A Youth "V" v Police [2012] NTSC 28

PARTIES:	A Youth "V" v Police
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 50 0f 2011 (21116046), JA 51 of 2011 (21114457), JA 52 of 2011 (21118321), JA 53 of 2011 (21118072), JA 54 of 2011 (21133921), JA 55 of 2011 (21124783), JA 56 of 2011 (21128914), JA 57 of 2011 (21126806)
DELIVERED:	27 April 2012
HEARING DATES:	21 March 2012
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Mr Neill SM

CATCHWORDS:

Appeal against sentence – Manifestly excessive – Totality principle – Weight to be given to Appellant's circumstances and psychological report – Appeal dismissed

Youth Justice Act s 4, s 81,
Juvenile Justice Act

Hampton v The Queen (2008) NTCCA 5; *House v R* (1936) 55 CLR 499; *Mill v The Queen* (1988) HCA 70; *Neal v R* (1982) 149 CLR 305; *P (a minor) v Hill* (1992) 110 FLR 42; referred to

The Queen v Haji-Noor 21 NTLR 127; distinguished

REPRESENTATION:

Counsel:

Appellant:	Ms Craven
Respondent:	Mr Micairan

Solicitors:

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

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

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BETWEEN:

V
Appellant

AND:

Police
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 27 April 2012)

Introduction

[1] This is an appeal against sentences imposed by a Magistrate on 9 November 2011 sitting in the Youth Justice Court in Alice Springs. The Appellant V was born 24 September 1997. He was fourteen years old[1] when the sentences were imposed. He was thirteen at the time of commission of the offences.

[1] T5, 9/11/2011.

[2] The Appellant was sentenced by the learned Magistrate to a total effective term of eighteen months detention for a series of offences committed by him between 21 January 2011 and 9 August 2011. The offences included assaults involving the Appellant spitting on a number of different youth workers and detainees at the Don Dale Detention Centre. He was also sentenced for offences of damaging the property of the Don Dale Detention Centre. He was dealt with for a total of fifteen offences.

[3] The learned Magistrate did not impose convictions for any of the offences. The term of detention, (18 months) was backdated to commence 9 February 2011. A non-parole period was fixed. The Appellant became eligible to apply for parole on 10 November 2011, the day after he was sentenced.

[4] At the time the sentence the subject of this appeal was imposed, V was already in detention serving an eighteen month sentence imposed on 24 March 2011 for a series of offences he had committed in 2009 and 2010. On those sentences he was due for release on 7 January 2012. That sentence was initially passed without a non-parole period being set. On 6 June 2011, on Appeal to this Court, a non-parole period of nine months was fixed commencing 8 July 2010.

[5] The imposition of that non-parole period meant that the Appellant was eligible for parole commencing 8 April 2011 however there was no successful application for parole. His Honour noted that the series of

offences committed during detention prevented parole proceedings.[2] As at 9 November 2011 when the sentence the subject of this appeal was passed, V had spent sixteen months of the eighteen month sentence in detention and without parole.

The Appellant's Antecedents

[6] The Appellant has a lengthy prior criminal history, particularly when considered in the light of his young age. At the same time, V's behaviours must be contextualised within the fundamentally difficult relationship he has with his mother leading to involvement with Children and Family Services and an order for protection. His personal and family history is complex, as are issues relevant to addressing his welfare and education needs. Both V and those attempting to offer services are in a difficult situation. V has complex needs and behaviours that require significant attention.

[7] His Honour on my reading of the transcript was clearly aware and engaged with the difficult background of the offending and of V's circumstances. It was a difficult sentencing exercise. His Honour was concerned to find options to address V's circumstances and behaviours but concluded nothing but detention was appropriate. The learned Magistrate considered alternatives.

[8] At age eleven V was dealt with in the Youth Justice Court for three separate assaults; he was dealt with for a further assault when he was twelve years

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2 T2, 09/11/2011.

old and four previous assaults when he was thirteen. This Court was told some of the previous findings of guilt involved the Appellant spitting; none were assaults on police.

[9] V's other previous offences are primarily property related. There are four previous findings for disorderly behaviour, two for being armed with an offensive weapon, two counts of stealing, three counts of unlawful use of a motor vehicle, six counts of unlawful damage to property, one failure to comply with a loitering notice and one charge of dangerous driving in conjunction with charges of driving unlicensed, uninsured and unregistered and failing to stop after an accident.

[10] The Appellant appeared before the Youth Justice Court on six separate occasions for these offences including proceedings for failing to comply with previous orders.

[11] He had also been found to be in breach of his bail conditions on five occasions over a 15 month period between 14 December 2009 and 25 March 2011.

Grounds of Appeal

[12] There are three grounds of appeal:

i. That the learned Stipendiary Magistrate erred by failing to take account, or proper account, of the totality principle;

ii. That the learned Stipendiary Magistrate erred in failing to give sufficient weight to the particular circumstances of the Appellant's case, his personal background and the issues addressed in the psychological report prepared by Katie Miles;

iii. That in all of the circumstances, taking into account the principles under section 4 of the Youth Justice Act, the sentence was manifestly excessive.

Ground 1- the learned Magistrate erred by failing to take account, or proper account, of the totality principle

[13] It is accepted the totality principle must be applied. It is well entrenched. As outlined in *Mill v The Queen*[3], the Court must, when dealing with cases of multiplicity, look at the totality of the criminal behaviour and review the aggregate sentence to ensure that it is 'just and appropriate'. The Appellant submits that the sentence imposed, namely eight separate periods of detention to be served partially cumulatively was contrary to the application of those same principles. They are set out *Hampton v The Queen:*[4]

> "Generally speaking when a number of offences arise from substantially the same act or circumstances or a closely related series of occurrences, and subject to the ultimate sentence adequately reflecting the gravity of the total criminal conduct, concurrent sentences are appropriate".

3 (1988) HCA 70.
4 (2008) NTCCA 5, Riley J.

[14] The Appellant submits that additional care must be taken when applying the principle in relation to youths. Reference was made to *P (a minor) v Hill*[5] and in particular the manner in which His Honour Mildren J applied sentencing principles to youths, both as that principle is accepted at common law and according to the (then) *Juvenile Justice Act*,[6] namely that:

> "The approach of the courts when dealing with juveniles must be cautious, patient and caring, with the interests of the juvenile foremost in mind. Of course, there are some offences which warrant an immediate custodial sentence notwithstanding that the offender is a juvenile and notwithstanding, even, that the juvenile has no prior convictions. But these are for extremely serious crimes, usually, but not always, crimes of violence where it is right that the need to punish and deter is given particular emphasis ... I do not say, of course, that in the case of a persistent offender, where the crimes are not in the extremely serious category, that it is not appropriate to order detention or imprisonment. But even in such cases, detention or imprisonment should only be used as a last resort, where all other options are inappropriate and the need for deterrence and to protect the community must be given special prominence ..."

[15] In particular, it is submitted that as V is a youth, who at age thirteen years is particularly young, the ultimate sentence needs to reflect the actual gravity of his criminal conduct with reference to his age and the principles that are particular to youths.

[16] The Appellant submits that the learned Magistrate failed to turn his mind to the principle of totality; this was said to be especially important given the principles under s 4 of the *Youth Justice Act* and the specific circumstances of this case. It was submitted the result was a crushing sentence for a

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5 (1992) 110 FLR 42.

6 I accept the same considerations apply to the *Youth Justice Act*.

youthful offender. It was submitted this was due to the learned Magistrate engaging in a fundamentally 'arithmetic' process when determining the sentence to be imposed.

[17] The Appellant's submission was that as V had been unsuccessful in obtaining parole on the previous sentences, there was a high likelihood that he would serve the whole of the eighteen months in detention.

[18] Further, it was submitted the learned Magistrate failed to properly take account of the principles under section 4 of the *Youth Justice Act* when he arrived at the total sentence, in particular sections 4(b), (c), (f), (g) and (n) and sections 81(3), (4) and (6).

[19] The Respondent submitted that by His Honour backdating the sentence the Appellant was given the opportunity to apply for parole on the same day and thus was presented with an incentive to reform and rehabilitate in order to be released. The Respondent pointed out that the Northern Territory Court of Criminal Appeal has emphasised the benefits that parole offers individuals in relation to their rehabilitation and eventual release and that such an incentive should not be underestimated.[7] Although with respect I accept that principle, in my view generally options other than setting a non-parole period are more appropriate for youths. *The Queen v Haji-Noor* concerned an adult. The question of a non parole period was raised in the context of a breach of a significant suspended sentence. In this matter

[7] *The Queen v Haji-Noor* 21 NTLR 127.

however, there were particular circumstances that His Honour reasoned justified a non parole period even for a young offender.

[20] Section 4 of the *Youth Justice Act* requires the Court *inter alia* to take into account the need of a youth to be held accountable and to be encouraged to accept responsibility for the behaviour; to take account of their needs and to provide an opportunity to develop in socially responsible ways; to be kept in custody only as a last resort and for the shortest appropriate period of time; to be made aware of the consequences of contravening the law; to allow the youth to be integrated into the community; and, to balance the needs of the youth, any victims and the interests of the community.

[21] Section 81 of the *Youth Justice Act* requires the Court to consider *inter alia* the nature and seriousness of the offence; the history of previous offending; cultural background; age and maturity; proportionality; participation of the family and opportunities for the youth to engage in educational programmes and employment. Further, it is provided that the absence of such participation or opportunities must not result in the youth being dealt with more severely for the offence.

[22] These sections generally involve balancing the needs of the offender, more specifically their development and reintegration into society, against the other principles of sentencing youths.

[23] It is clear the learned Magistrate did turn his mind to the principles of totality and set wholly concurrent sentences for most of the offences that

arose from the same set of circumstances and made others partially cumulative. It is true that all of the offending occurred in detention, some of the offences, but not all, were committed in close proximity. The offending spans some seven months. Some accumulation might be expected in those circumstances.

[24] Further, and most significantly, by making nine months of the total effective term concurrent with the sentence he was already serving, it is clear His Honour engaged deeply in the process the law required of him. That is evident from the sentencing remarks and the final disposition. The exercise of a discretion of this kind will not be lightly interfered with. I would not allow this ground of appeal.

Ground 2 – the learned Stipendiary Magistrate erred in failing to give sufficient weight to the particular circumstances of the Appellant's case, his personal background and the issues addressed in the psychological report prepared by Katie Miles.

[25] The Appellant submitted the psychological report of Katie Miles that outlined how V's particular circumstances and background impacted on his criminal behaviour was given insufficient regard by the learned Magistrate. Additionally, it was argued that His Honour should have had more regard to Ms Mile's characterisation of the Appellant's continued contact with the criminal justice system as being one of a "merry go round".

[26] It was submitted that the emotional stress which may account for the criminal conduct of an individual is information that should always be used when considering an appropriate sentence as a method of evaluating the moral culpability of the offender.[8] Thus it was submitted that the learned Magistrate did not place enough emphasis on the report of Ms Miles when deliberating on an appropriate sentence for the Appellant, having regard to all of his personal background and circumstances.

[27] The psychological report of Ms Miles provides helpful information and insight into V's behaviour and the circumstances that have lead him to behave in the manner that he has, however, her report was one of a number of reports and opinions, that with other material and submissions was before His Honour. His Honour was not only entitled but was required to assess and determine what weight to give to Ms Mile's report when balanced against the other material before him.

[28] His Honour noted that Ms Mile's recommended a residential program aimed at addressing the needs of V's developmental trauma, however the only available program at that time was Brahminy Youth Camp. The Appellant refused to enter that program. That refusal necessarily involved considering other options, particularly any other order for conditional release. I do not take His Honour as adding to the sentence because of the unavailability of that programme, but rather, in the circumstances, fashioning an order that would allow correctional authorities to consider other options at an

8 *Neal v R* (1982) 149 CLR 305, 7.

appropriate time. Along with her opinion that V's presentation was consistent with a diagnosis of ADHD, Ms Miles reported his condition would be better understood as "developmental trauma". Ms Miles advised such a condition was not yet included in the Diagnostic Statistical Manual. Clearly His Honour could not place significant weight on that part of her opinion.

[29] Given the Appellant's persistent offending, the decision not to order release simply under the care of the Department of Families and Children's Services is in my view within the bounds of proper sentencing practice, notwithstanding the young age of the appellant.

[30] His Honour was at pains to emphasize that he considered a structured environment to be the only suitable option. I would not interfere with His Honour's decision in this regard.

Ground 3 – That in all the circumstances, and taking into account the principles under section 4 of the *Youth Justice Act,* the sentence was manifestly excessive

[31] An Appellate Court must not interfere with a sentence imposed unless specific error can been shown in the original sentence.[9] That error may be demonstrated by the sentencing Judge's failure to properly exercise the sentencing discretion or by imposing a sentence that is plainly unreasonable or unjustified. The original sentence is presumed to be correct.

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9 *House v R* (1936) 55 CLR 499, 504.

[32] The Appellant submits that the learned Magistrate imposed a manifestly excessive sentence by characterising the circumstances of this case as a very serious example of this type of offending. His Honour stated:

> "This sort of offending is serious. These are not boyish pranks. These are not merely cries for help from a very troubled young person, although I don't doubt that there are elements of that. These are serious offences, deliberately and consciously carried out by the young man."[10]

[33] The Appellant concedes that spitting is serious offending. It is submitted however, it did not cause bodily harm to any of the victims and V was easily restrained in a short period of time. I will not here go through all of the details of each offence, but clearly, His Honour examined the facts of offending.[11]

[34] The Appellant relied on the statement of His Honour Justice Murphy in *Neal v R:*[12]

> "Although spitting is degrading, humiliating, and insulting for the victim (and also degrades the offender), such an assault is not worse than every other type of assault that could be dealt with summarily under the Criminal Code."

[35] It is argued the Appellant's actions were unplanned and an emotionally charged attempt to control his environment in which he felt helpless and powerless; that in effect he was trying to act out against the people he perceived to be oppressing him.

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10 T5, 09/11/2011.
11 T5-8, 09/11/2011.
12 (1982) 149 CLR 305, 7.

[36] The Respondent argues that the Appellant spat at his victims as a way of retribution and was trying to assert control over them by degrading them.

[37] The submissions by counsel for the Appellant on the one hand and counsel for the Respondent on the other are not mutually exclusive. It is reasonable to accept there may be elements of both aspects underlying such difficult and complex behaviour. His Honour acknowledged as much. His Honour has however concluded the offences were serious and committed deliberately. He was entitled to do so. I agree the Appellant's behaviour points to serious problems. That was all before His Honour. When His Honour refers to the offending as 'serious', it must be accepted His Honour was speaking of offending of this type, in these circumstances; I do not take His Honour to be suggesting the offences were serious within the range of all conceivable types of assault. The difficulty for the Appellant is the persistent nature of his offending behaviour.

[38] The Respondent highlighted the importance of protecting detention personnel and other detainees from this kind of behaviour. On appeal the respondent submitted emphasising general deterrence was wholly appropriate, having regard to circumstances where other detainees witnessed this type of behaviour.[13]

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[13] *Schneidas [No 1]* (1980) 4 A Crim R 95, 100. *Regina v Stephen John Davis* (unreported decision of the NSW Court of Criminal Appeal – 4 February 1994, 3. *Hampton v The Queen* (SCC 21021315 – 6 July 2011).

[39] General deterrence is not a dominant principle when sentencing youths. It is not entirely irrelevant however when dealing with persistent offending. In the context of this case the sentencing principles applying to youths were in my view complied with by His Honour.

[40] As pointed out by the Respondent, His Honour proceeded without conviction for each of the offences and in doing so spared V some of the social prejudice and potential for being oppressed which was a possible outcome had a conviction been recorded.[14] His Honour referred to V's "extreme youth". This factor appeared to weigh heavily on His Honour's mind.

[41] The Appellant concedes that his previous record notes 34 entries for failing to comply with Youth Court orders. It was however pointed out that the learned Magistrate erred by counting six entries on his record that appear only by virtue of a record of the Appellant's previous appeal.[15] Thus it is submitted His Honour impermissibly aggravated the reality of the Appellant's history. Further, it was pointed out the remaining twenty eight entries were not discrete occasions. It was submitted the Appellant has only physically appeared in Court on all of the breaches on six separate occasions. Thus it was submitted the learned Magistrate had, on those breaches of orders, impermissibly aggravated the sentences imposed.

[42] The Respondent concedes His Honour was in error regarding the final six entries on his previous convictions. Those entries clearly relate to the

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14 *Westphal v O'Connor* [2011] NTSC 33, 12.
15 Exhibit P1, the six antecedents are noted next to the Supreme Court entries.

Appellant's previous appeal. The other breaches were dealt with collectively, however, they remain distinct breaches. It is acknowledged the Appellant has not appeared separately on all breaches.

[43] I agree the six most recent entries were irrelevant and should not have been taken into account. In the circumstances it does not however amount to an error of the type that an appellate Court would interfere with. Without the six last entries of failure to comply with a Court order, His Honour would still have been justified to proceed the way that he did. The breaching history is still significant without those six entries. I would not allow this ground of appeal.

Conclusion

[44] I will be dismissing the appeal. His Honour ordered a non-parole period, effectively coinciding with much of a previous order made on Appeal. The Appellant's counsel raised a difficult issue, (and I agree it is of concern), to the effect that the Appellant will have difficulty successfully applying for parole. A successful application will require the assistance of the Department of Children and Family Services, V's family and the services he is engaged with. V is in the care of the CEO. He is therefore reliant on the co-operation of those who provide services to assist him in relation to parole. In that sense the Appellant is vulnerable.

[45] By His Honour's comments[16] I have understood His Honour expected the Appellant would be assisted:

> "I have made it plain in my introduction today that any consideration of V's early release from detention will depend upon there being presented, either to a court or now, following my sentencing, to the Parole Board, of some appropriate arrangement so that V might be released on parole but in circumstances where he will not be a risk to himself or the community he is placed in, and where he is not set up to fail as soon as he is released.
>
> Arrangements such as the alternatives set out in the reports which I have obtained obviously need to be investigated and reports need to be prepared to assist the Parole Board and to assist the young person we're dealing with here.
>
> Although the protection of the community is a major factor in the circumstances of all of V's offending, the welfare of V is also the major factor and some effort must be made by the people responsible for preparing reports to get those done and get those available to the Parole Board in the event of any application for parole".

[46] I understand the Youth Justice Court rarely imposes a non-parole period on such a young person. In my respectful view, in general this must be the correct approach. It was not however, an error for His Honour to impose a non parole period in this particular case. What is difficult is that His Honour's expectation that V would be assisted in his application may not have been met. That is not however a reason to allow the appeal. Efforts now need to be made to put an appropriate application before the Parole Board.

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16 T9, 09/11/2011.

[47] The appeal is dismissed.

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