre-sentence report the appellant was aware that an actual term of imprisonment was the likely result and yet he expressed the view to the reporting officer that he was not willing to agree to undertake a home detention or a community work order.

[13] In the course of his submissions to the learned magistrate, counsel for the appellant reiterated the advice contained in the report that the appellant did not wish to partake in home detention or community service. Submissions were directed towards a sentence of imprisonment that was wholly suspended. During the course of the proceedings before his Worship there was an adjournment. Following that adjournment, his Worship was informed that the appellant "would not completely rule out the idea" of home detention. Counsel went on to submit that the position of the appellant remained that a wholly suspended sentence would be appropriate.

[14] The position that confronted his Worship on the issue of home detention was that there was an initial rejection of that option at the time of the pre-sentence report. That position was confirmed at the hearing. There was then a begrudging indication that the appellant would not completely rule out the idea. Clearly the matter was raised and discussed with the

sentencing magistrate. In my view the submission that his Worship failed to consider the sentencing option of a home detention order is not borne out by reference to the transcript. He did so. There was ample reason for his Worship to decline to adopt that sentencing option.

[15] It was also submitted that his Worship failed to give sufficient weight to the appellant's offer to make restitution. There was much discussion with counsel about restitution, including as to how payment may be achieved. Restitution was in fact ordered. In my view, there is no sustainable basis for the submission that his Worship failed to give the matter appropriate weight.

[16] It was further submitted that his Worship did not provide sufficient weight to the appellant's plea of guilty. The appellant submitted that he was entitled "to a full discount in the order of 20 to 25% not only on a temporal basis but as the plea advanced the administration of justice". Reference to the transcript reveals that his Worship in fact proceeded on the basis that the appellant "pleaded guilty at a relatively early stage" and he indicated he would give credit in the order of "a 10 or 20% discount for that". Such an allowance was appropriate in all the circumstances. This submission is without foundation.

[17] Finally it was the submission of the appellant that in the circumstances of the offending and of the offender the sentence imposed upon the appellant was manifestly excessive. In the course of submissions the appellant conceded that the imposition of the identified terms of imprisonment for the

offending was commensurate with each offence. However it was said that the total effective head sentence of seven months imprisonment was manifestly excessive when the maximum penalties were considered. The maximum penalty for an offence against s 251(1) of the Criminal Code, which related to 13 of the offences, was imprisonment for two years. The maximum penalty for an offence against s 251(2) of the Criminal Code, which related to two of the offences, was imprisonment for seven years. The individual sentences imposed were not excessive considered in light of the maximum penalties applicable.

[18] Further, it was submitted that whilst the terms of imprisonment imposed were conceded to be commensurate the learned magistrate was still required to decide whether to wholly or partly suspend the sentence as an appropriate disposition. Reference was made to *Dinsdale* (2000) 202 CLR 321. It was submitted that the failure to wholly suspend the sentence was manifestly unjust.

[19] The appellant submitted that there existed a wealth of subjective circumstances supportive of a fully suspended sentence for the appellant. These circumstances included the appellant's age (24 years), his prospects for rehabilitation, his troubled childhood and family life, matters set out in a report from a psychologist relating to anger displacement, his positive attitude to his hobby of restoring cars, his willingness to make restitution and the fact that he had not before served a term of imprisonment. All of these matters were before his Worship.

[20] The circumstances of the appellant must of course be balanced with the circumstances of the offence and with the countervailing information provided to the court.

[21] The offences were serious. The slingshots and ammunition had been purchased some days prior to the offending and in that sense the offences were premeditated. The offending occurred over two separate periods with the second series of offences occurring some four nights after the first series. There was an escalation in the seriousness of the offending on the second occasion. There was plenty of time for the appellant to reconsider his position but he chose to re-offend in an even more serious way. The offending was wanton and senseless. On each occasion the appellant committed the offending in company. There was no suggestion that he was other than a full, willing and active participant on each occasion.

[22] The pre-sentence report included the following observation:

> "The writer believes the offender is at risk of re-offending, based on his apparent immaturity and lack of insight into the seriousness of his offences. The offences implied a high degree of recklessness and aggression and the writer feels that the offender needs to develop a more mature attitude and awareness of the feelings of others if he is to avoid further offending. His episodic inability to control his anger could leave him vulnerable to future outbursts and therefore the writer considers there may be a risk of the offender causing harm to the public."

[23] When discussing the matter with the reporting officer the appellant indicated that the original intention was to "target cats" and also "a Rottweiler that barked at him". It was noted in the report that there was no basis for

concluding that the appellant felt any genuine remorse for his actions or that he appreciated the ramifications of his conduct. He lacked insight into the seriousness of what he had done. He declined to allow other people to be interviewed.

[24] In sentencing the appellant the learned magistrate referred to the various issues raised on his behalf. He referred to the matters in the pre-sentence report and noted that there were "very positive aspects on the defendant's side in terms of his preparedness to work, his lack of preparedness to accept public charity and also in essence his acceptance ultimately of responsibility for his behaviour". He referred to and took into account the submissions of his counsel. He referred to the psychological report that had been received and the recommendation that the appellant needed some assistance and counselling in relation to anger management.

[25] With respect to the appellant the sentences imposed by his Worship were comfortably within the range of sentencing available to him. I see no error in the sentences imposed. They are not manifestly excessive.

[26] The appeal is dismissed.

———————————