Rory v Sanderson [2012] NTSC 6

PARTIES:	RORY, Quinton Stewart
	v
	SANDERSON, Melissa Deborah
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA29/2011 (21114043)
DELIVERED:	31 January 2012
HEARING DATES:	20 January 2012
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

MAGISTRATES – appeals from Magistrates – appellant convicted of aggravated unlawful entry and other offences – whether Magistrate erred by taking into account offences committed when the appellant was 14 years of age as to which no conviction recorded – whether Magistrate failed to give proper consideration as to whether exceptional circumstances existed in relation to appellant – whether Magistrate failed to consider adequately and make due allowance for the appellant's early plea and assistance to the authorities – whether sentence imposed manifestly excessive – appeal dismissed.

Sentencing Act, s 78B; *Youth Justice Act*, s 136.

Brokus v Eaton [2010] NTSC 20, distinguished, referred.
R v Mills [1998] 4 VR 235 at 24, distinguished.
Reg v Tsokos [1995] NSWCA 388, followed.
Duthie v Smith (1992) 107 FLR 458; *Pascoe v Davis* [2010] NTSC 40; *R v Kelly* [2000] 1 QB 198; *R v Simon Okinikan* (1993) 14 Cr App R (S) 453; *Turner v Trennery* [1997] 1 NTSC 21, referred.

REPRESENTATION:

Counsel:

Appellant:	A Pyne
Respondent:	C Henderson

Solicitors:

Plaintiff:	North Australian Aboriginal Justice Agency
Defendant:	Office of the Director of Public Prosecutions

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

Rory v Sanderson [2012] NTSC 6
No. JA 29 of 2011 (21114043)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against the sentence of the Court of Summary Jurisdiction at Katherine

BETWEEN:

QUINTON STEWART RORY
Appellant

AND:

MELISSA DEBORAH SANDERSON
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 31 January 2012)

Introduction

[1] The appellant, by notice dated 17 October 2011, as amended on 6 January 2012, appeals against a sentence imposed on him on 23 September 2011 by the Chief Magistrate, sitting as the Court of Summary Jurisdiction at Katherine.

[2] On 14 July 2011, the appellant had pleaded guilty to three separate charges, namely that, on 18 March 2011 he:

(1) Unlawfully entered a building, namely The Malandari Aboriginal Community Store, circumstances of aggravation being that he intended to commit a crime of stealing therein and that the unlawful entry occurred at night time;

(2) stole a variety of items of the total value of approximately $1717, the property of The Malandari Aboriginal Community Store; and

(3) unlawfully damaged property, namely, a chain mesh fence, a rear toilet window, the cool room locking mechanism, the door and lock to the office and a glass cabinet, a circumstance of aggravation being that the damage was caused when preparing to commit the crime of stealing. The cost of rectification of the damage was assessed at $2048.

[3] The offence of unlawful aggravated entry attracted a maximum sentence of imprisonment for 14 years. That of stealing attracted a maximum sentence of imprisonment for seven years. That of aggravated unlawful property damage attracted a maximum sentence of imprisonment for 7 years.

The sentences imposed

[4] In relation to the first count against him the appellant was convicted and sentenced to imprisonment for six months, conditionally suspended on the rising of the Court. The period of operation of the suspension was 12 months.

[5] As to the second and third counts, the learned Chief Magistrate recorded convictions and required the appellant to enter into a bond of $500 to be of good behaviour for a period of 12 months.

The appeal

[6] The present appeal is founded on four grounds, namely:

(1) That the learned Chief Magistrate erred by taking into account offences committed while the appellant was 14 years of age and for which no conviction was recorded, contrary to s 136 of the *Youth Justice Act*;

(2) That the learned Chief Magistrate failed to give proper consideration to whether there were exceptional circumstances in relation to the offender under s 78B of the *Sentencing Act*;

(3) That the learned Chief Magistrate failed to give proper weight to the appellant's early plea of guilty and his assistance to the authorities; and

(4) That the sentence imposed was manifestly excessive.

Relevant narrative facts

[7] The relevant events took place at Borroloola on the evening of Thursday 17 March 2011. The appellant was then just over 18 years of age.

[8] The appellant and a co-offender had been at a camp in Borroloola and consumed an unknown amount of liquor. Ultimately they became intoxicated.

[9] At about 2:30 a.m. the appellant and his co-offender walked along the dirt road to the rear of the Malandari Store. The appellant was carrying a pair of bolt cutters. They stopped outside the locked up perimeter fence, where the two of them made a plan to break in and steal grog.

[10] They cut a hole in the fence using the bolt cutters and then the two of them gained entry to the premises immediately surrounding the store.

[11] They walked across the grounds to the back of the shop where they gained entry into the building by breaking a window in the female toilets.

[12] Whilst inside the two offenders used a wood handle mattock to smash the locking device on the cool room door. The locking device was damaged beyond repair and had to be replaced.

[13] The appellant and his co-offender then went into the cool room and removed eight 30 packs of XXXX beer.

[14] Having done so the two offenders next smashed the glass door of a secured display cabinet in the middle of the shop, from which they stole a DVD player and a Telstra mobile phone.

[15] The two of them thereafter proceeded to the office where they smashed open a wooden door and a lock, once again using the mattock.

[16] Having entered the office they stole $840 in cash.

[17] The two offenders then took all of the stolen items outside the building via the window of the female toilet.

[18] As they were proceeding to transfer items through the hole in the fence the manager of the store came on the scene and the two offenders ran away, taking with them one of the cartons of beer, but leaving the other stolen items at the premises. They returned to the camp and proceeded to drink the beer with friends and family.

[19] Police officers were summoned to the Store premises and, on going inside the fence, found the various stolen items other than the single carton of beer.

[20] On the afternoon of the following day the appellant was interviewed by police officers. He admitted the commission of the offences.

Principles as to the approach of the Court to appeals against sentence

[21] The principles applicable to an appeal of this nature are well settled. They derive from authorities such as *Salmon v Chute and Another*,[1] and *Cranssen v R.*[2] With respect, they were very conveniently summarised by Thomas J in the course of her judgment in *Brandenburg v Hales and Carlon.*[3]

[22] She reiterated the oft-made point that it is fundamental that the exercise by a magistrate of the sentencing discretion is not to be disturbed on appeal unless error in that exercise is demonstrated, it being presumed that there is no error.

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[1] (1994) 94 NTR 1 at 24.
[2] (1936) 55 CLR 509 at 519.
[3] [2006] NTSC 3.

[23] It is not enough that an appellate court considers that it would have imposed a different sentence or that it thinks, for example, that a sentence is overly severe. It interferes only if it be shown that the sentencing judicial officer was in error or acted on a wrong principle or misunderstood or wrongly assessed some salient feature of the evidence. Error may appear in what the sentencing judicial officer has said, or the very terms of the sentence itself may be such as to patently manifest such error.

The basis of the appeal

[24] The appellant takes no issue with the disposition of the learned Chief Magistrate as to Counts 2 and 3. However, he seeks to impugn the sentence imposed in relation to Count 1 on multiple bases. It is convenient to deal with these seriatim.

[25] First, it is complained that she erred by taking into account in the sentencing process certain offences committed whilst the appellant was only 14 years of age and in respect of which no convictions had been recorded. As to this reliance is placed on s 136 of the *Youth Justice Act* which, relevantly, stipulates that:

> "If a court finds a youth guilty of an offence but does not record a conviction, no evidence or mention of the offence may be made to, nor may the offence be taken into account by, a court other than the Youth Justice Court".

[26] However, that section specifically stipulates that this does not apply, if the offence was committed after the youth had turned 15 years of age.

[27] During the course of the proceedings before the learned Chief Magistrate the prosecutor tendered an "Information for Courts" concerning the appellant. This was done apparently without objection. Indeed, on 14 July 2011, counsel for the appellant herself made specific reference to offending in 2007 in respect of which no convictions were recorded but good behaviour bonds were imposed.

[28] The information revealed that, between 14 November 2007 and 12 January 2011, the appellant had appeared before the Borroloola Youth Justice Court on three separate occasions, as to a total of some 11 offences proven against him.

[29] Five of these were motor vehicle related or liquor offences in relation to which convictions were recorded.

[30] The remainder were two stealing offences committed on 27 March 2008 (to which s 136 was inapplicable) and trespassing offences, an offence of unlawfully damaging property and an offence of attempting to commit a crime committed on 5 and 22 of April 2007. Convictions were not recorded in respect of any of those offences and the appellant was released on a good behaviour order for 12 months.

[31] It follows that the learned Chief Magistrate was entitled to take the stealing offences into account, but not the offences committed in April 2007.

[32] I note that there are markings on the information sheet, presumably made by the learned Chief Magistrate, in relation to the 2008 offences and also certain offences for which convictions were recorded. There are no such markings in relation to any offences committed when the appellant was under 15 years of age.

[33] It is further to be noted that a pre-sentence report prepared for the learned Chief Magistrate also refers to the 2007 offences.

[34] Counsel for the appellant has directed attention to transcript references in which the learned Chief Magistrate specifically commented on the existence of the 2007 offences in the course of discussions with the prosecutor and Counsel for the appellant.

[35] In her sentencing remarks the learned Chief Magistrate, inter-alia, had this to say:

> "..... The law says that people who break into buildings like the store you broke into and when you do that at night time, that the worst case you go to gaol for 14 years, that's how bad those sort of things are.
>
> In this one, you know, you and the other young fellow, you cut a hole in the fence and you broke some of the store there, you've smashed a part, the bolt – the locks and you took quite a lot of beer. You took some other things, so *[it]* wasn't just a little kind of minor thing, it was quite a serious thing and you were really involved. Also you were on a good behaviour bond because you'd been caught in January and had given a promise to that court really and to your community to say that you are going to stay out of trouble and here you were getting into trouble again.

> So you have been in trouble before, you're not being punished again for what's happened in the past, but you are not the same who's never been in trouble before. So when I consider that, even though you have pleaded guilty and even though you have done really well, because it's such a serious matter and you have been in trouble before that is a matter that, you know, a sentence of imprisonment is an appropriate one.
>
> But what it's going to be is a suspended sentence, which means you don't actually go to gaol. As soon as you walk out the door of this court room it starts being suspended, which means it hangs over your head. So if you do anything wrong for that period of time, then you do go to gaol for the period that I said. But I don't think you are going to do anything wrong. If I thought you were, I wouldn't be giving you this sentence....."

[36] As I understand it, the appellant contends that the fact that the learned Chief Magistrate was made aware of the 2007 offences resulted in inappropriate weight being given to his past history. It was submitted that he was treated as somebody who had a "criminal history", not as somebody who was still very young and had only one set of directly relevant priors, that had occurred only months after he had turned 15.

[37] Counsel for the respondent accepted that the 2007 offences should not have been brought to the attention of the learned Chief Magistrate, but contended that, on a fair reading of the transcript, it could not be said that this played any part in her ultimate sentencing disposition. She invited me to conclude that the learned Chief Magistrate simply pointed out that the appellant was not a first offender and that the offending for which he was being dealt with had to be seen against the background of the 2008 offending.

[38] The last mentioned offending involved two counts of stealing from the same Store, in respect of which the appellant was released on a good behaviour order for 12 months.

[39] I consider that there is force in counsel's contention. Given that details of the 2007 offences should not have been placed before the learned Chief Magistrate, I do not think that what occurred led her into error. An overall review of her reasons renders it clear that her primary focus was on the inherent gravity of the offence charged as Count 1, by a person who, whilst young, could not be said to be a first offender. Her reference to the appellant having been in trouble before was, in my view, a reference to the prior stealing offences and other offences to which convictions had been recorded.

[40] I do not consider that Ground 1, on the basis on which it was advanced, has been made good. I see no convincing evidence that, in sentencing the appellant, she had any regard at all to the 2007 offences.

[41] The second complaint made on behalf of the appellant is that the learned Chief Magistrate failed to give proper consideration to whether there were "exceptional circumstances" in relation to the offender, as adverted to in s 78B of the *Sentencing Act*.

[42] Relevantly, that section prescribes that a Court that records a conviction against an offender found guilty of an aggravated property offence must order the offender to serve a term of imprisonment or be subject to a

community work order, unless there are exceptional circumstances in relation to either the offence or the offender.

[43] Specifically, counsel for the appellant relied on a combination of factors as constituting exceptional circumstances in relation to the offender, namely:

(1) his youth and relatively limited prior record;

(2) his acceptance of responsibility and efforts at rehabilitation; and

(3) the fact that a non-custodial option (a community work order) may have been appropriate but was unavailable to him through no fault of his own.

[44] In essence, counsel for the appellant contends that the learned Chief Magistrate failed to give primary consideration to the appellant's youth and demonstrated capacity for rehabilitation but, instead, focused on the maximum penalty for the offence, the involvement of the appellant in its commission and the fact that he was subject to a good behaviour bond at the time of the offence.

[45] Emphasis was placed on cases such as *R v Mills*,[4] *Pascoe v Davis*[5] and *Brokus v Eaton*[6] in support of the proposition that, notwithstanding the provisions of s 78B of the *Sentencing Act*, the principles governing the exercise of the sentencing discretion in relation to youthful offenders –

[4] [1998] 4 VR 235 at 241.
[5] [2010] NTSC 40 [22].
[6] [2010] NTSC 20 [12].

particularly those who have only just attained 18 years of age and have not previously served a custodial sentence – remained of particular importance.

[46] It was further submitted that the sentence imposed failed to give adequate recognition to the appellant's acceptance of responsibility and successful efforts towards rehabilitation.

[47] Reference was made to his participation in the Community Court process (including the censure of members of his community and admissions by him to them that his actions had been wrong) and to good reports concerning his participation in a Rural Operations Course with a view to employment as a stockman on Victoria River Downs Station.

[48] Counsel in effect argued that the manner in which the learned Chief Magistrate discussed the various possible sentencing strategies indicated that she ignored the principle that imprisonment should be a sanction of last resort (*Turner v Trennery*[7]) and had failed to recognise the exceptional circumstances said to exist, by virtue of the appellant's progress towards rehabilitation.

[49] It was also asserted that the learned Chief Magistrate did not give adequate consideration to the question of whether the unavailability of community work at Borroloola, coupled with the appellant's youth and current personal circumstances, constituted exceptional circumstances.

[7] [1997] 1 NTSC 21.

[50] At the end of the day the necessary starting point for a consideration of the those submissions is the issue of what is meant by the expression "exceptional circumstances", as employed in s 78B of the *Sentencing Act*.

[51] The expression is not defined and its application must depend on the facts of each individual case (*R v Simon Okinikan*[8]).

[52] However, as Lord Bingham said in *R v Kelly,*[9] the word exceptional describes a circumstance which is out of the ordinary course, or unusual, or special or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; it cannot be one that is regularly, or routinely, or normally encountered.

[53] It must be a circumstance clearly out of the ordinary.

[54] With respect, it seems to me that certain of the submissions on behalf of the appellant seek to put to one side the important point that the Legislature has made it abundantly clear that the class of offence to which s 78B of the *Sentencing Act* directs its attention is to be categorised as extremely serious so as to, prima facie, attract a heavy mandatory type of penalty. It is notorious that such offences are not infrequently committed by youthful offenders.

[8] (1993) 14 Cr App R (S) 453.
[9] [2000] 1 QB 198.

[55] Moreover, as Lord Taylor CJ commented in *Okinikan,*[10] albeit in a different statutory context;

> "..... taken on their own, or in combination, good character, youth and an early plea are not exceptional circumstances justifying a suspended sentence. They are common features of many cases."

[56] In the instant case, the learned Chief Magistrate declined to find the existence of exceptional circumstances. She stressed that the serious offence presently under consideration had been committed whilst the appellant was subject to a good behaviour order in relation to earlier offences.

[57] She recognised that he had made recent good progress with the Rural Operations Course and this plainly led her to suspend most of the custodial sentence imposed.

[58] I remain un-persuaded that she fell into error in rejecting the proposition that exceptional circumstances had been demonstrated.

[59] The combination of youth, limited prior offending history and some apparently successful steps towards rehabilitation are no by no means out of the ordinary.

[60] The non-availability of a community work order is also not an uncommon situation in many of the more remote areas and, as counsel for the respondent pointed out, it is a problem facing many offenders. Whether it

[10] Ibid at 456,457.

can properly be said to be a circumstance personal to the appellant in this case is a moot point.

[61] That said, the plain fact of the matter is that, such were the inherent seriousness of the offending and the past history of the appellant, an order of that type could never have been a serious sentencing option in this case.

[62] In the instant case it had to be firmly borne in mind that, not only was the relevant offending inherently serious in nature, but also it was premeditated – the appellant had equipped himself with a pair of bolt cutters to gain access to the target premises. Moreover, this was a second foray against the same Store. The appellant was subject to a good behaviour order for two counts of stealing from it in 2008.

[63] All of the above circumstances had to be taken into account as a totality and I consider that the assessment made by the learned Chief Magistrate was correct.

[64] The second ground has therefore also not been made good.

[65] The third ground relied on by the appellant is an assertion that the learned Chief Magistrate failed to give adequate consideration to the appellant's early plea and co-operation with the police.

[66] It is clear from the transcripts relating to the multiple appearances of the appellant before the learned Chief Magistrate that she well appreciated that he had entered an early plea, made full admissions to the police and taken

positive steps towards rehabilitation. She obviously made allowance for those factors, as is evident from her ultimate sentencing strategy.

[67] In the final analysis, she concluded that such was the serious nature of the offending by a person who was by no means a first offender and had breached a good behaviour order that a custodial sentence was appropriate.

[68] In my opinion the learned Chief Magistrate was well entitled to come to that conclusion. Indeed, it is my view that such a sentence was not only appropriate – it was inevitable given the circumstances.

[69] There is no substance in this ground of appeal.

[70] Finally, it is contended that the sentence imposed was manifestly excessive, particularly having regard to the facts that the appellant was a young man who had expressed remorse, taken positive steps toward rehabilitation and had never before been subject to a custodial sentence.

[71] It is trite to say that a sentencing Court is required to give effect to the obvious intention of the Legislature in prescribing penalties and their mode of application and, in so doing, to apply the principles spelt out in the *Sentencing Act* in a balanced manner.

[72] In the instant case the categorisation of this type of aggravated offence as serious is clearly spelt out in the relevant legislation. The actual offence, as committed, was a serious example of its type and gave rise to significant damage to a community owned asset. It was a type of offence that is

unfortunately prevalent. Moreover, as has been recited, it was committed only a short time after prior relevant offending had caused the appellant to be subject to a good behaviour order.

[73] The offence plainly called for a custodial disposition, despite the fact that the appellant had not previously received any custodial sentence.

[74] The sentence actually imposed was, on the face of it, very considerably less than sentences frequently imposed on adult offenders for such offences. It constituted a very modest sentence, as a proportion of the prescribed maximum, although it was towards the top end of the spectrum for a youthful offender such as the appellant.

[75] In practical terms it was virtually fully suspended on appropriate conditions, to afford the appellant an opportunity of continuing his efforts towards rehabilitation, whilst, at the same time, affording the Territory community the protection envisaged by the *Sentencing Act*.

[76] I am unable to conclude that the sentencing strategy adopted fell outside the range of reasonable outcomes appropriate to the circumstances. On the contrary, it was a merciful disposition.

[77] Before parting from a consideration of that ground there is one further aspect which I must refer.

[78] In the course of his submissions counsel for the appellant sought to draw comfort from the general established principles concerning the sentencing of

young offenders and, inter alia, relied upon the conceptual approach referred to by the Victorian Court of Appeal in *Mills*[11] and *Brokus.*[12]

[79] I took him to go so far as to argue that, with such an offender, a custodial sentence should only be a sentence of last resort.

[80] It seems to me that such a proposition cannot withstand serious scrutiny. It is implicit in the reasoning in cases such as *Brokus*, where Martin (BR) CJ commented that, where legislation requires that a sentence of imprisonment be imposed, this approach [i.e. the principles related to the sentencing of young offenders not previously convicted of a criminal offence] becomes particularly important in considering the length of the period of actual imprisonment that the offender should be required to serve – that the concept of a custodial sentence being one of last resort must clearly be inapplicable when statutory provisions expressly or impliedly negate such an approach.[13]

[81] Further, as was pointed out in *Reg v Tsokos*[14] there is no authority for the proposition that the court, unable to impose a sentence it regards as theoretically the most appropriate, to impose a sentence that is more lenient. The correct approach is to choose from those options that are available the sentence that is most appropriate.

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[11] Ibid at 241.
[12] Ibid at [12].
[13] Duthie v Smith (1992) 107 FLR 458 at 466.
[14] [1995] NSWCA 388.

[82] In the instant case, the only statutory option available was a custodial sentence and the learned Chief Magistrate was bound to adopt it. The only residual issue was as to how such a sentence ought to be crafted in the circumstances. She imposed a sentence within proper sentencing parameters having regard to the factors to be taken into account and then quite properly suspended virtually all of it in recognition of the mitigating factors identified to her. The appellant has no cause for complaint.

[83] None of the grounds of appeal relied on have been made good. The appeal must be dismissed.
