Namatjira v Cornford [2006] NTSC 63

PARTIES:	NAMATJIRA, Lisa Swift v CORNFORD, Michael
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 17 of 2006 (20530852)
DELIVERED:	11 August 2006
HEARING DATE:	2 August 2006
JUDGMENT OF:	Olsson AJ
APPEAL FROM:	Court of Summary Jurisdiction sentence, Mr M Carey SM, 17 February 2006

CATCHWORDS:

APPEAL – JUSTICES

Appeal against sentence – whether sentence manifestly excessive – whether sentence disproportionate to the gravity of the offending – appellant's criminal history a relevant consideration -

Appeal against sentence – conditions of suspended sentence – learned magistrate not fully informed as to practicality of condition as to residence –

Appeal allowed

Veen v The Queen (No. 2) (1988) 164 CLR 465, followed
House v The King (1936) 55 CLR 499, followed
Cranssen v The King (1936) 55 CLR 509, followed
Liddy v The Queen [2005] NTCCA 8, followed

REPRESENTATION:

Counsel:

Appellant:	K Roussos
Respondent:	C Roberts

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Ols0610
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Namatjira v Cornford [2006] NTSC 63
No JA 17 of 2006 (20530852)

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 Alice Springs

BETWEEN:

NAMATJIRA, Lisa Swift
Appellant

AND:

CORNFORD, Michael
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT
(Delivered 11 August 2006)

Background

1. This is an appeal against a sentence imposed by a stipendiary magistrate consequent upon the appellant entering a plea of guilty to a charge that, on 18 December 2005 at Alice Springs, she attempted to commit a crime, namely stealing.

2. The learned magistrate recorded a conviction in respect of the offence and sentenced the appellant to one month imprisonment, to be suspended

forthwith with an operational period of 12 months. It was a condition of the suspension that the appellant travel to Kwala Outstation by 20 February 2006 and remain there during the period of operation and not enter Alice Springs except for medical emergencies.

3. The appellant complains that the sentence imposed was manifestly excessive in all the circumstances. Reliance is placed, in the amended grounds of appeal filed in this matter, on a number of issues related to that aspect - to which I shall come in due course.

The relevant facts

4. The Court was informed that, at about 11:27 p.m. on 18 December 2005, the appellant was at the Coles Supermarket in Alice Springs looking for food because she was hungry. She removed several items from shelves in the store and placed them down the front of her pants.

5. The appellant was noticed by staff on another occasion putting an item down the front of her pants. Presumably because she became aware that her action had been seen at that time, she placed the item back on the shelf and then tried to leave the store by going through the check out without paying for items that she already had on her body.

6. She was apprehended by security staff inside the store and asked to remove any items that she had on her body. She declined. She was taken to the rear of the store by security personnel and placed in a room awaiting police arrival.

7. Police attended a short time later. She was then searched by a female security guard and a variety of food and other non-food items were located within her clothing. The total value of these was of the order of about $59.

8. The appellant was arrested and taken to the Alice Springs Watchhouse. It was noted that she was, to some extent, intoxicated at the time. She later told the police that she was hungry and had no money when she entered the store.

9. The Court was informed that the appellant had had some difficulties with her family that night and was hungry and left with no means with which to feed herself. She readily admitted her offence to the police.

10. The learned magistrate was advised that the appellant had a not insignificant antecedent record relating to offences committed over a period extending back to early 1999. These involved unlawful damage to property, three offences of stealing, three offences of entering a building with intent to commit a crime and various motor vehicle related offences. She has received a number of short custodial sentences and has appeared before the court on breach applications relating to four separate offences. Two of the breach applications were dealt with early in 2005 and, on the last occasion, resulted in the restoration of a custodial sentence of three months imprisonment.

11. Counsel pointed out that the appellant was only 20 years of age, having been born in Alice Springs and grown up in Hermannsburg. It seems that she was raised by an aunt because of a somewhat violent relationship that existed

between her parents. She attended school at Yirara until she was 18 years of age and can read and write English.

12. The learned magistrate was told that the appellant had made an unfortunate marriage with an aboriginal man who is currently in jail as a consequence of having occasioned serious knife injuries to her. It was said that she has had a problem with alcohol since she formed that relationship, although she usually lives at Kwala Outstation outside Hermannsburg where she normally does not get into a great deal of trouble. It was submitted that the outstation is a dry community and that the appellant only seems to get into trouble when she comes into Alice Springs and commences drinking and getting into strife with her family.

13. In sentencing the appellant the learned magistrate had this to say:

> "I've taken into account your plea, and I know you've been in custody now for several days and that you were hungry at the time you took this food. That doesn't explain the other items, but the fact that you were drunk may well do. I think the best thing that we can do for you is send you home and make you stay there and keep away from the grog.
>
> So, you'll be convicted and sentenced to one month's imprisonment. It will be suspended forthwith with an operational period of 12 months. And it's a further condition of the order that you travel to Kwala Outstation by the 20th -- that's next Monday, of February, and remain there and not enter Alice Springs except for medical emergencies.
>
> So you go home to Kwala and you stay there for the next 12 months. You understand?---Yes."

Issues arising in relation to the appeal

14. There are essentially two prongs to the contentions advance by Ms Roussos, of counsel for the appellant. The second of those really arises from new evidence that was admitted before me without objection.

15. First, it is argued that the sentence imposed by the learned magistrate was disproportionate to the gravity of the offending. Second, it is said that the learned magistrate was not fully informed as to the practical situation related to Kwala Outstation and that, on the information now available, the condition imposed on the appellant that she reside there is unworkable and inappropriate.

16. Ms Roussos stressed the young age of the appellant and argued that the custodial sentence imposed was, on the face of it, disproportionate to the gravity of the offence of attempted shoplifting. She emphasised the appellant's cooperation with the police and ready admissions to them, the entry of a timely plea, what she described as the opportunistic nature of the offence and the fact that all items taken had been recovered unspoiled.

17. She submitted that the appellant had spent four days on remand in difficult conditions and that this, alone, was a sufficient and salutary punishment having regard to the nature of the offending. A non-custodial disposition based upon a bond to be of good behaviour was, she said, that which was plainly indicated in the circumstances.

18. As to the condition imposed, she placed before me an affidavit exhibiting a letter received from Mr Hassall, a case worker with the Tangentyere Council Central Australian Youth Link-up Service. This indicated that Kwala Outstation consists of one house, very close to the road, some 15-20 kilometres this side of Hermannsburg. It is said that, when the family come

to town or go to Hermannsburg, Kwala is empty and that it would not be realistic to expect the appellant to reside there permanently.

19. That assessment is accepted by Mr Roberts of counsel for the respondent and is therefore not contentious. It is accepted that, if a suspended custodial sentence is to remain in place, the appeal ought to be allowed for the purpose of setting aside the residence condition and the matter should be remitted to the learned magistrate for reconsideration of that aspect.

20. Mr Roberts did not seek to challenge the mitigatory features relied upon by Ms Roussos. However, he contended that the submissions made on behalf of the appellant failed to accord due recognition to the significance of the appellant's antecedent record and the fact that the time had arrived at which paramount considerations were personal deterrence of the appellant and protection of the public.

21. Moreover, whilst acknowledging that the appellant had spent four days in custody on remand, he pointed out that this had been the consequence of her own conduct. She had originally been granted police bail on her arrest, and had failed to answer to it. She was then arrested and granted bail with one surety, but no surety was forthcoming. She thereafter appeared before the Court again quite promptly and pleaded.

22. Mr Roberts accepted that care was necessary in relation to the manner in which the appellant's antecedent record was taken into account in the sentencing process and that it cannot be given such weight as to lead to the

imposition of a penalty that is disproportionate to the gravity of the instant offence (*Veen v R (No 2)* (1988) 164 CLR 465 at 472).

23. However, he went on to emphasise, correctly, that in *Veen (No 2)* the majority of the judges of the High Court had indicated that the antecedent criminal history is relevant to show whether the instant offence is an uncharacteristic aberration, or whether the offender has manifested in the commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may well indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case *"or shows a need to impose condign punishment to deter the offender……"*

24. In the present case the appellant's antecedent record runs to some 3 1/2 pages and extends back to mid-2003. It discloses a continuing disregard for the law and the rights of others. There are, *inter alia*, two prior convictions for stealing, two convictions for entry with intent and a conviction for attempt to commit a crime. The last mentioned offence was committed on 21 November 2003 and involved damage to shop premises in an attempt to break into them for the purpose of stealing.

25. Prior to that offence the appellant had been the subject of several custodial dispositions. On 1 May 2003 she was sentenced to 21 days imprisonment for entry with intent and stealing. On the same date, she was convicted of a separate offence of entry with intent and sentenced to three months

imprisonment concurrent, suspended after the service of 21 days with an operative period of 12 months.

26. The appellant again appeared before the court on 3 June 2003 on a breach application and the suspended sentence was restored as to two weeks.

27. That situation was followed by the imposition, on 3 February 2004, of a sentence of three months imprisonment for the last offence referred to in paragraph 24 of these reasons, suspended with an operative period of 14 months from 30 December 2003.

28. A breach application was made to the court on 12 August 2004, consequent upon the conviction of the appellant, on that date, of an offence of stealing. In the result, the appellant was re-sentenced to three months imprisonment to be suspended after service of one month, with an operative period of 14 months.

29. That was followed by a further appearance on a breach application on 21 January 2005, which resulted in the operative period being extended for six months.

30. There was yet a further breach application, dealt with on 14 March 2005. On that occasion the appellant was required to serve the outstanding balance of two months.

Conclusion

31. But a glance at the history of the appellant, as I have related it, indicates in unmistakable terms that, when the appellant appeared before the learned magistrate, not only had she well and truly exhausted any entitlement to

leniency, but also the factors of personal deterrence and protection of the community had clearly become dominant considerations. She had not even learnt from the consequences of breaching conditions of suspension.

32. Of course, any sentence imposed had, nevertheless, to remain proportionate to the inherent gravity of the particular offending, but it is difficult to see how it can realistically be argued that the imposition of a suspended custodial sentence was inappropriate in the circumstances.

33. Is trite to say that the onus lies upon the appellant of demonstrating error in the sentencing process, in that the learned magistrate proceeded on some wrong basis of principle, allowed extraneous or irrelevant matters to guide or affect him, mistook the facts, or failed to take into account some material consideration. (*House v The King* (1936) 55 CLR 499 at 504, *Liddy v R* [2005] NTCCA 8, *Cranssen v The King* (1936) 55 CLR 509 at 519-520). In some instances, a sentence imposed may be plainly unjust on the face of it, although some specific error may not readily be discernible.

34. Minds may reasonably differ as to what precise sentencing disposition was appropriate in this case and it is not for me simply to proceed upon the basis that, had I dealt with the matter at first instance, I may have imposed a sentence different from that now sought to be impugned.

35. In my opinion, no overt error on the part in the learned magistrate can be perceived. Having regard to the matters recited by me, a suspended custodial sentence was amply justified.

36. True it is that this was an attempt offence, but it involved the taking of a series of disparate items, some of them quite unrelated to food items. Furthermore, given that the appellant was intoxicated to some degree, it is, with respect, a little facile to say (as Ms Roussos sought to do) that this was an opportunistic offence. The material before me strongly indicates that the appellant went into the supermarket with no money and, by necessary inference, with the deliberate intention of at least stealing food items if she could get away with it.

37. I accept that, for an attempt offence by a still young offender, this was a fairly severe sentence after allowing an appropriate discount for plea. On the other hand, I remain unconvinced that, in the circumstances, it was so disproportionate as to indicate error in the sentencing process. Indeed, the appellant was fortunate in not having to serve some additional time beyond that spent on remand, in recognition of the need for personal deterrence and protection of the community.

38. Accordingly, the primary sentence imposed must stand and the appeal in relation to it must be dismissed. I will allow the appeal for the limited purpose of setting aside the relevant residence condition and remitting the matter for reconsideration by the learned magistrate of that aspect.

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