Calverley v Trenerry [1999] NTSC 78

PARTIES:	PAUL ANTHONY CALVERLEY
	v
	ROBIN LAURENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA24 of 1999 (9901421)
DELIVERED:	10 August 1999
HEARING DATES:	29 and 30 July 1999
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	S. Cox
Respondent:	I. Rowbottom

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecution

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

Calverley v Trenerry [1999] NTSC 78
No. JA24 of 1999 (9901421)

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:

PAUL ANTHONY CALVERLEY
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 10 August 1999)

[1] On 30 March 1999 the appellant was convicted of various offences and was sentenced to a total of 24 months imprisonment. That sentence was to be suspended under the terms of the *Sentencing Act* after he had served eight months imprisonment. He now appeals against the sentence imposed upon him on that occasion.

[2] The offences which were dealt with on 30 March 1999 can be divided into four groups.

[3] The first occurred on 3 November 1998. On that occasion the appellant and a co-offender attended at Ingham's Chicken Farm intending to borrow a car from the uncle of the co-offender. There was no vehicle available to be borrowed and the co-offender then went to the lunch area of the building and rummaged through employees' bags. He eventually obtained a set of car keys. The co-offender used the keys to obtain access to a Toyota Corolla motor vehicle which he drove to where the appellant waited and they drove off. They took the vehicle to a remote location where they took turns in driving the vehicle through the scrub. In that process the vehicle was badly damaged and eventually it became jammed upon a log. The appellant and his co-offender then packed the inside of the vehicle with grass and set fire to the grass causing the vehicle to be extensively damaged.

[4] In relation to that incident the appellant was convicted of the offence of unlawful use of the motor vehicle with the circumstance of aggravation that the motor vehicle was damaged and the cost of compensating for the damage was more than $1000 and was, in fact, a sum of $10000. Section 218(1) and s (2)(c) of the *Criminal Code* apply. The appellant was sentenced to 18 months imprisonment.

[5] The next group of offences occurred on 7 December 1998 when, with co-offenders, the appellant unlawfully entered the Ampol Humpty Doo service

station. The circumstances of that incident were that he attended at the service station with three others. He stood watch whilst the others entered the building through the roof. The door to the building was then opened and some tyres removed.

[6] The appellant and his co-offenders then went to the shop area of the service station where one of the co-offenders smashed the front door, entered the building and unlocked the door to allow the others to enter. The appellant acted as a lookout and assisted in the removal of property without entering the building.

[7] In relation to that incident the appellant pleaded guilty to the offence of unlawful entry of a building at night with intent to commit the crime of stealing. For this he was sentenced to six months imprisonment. He also pleaded guilty to stealing tyres and cigarettes valued at $2860.14 and was sentenced to four months imprisonment. Finally he pleaded guilty to unlawfully damaging property, namely the front door to the premises, with the circumstance of aggravation that the loss caused by the damage was greater than $500 and was, in fact, $1000. He was sentenced to two months imprisonment in respect of that offence.

[8] The next series of offences occurred on 11 January 1999 and related to the premises of Kings Cash at Humpty Doo.

[9] On 11 January 1999 the appellant and co-offenders attended at the premises of Kings Cash in Humpty Doo. One of the co-offenders used a hammer to

smash the front window of the premises and the appellant and two of his co-accused entered the building. They stole electrical equipment, jewellery and sunglasses valued at $4003.67.

[10] In relation to that matter the appellant pleaded guilty to unlawful entry at night with intent to commit the crime of stealing and was sentenced to six months imprisonment. He also pleaded guilty to stealing and was sentenced to four months imprisonment and, finally, he pleaded guilty to the unlawful damage of the front window to the value of $400 and was sentenced to two months imprisonment.

[11] The final series of offences occurred on 14 January 1999.

[12] On that occasion the appellant with two co-offenders drove to the Koolpinyah Fire Station where they entered the fire station through an unlocked front door. They took soft drink from a fridge. In that process they found the keys to a Toyota Landcruiser Fire Tender and they drove away in that vehicle to the Howard Springs pine forest. They then drove the vehicle to Gunn Point and took turns in driving. They camped out overnight at Gunn Point and drove the vehicle back to the pine forest the following day. In the course of doing so, the vehicle became stuck in a creek bed and could not be driven out. The appellant and one of his co-offenders took a jerry can of petrol from the Fire Tender and poured petrol over the vehicle and inside the cabin. They then laid two trails of petrol from the Fire

Tender and the appellant and a co-offender each lit one of the fuel trails with a cigarette lighter. The Fire Tender was destroyed.

[13] In relation to that incident, the appellant pleaded guilty to unlawfully entering the Koolpinyah Fire Station at night with intent to steal. He was sentenced to six months imprisonment. He pleaded guilty to the unlawful use of the Fire Tender, which unlawful use was accompanied by the circumstance of aggravation that the vehicle was unlawfully damaged and the cost of compensating for the damage was more than $1000 and was, in fact, $55000. He was sentenced to two years imprisonment in respect of that offence.

[14] All of the sentences were ordered to be served concurrently. The total period of imprisonment imposed upon the appellant was 24 months and was directed to be suspended pursuant to s 40 of the *Sentencing Act* after he had served eight months.

[15] An important consideration in the sentencing process was that the appellant, who was then aged 17 years, came forward to confess to the offences that had been committed and did so in circumstances where he had no reason to believe that the authorities were aware of his involvement. The observation made by his Worship at the time of sentencing was that "one really can't ask more … than that offenders thinking the matter over decide to make a clean breast of it to police."

[16] His Worship then went on to impose the sentences set out above and in doing so he made the following comments:

> "In my view every one of your offences is – every one but one of your property offences is too serious to warrant the minimum. The one exception being the stealing of drinks from the fire station. But in my view irrespective of the mandatory sentencing regime there are cases, even before that regime came in, and there continue to be cases when sentences which hopefully will make other young fools and old fools understand that there (are) items of property which ought to be regarded as almost sacrosanct by other members of the community and there are things that cannot be excused.
>
> Notwithstanding the fact that you are young and you are very young, you are only six months as it were out of the Juvenile Court for these matters – six or eight months out the Juvenile Court and notwithstanding that you have no previous convictions this is, in my view, a case in which general deterrence must enter into the equation and the sentence I pass on you must be such as will make anyone realise that if he or she takes part in offending of this sort [they] can expect punishment which will be punishment indeed.
>
> I am therefore of the view that I need to send you to gaol, notwithstanding your youth, notwithstanding your prospects back in South Australia and notwithstanding your cooperation with police, your giving yourself up, your making of admissions and the other matters I mentioned earlier on in these remarks."

[17] **The Nature of the Appeal**

The nature of an appeal against sentence is now a matter of settled law. The magistrate's exercise of his sentencing discretion is not to be disturbed on appeal unless error in that exercise is shown. There is a presumption that there was no error: *Salmon v Chute & Another* (1994) NTR1 at 24 – 25. It is not enough that the court on appeal would have imposed a less or different sentence or considers this sentence over-severe. An appellate court does not interfere with the sentence imposed merely because it is of the view that the

sentence is insufficient or is excessive. It interferes only if it be shown that the sentencing magistrate was in error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. It is not necessary that some definite or specific error be identified. The nature of the sentence, in the circumstances, may be enough to demonstrate that in some way the exercise of the discretion has been unsound: *R v Tait* (1979) 24 ALR 473 at 476; *Cranssen v R* (1936) 55 CLR 509 at 519 – 520. In order to demonstrate that a sentence is manifestly excessive it is for the appellant to show that it was not just arguably excessive but so very obviously excessive that it is unreasonable or plainly unjust: *Salmon v Chute* (supra) at 24.

[18] Ms Cox, who appeared on behalf of the appellant, submitted that the sentences imposed were manifestly excessive in all of the circumstances. Her complaints were directed to the sentences of imprisonment of 24 months, and of 18 months, imposed in respect of the offences related to the unlawful use of the motor vehicles.

[19] In relation to the unlawful entry to and stealing from the Ampol Service Station and Kings Cash the sentences imposed were, to my mind, unexceptional. This is also the case in relation to the sentence imposed regarding the unlawful entry to the Koolpinyah Fire Station. There was no submission to the contrary.

[20] In relation to the remaining offences Ms Cox contended that the sentences imposed failed to properly reflect:

1. the appellant's previous good character;

2. that he was a youthful first offender;

3. the appellant's prospects of rehabilitation;

4. the appellant's cooperation with police; and

5. the appellant's degree of culpability in the offences.

Ms Cox acknowledged that the learned Magistrate made reference to each of these matters. Her submission was that, notwithstanding that reference, the matters identified were not adequately taken into account. She submitted that the sentences accorded undue weight to considerations of general deterrence.

[21] A review of the transcript reveals that his Worship had in the forefront of his mind the youth of the appellant, his co-operation with the police and his prospects for rehabilitation. Notwithstanding those matters his Worship regarded the seriousness of the offending as requiring a period of actual imprisonment.

[22] In my view his Worship was entitled to take the view that the circumstances of these matters were of that level of seriousness. The appellant was involved in four separate incidents of offending spread over a period of some two and a half months. The total cost of his misconduct in terms of

damage to property and theft of property exceeded $70,000. Of major significance was the fact that the offending involved the deliberate and wanton destruction of the two motor vehicles with a combined value of $65,000. The destruction of the fire tender, which belonged to a voluntary rural organisation, was particularly serious. This was a community resource that served to ensure the maintenance of public safety in an area where the threat of fire is, for much of the year, very real.

The Youthful Offender

[23] The relative youth of an offender will always be an important consideration in the sentencing process. In the case of youthful adults, such as the appellant in this case, rehabilitation must be given prominent attention. It is necessary that courts bear in mind that it is a grave step to impose a term of imprisonment on such an offender. Rehabilitation will be the dominant consideration "in the ordinary run of crime": *Lahey v Sanderson* (1959) Tas S R 17 at 21. In *Mason v Pryce* (1988) 53 NTR 1 (at 9) Kearney J said:

> "Reformation is usually the dominant consideration in determining the appropriate punishment. This is so as better to achieve the long term protection of the public. Practicable alternatives to sending youthful first offenders to gaol are to be sought, to assist them to reform and to avoid the possible corrupting influence of other gaol inmates."

[24] However it must also be accepted that there are offences which are so serious that a custodial sentence must follow. Considerations of general deterrence should not be ignored completely when sentencing young

offenders. For the court to do so in cases such as this, where there has been the wanton destruction of both private and public property of significant value, would be to fail to fulfil the protective function of the sentencing process. Both the offender and other persons with similar impulses must understand that to commit such an offence will lead to severe punishment.

[25] In the present case, had a mature adult committed the offences, it is my view that the principles of retribution and general deterrence would have demanded a head sentence greater than that imposed by his Worship. However with an offender who can be described as a youthful adult and who was just months out of the Juvenile Court, the situation must be different. In this case the surrounding circumstances give cause for confidence in the prospects for successful rehabilitation. His Worship recognised that to be the case.

[26] Unfortunately the offences committed by the appellant were not isolated. They did not arise from a single youthful escapade but rather were spread over a period of time. The instances of destroying the motor vehicles were some 10 weeks apart. Between those occurrences the appellant was involved in other serious criminal conduct on two occasions.

[27] In addition the nature of the offending was, in these cases, removed from the more common scenario of unlawfully obtained motor vehicles being damaged as a consequence of negligence or inadvertence by the offender. In each of these matters the appellant undertook a deliberate course of conduct

in destroying the property. In the case of the Toyota Corolla the vehicle was filled with grass and then burned. In the case of the Fire Tender, the vehicle was held overnight with ample opportunity for the appellant to reconsider his conduct. It was on the following day that petrol was poured over the vehicle, two trails of petrol laid and a deliberate fire set.

[28] The destruction of these vehicles was deliberate and calculated.

[29] The maximum penalty for the offences as provided by s 218(2)(c) of the *Criminal Code* is 7 years imprisonment. This reflects the gravity with which such matters are regarded. The surrounding circumstances of the matters to which the appellant has pleaded guilty take them into the category of the more serious of offences contemplated by the section.

[30] In my opinion, his Worship placed appropriate emphasis on the need for deterrence in cases of this kind. He took into account all of the matters favourable to the appellant but concluded that, in the circumstances, a period of imprisonment was called for. Having determined that a period of actual imprisonment was appropriate, his Worship took into account the youth and prospects for rehabilitation of the appellant in suspending the greater part of that sentence. I am unable to say that the sentences imposed were beyond the range available to his Worship nor am I able to identify actual error on his part.

[31] I dismiss the appeal.

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