Van Toorenburg v Westphal [2011] NTSC 31

PARTIES:	VAN TOORENBURG, Jason v WESTPHAL, Lindsay
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 4 of 2011 (21100692) JA 5 of 2011 (21101658)
DELIVERED:	20 April 2011
HEARING DATES:	31 March 2011
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Mr Neill SM

CATCHWORDS:

Criminal law – Appeal against sentence – three appeal grounds – manifestly excessive – failure to apply principle of totality – failure to give sufficient weight to plea – presumption that there is no error in sentencing – appellant must demonstrate that sentencer erred – strongly preferable for sentencing court to indicate how the plea of guilty was taken into account – ultimate sentence must reflect the gravity of the total criminal conduct – no error found for Magistrates failure to order concurrency – must be shown sentence is not merely excessive but that it is manifestly so – Appeal dismissed.

Criminal Code (NT) s 251 (1)
Sentencing Act (NT) ss 55(j), 88(c)

Hampton v The Queen [2008] NTCCA 5; *House v King* (1936) 55 CLR 449; *Cransson v The King* (1936) 55 CLR 509; *The Queen v Tait* [1979] FLR 386 at 388; applied

Damaso v The Queen (2002) 130 A Crim R 206; *Kelly v The Queen* (2002) 10 NTLR 39; *Bond v Burgoyne* [2005] NTSC 51; *Veen v The Queen* (No 2) 1987-1988 164 CLR 46; *Pappin v The Queen* (2005) NTCCA 2; followed

Janima v Edgington No 36 of 1995; referred to

REPRESENTATION:

Counsel:

Appellant:	R Anderson
Respondent:	C Roberts

Solicitors:

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

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

Van Toorenburg v Westphal [2011] NTSC 31
No JA 4 of 2011 (21100692)
JA 5 of 2011 (21101658)

BETWEEN:

JASON VAN TOORENBURG
Appellant

AND:

LINDSAY WESTPHAL
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 20 April 2011)

Introduction

[1] This is an Appeal against sentences imposed on 20 January 2011 in the Court of Summary Jurisdiction at Alice Springs. The Appellant was dealt with for two counts of unlawfully damage property contrary to s 251 *Criminal Code* (NT). He committed these offences on two separate occasions at two separate premises on the 8th and 14th January 2011 respectively. A plea of guilty was entered to both counts in the Court of Summary Jurisdiction at Alice Springs on 20 January 2011. The learned Magistrate sentenced the Appellant to three months imprisonment on each count. The sentences were ordered to be served cumulatively and to

commence on 14 January 2011, the date the Appellant was taken into custody for the second offence. An order of restitution in the sum of $555.00 was made in relation to the offence committed on 8 January 2011 ('the first offence'). The total effective term was six months imprisonment.

[2] Three grounds of appeal were argued before this Court. First that the sentences on each count and their accumulation was manifestly excessive; second, the learned Magistrate erred in failing to apply the principle of totality and third the learned Magistrate erred in failing to give any or sufficient weight to the Appellant's plea of guilty.

[3] The principles governing Appeals of this type are clear. A discretionary sentence will not be interfered with unless error is clearly shown or the sentence itself is so excessive or inadequate as to manifest such error.[1] The sentence is presumed to be correct. The relevant principles are usefully summarised by the Court of Criminal Appeal (NT) in *Damaso*:[2]

> The general principles applicable to appeal against sentence are well-known. The presumption is that there is no error in the sentencing; an appellant must demonstrate that the sentencer erred, either by acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the facts: *Raggett* (1990) 50 A Crim R 41. In applying these principles to submissions that a sentence is "manifestly excessive", it is for the appellant to show that the nature of the sentence itself affords convincing evidence that in some way the exercise of the discretionary sentencing power was unsound. To do so, he must show that the sentence was clearly and obviously, and not just arguably, excessive: *Cranssen* (1936) 55 CLR 509 at 520.

[1] *House v King* (1936) 55 CLR 449; *Cransson v The King* (1936) 55 CLR 509; *The Queen v Tait* [1979] FLR 386 at 388.
[2] (2002) 130 A Crim R 206 at 216.

Material before the Court of Summary Jurisdiction

[4] In relation to the first offence, the facts briefly were that after consuming alcohol at around 9:45pm the Appellant threw a concrete slab approximately 12 times at a window of Shorty's Quality Meats. As a result the window was broken. The Appellant was arrested by police. In relation to the offending on 14 January 2011 ("the second offence") after consuming alcohol on the evening of 13 January, at around 12:00am the Appellant, with an unknown woman, entered a private property at 27 Plumbago Crescent Alice Springs. He picked up a scooter that was in the yard of those premises and threw it through the kitchen window. He then broke a bedroom window of the house before repeatedly kicking the sliding door, causing damage. He was approached by residents of the property and asked why he had damaged the property. The Appellant replied it was a "random thing" and proceeded to leave the property, walking down Plumbago Crescent. He fell asleep in the front yard of another property. At 1:20am the Appellant was arrested.

[5] A quote for the cost of damage and repair was tendered for Shorty's Quality Meats for $555.00. There was no quote tendered for the damage to the property in Plumbago Crescent however the complainant provided the value as approximately $800.00. The Appellant's previous convictions were tendered. The prior convictions disclose numerous convictions and sentences recorded in South Australia. A significant number of the previous convictions are for damage property and offences that although not precisely the same as criminal damage, display similar levels of criminality; for

example, offences such as criminal trespass and unlawfully on premises. Convictions and various sentencing orders are recorded in 2009, 2008, 2007, 2003, 2002, and 2001 for offences of a similar level of criminality, including criminal damage. Also recorded are offences for dishonesty including the more serious crime of break and enter recorded around 1999-2000. There are also convictions from the early 1990's for break and enter, unlawfully on the premises, larceny and similar offending. The learned Magistrate went through the list of previous convictions at the commencement of the remarks on sentence.[3]

[6] The Appellant obviously had a difficult and harsh background. On behalf of the Appellant the learned Magistrate was told the Appellant was 36 years of age. He had been involved in a number of difficult personal relationships. His parents divorced when he was young. His father was an abusive alcoholic. He stayed with his mother after the divorce. The Court was told the Appellant, his mother and brother had been subject to abuse from the Appellant's father. He did not complete year 10 at High School in Adelaide. He initially worked in French polishing, then dye-casting for Olympic Aluminium Dye-Casting, followed by roof tiling and factory metal work. As a young person his first relationship finished after a short time. There was one child from that relationship who he has not had contact with for many years. He started serious drug and alcohol abuse at around the age of 21. He commenced drinking in his early teenage years. He has more

[3] Transcript 20-01-2011 at 13 & 14.

contact with a child from a second relationship. That child lives with the mother.[4]

[7] The Appellant's counsel submitted his criminal history was based around being drunk. Some cases of breaking into commercial premises were said to be motivated in order to find a place to stay. More recently he has been in a relationship with a woman from Central Australia he met in Adelaide. He came to Alice Springs with her in December 2010 to visit her family.

[8] His explanation in relation to the first offence was that after a drunken argument with family he walked away from the group to avoid further argument. Being by himself in a strange town he did not know where he was. It started raining. He picked up the brick and started smashing the window (of Shorty's Quality Meats) to attract the attention of someone in order to be arrested. He sat down, waited and told police that it was he who had broken the window.

[9] Through his counsel he told the Court he had little memory of the second offence however it was not dissimilar to the first offence where he had been arguing with a "big mob" and had been assaulted by somebody. He remembers throwing something at a window and breaking it but cannot remember much else. He wanted to plead guilty to the charge. It was submitted to the Court that this occasion again involved excessive alcohol

[4] Transcript 20-01-2011 at 9.

consumption. Once again it was submitted it was relevant that he was not in a familiar place and was in a strange set of circumstances.

Reasoning of the learned Magistrate

[10] The learned Magistrate spent some time dealing with the Appellant's prior convictions which, as indicated were lengthy and of a similar type or level of offending. The learned Magistrate said of the previous convictions that if the Appellant had not had "the quite extraordinary record in South Australia … I might have regarded these two examples of offending in the Northern Territory as just the sad and pathetic activities of a hopeless drunk who is kicking out against the world but I don't think that that is, in fact, a sufficient assessment of your behaviour when one looks at your previous record".[5]

[11] His Honour went on to characterise both activities as serious examples of their kind, noting the maximum penalty for this type of offending under s 251(1) *Criminal Code* (NT) is two years imprisonment. The learned Magistrate noted he was not dealing with the worst type of offending but considered the offences were serious examples of this type of offending, with the second offence much more so than the first. In relation to the first offence on 8 January 2011 the learned Magistrate regarded the offending in a serious category as it was deliberate and conscious; it was not a spur of the moment result of "drunken adrenaline"; the Appellant used the heavy rock 12 times to break the window all because he wished to attract attention of

[5] Transcript at 14.

police. His Honour's reason for imposing a sentence of imprisonment for three months was to punish the Appellant and discourage other persons from committing the same or similar offence and to make it clear that the community, acting through the Court, did not approve of that conduct and to protect the community. This classical rationale for imposing a sentence of imprisonment seems entirely appropriate in the circumstances.

[12] In relation to the restitution order of $555.00 it was ordered the restitution be paid within six months of the Appellant's release from prison otherwise pursuant to s 88(c) *Sentencing Act* he would be imprisoned for six days. The Appellant's bail was also forfeited as at the first mention of his case on 13 January 2011 the Appellant had attended Court but left before his case was dealt with. This was because he became anxious when reminded by his counsel of his criminal history. A warrant was issued on that occasion.

[13] In relation to the second offence the learned Magistrate also regarded this as a serious matter as it involved intruding onto private property at around midnight, causing damage and disturbing the occupant. The sentence of three months imprisonment was ordered to be served cumulatively.

Arguments on Appeal

[14] It is convenient to deal with the third ground of appeal first: the alleged failure of the learned Magistrate to give any or sufficient weight to the guilty pleas.

[15] The Respondent concedes the sentencing reasons appear to be silent in relation to the quantum of any discount the learned Magistrate considered relevant to each of the sentences. On behalf of the Appellant this Court was reminded a plea of guilty is generally considered to illustrate remorse and taking responsibility.[6] The Court is obliged as a matter of both statute and case law to consider the timing of the plea and any indications to plead.[7] Even if the plea does not represent necessarily strong expressions of remorse, the willingness to facilitate the course of justice and the utilitarian value of the plea in saving the cost and convenience of a trial are to be taken into account in sentencing.[8] It is preferable that a sentencing Court indicate the extent and the manner in which a plea of guilty has been given weight as a mitigating factor. In *Kelly v The Queen*[9] the Court of Criminal Appeal (NT) said:[10]

> In our opinion it is desirable, that a sentencing court should indicate the extent of which, and the manner in which, a plea of guilty has been given weight as a mitigating factor, but we do not consider that it is possible to lay down any tariff. The weight to be given to the plea will vary according to the circumstances.

[16] In *Bond v Burgoyne*[11] Olsson AJ said:

> In this regard counsel drew attention to the well-known authority of *Kelly v The Queen (2000) 10 NTLR 39 at par 27*. The Court of Criminal Appeal there made the point that it is desirable that a

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[6] *Cameron v The Queen* (2002) 209 CLR 339.
[7] *Sentencing Act* (NT) 55(j) "whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so". See eg *Cameron* (above); *Kelly v The Queen* (2006) 10 NTLR 39.
[8] *Cameron v The Queen* at 360.
[9] (2000) 10 NTLR 39.
[10] *Kelly* at [27].
[11] [2005] NTSC 51 at [35] and [36].

> sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor. As the Court there pointed out, it is not possible to lay down any precise tariff. Suffice to say that, commonly, a discount between 20% and 30% is given, dependent upon the particular circumstances. It has long been recognised that a significant discount will be allowed where guilty pleas indicate contrition and remorse and an acceptance of responsibility and willingness to facilitate the course of justice or is indicative of rehabilitation.
>
> However, even where there is a little or no evidence of contrition, remorse and the other factors referred to, a more modest discount will also be attracted, if only for the bare utilitarian value of the plea (*R v Thompson and Houlton (2000) 48 NSWLR 383*). It is to be noted that this judgment was a guideline judgment in which the Court made the point that failure to explicitly state that a plea of guilty has been taken into account will generally be taken to indicate that the plea was not in fact given weight. Whilst that guideline is not directly applicable in the Territory it really reflects an obvious natural inference.

[17] It is indeed strongly preferable for a sentencing court, particularly when sentencing to terms of imprisonment to indicate how the plea of guilty has been taken into account. In this particular case however, throughout the submissions of counsel, (in particular in relation to the first offence), the learned Magistrate indicated that he did not regard the plea as an early plea. Although perhaps not expressly stated, the learned Magistrate was obviously concerned that although there was an early indication of a plea of guilty in relation to the first offence, the Appellant left the Court premises on the day of his first appearance without formally appearing. A warrant was issued.

[18] On 14 January 2011 the Appellant appeared as a result of being apprehended on a warrant for his failure to appear before the Court on the previous occasion and was also charged with ‘new’ offending (the second offence).

In answer to a submission from counsel that the Appellant came before the Court at the earliest available opportunity and entered his plea of guilty as an expression of remorse the learned Magistrate remarked "well, earliest possible opportunity is putting it too high, Mr Anderson. He didn't come before the Court at all on 13 January". Counsel pointed out that while that was true, counsel had indicated that it would be a plea to the first offence.

[19] After leaving Court on 13 January 2011, the Appellant next appeared in custody on 14 January 2011, having committed the second offence in the early hours of that day. He did not make an application for bail on 14 January and both pleas were formally entered on 20 January 2011. Through counsel he indicated his plea to the first offence on that day.

[20] While the learned Magistrate did not express how he would take into account the pleas of guilty, in the circumstances, there was every justification for not giving the pleas (particularly in relation to count one) significant weight. It could hardly be said the Appellant displayed a willingness to facilitate the course of justice when he had left the Court before being dealt with on the first occasion. While submissions supported the Appellant's expression of remorse, it has to be remembered he re-offended shortly after the first offence. The utilitarian value of the plea still needed to be considered but in the context of a three month sentence, any calculated discount may have amounted to a matter of a few days and on that basis in my view the approach does not disclose error. Similarly, although there is no doubt the Appellant pleaded guilty early to the second count, (a

week after his apprehension), and his willingness to facilitate the course of justice was therefore demonstrated, there is the countervailing factor that he offended on the second occasion on or about the night of his previous court attendance, when he left he Court when he was originally to be dealt with for the first offence.

[21] Although it would have been preferable for the learned Magistrate to express how the plea was taken into account in relation to count two, in my view it was open to the learned Magistrate to consider any discount in those circumstances would have been marginal only. Further, it was open for His Honour to have sentenced to a notionally greater period than the three months, adjusting back to three months because of the plea. I note His Honour thought the second offence was more serious than the first. These are circumstances in which I would not be prepared to interfere with the sentence on this basis. As is made clear by the authorities, "the weight to be given to the plea will vary according to the circumstances". The submissions and discussion between counsel and His Honour in relation to the pleas became inevitably caught up with the question of forfeiture of bail. This does not in my view disclose the error alleged, rather it reinforces my conclusion the discount was assessed as not particularly significant.

[22] In terms of ground two, (whether the learned Magistrate failed to consider the totality principle), it is acknowledged the learned Magistrate did not make express reference to the principle of totality when he imposed cumulative sentences, however this is a matter of discretion guided by the

principle that the ultimate sentence must reflect the gravity of the total criminal conduct. This will usually involve the sentencer reviewing the total sentence and considering whether the aggregate is just and appropriate.[12]

[23] There is no doubt His Honour considered both offences as serious examples of unlawful criminal damage. Clearly His Honour considered they were serious examples for slightly different reasons, in particular he clearly differentiated the second offence as it involved an element of intrusion onto private premises. His Honour gave sound reasons why he regarded these offences as serious examples of unlawful criminal damage. Although His Honour did not expressly say so, I have the impression from reading the transcript His Honour was deeply influenced by the fact that the second offence occurred only days after police intervention for the first offence. The second offence was also intrusive of private premises, late at night or very early morning. There were two different victims on two different occasions separated by one intervention by police, a Court attendance and the second offence was committed shortly after that attendance at the Court premises. It is not a case of the offending overlapping in any way or one offence contributing to the gravity of the other. I agree the Appellant presents as a tragic individual with extremely difficult alcohol and possibly drug problems, however the circumstances of the two lots of offending do not lead me to conclude the learned Magistrate was in error in ordering a

[12] See generally *Hampton v The Queen* [2008] NTCCA 5.

total term of six months imprisonment without ordering concurrency. It is important to remember this sentence is passed in a busy Magistrate's Court where remarks will often be brief. It is not to be assumed the failure to mention a principle means that it has been overlooked. In *Janima v Edgingto*n,[13] Mildren J said:[14]

> His Worship's remarks in sentencing were very brief. As stated by Muirhead J in Hill v Arnold (1976) 9 ALR 350 at 356, this court is appreciative of the difficulties and pressures under which Magistrates are working, but it is important that they give at least a succinct account of their main reasons for decisions, especially when sentencing a person to prison.
>
> Nevertheless, remarks on sentence are not to be analysed as critically as the words in a considered reserved judgment: see Jambajimba v Dredge (1985) 33 NTR 19, at 22 per Muirhead ACJ; and an appellate court is entitled, when considering the evidence and the reasons given, to assume that the Magistrate has considered all matters which are necessarily implicit in any conclusions which he had reached: see Bartusevics v Fisher (1973) 8 SASR 601 per Bright J.

[24] I would not interfere with the sentence based on this ground.

Manifestly excessive

[25] I have concluded that while the length of the sentences are towards the top of the range of what might be expected for this type of offending they were nevertheless within the discretionary range. His Honour was at pains to fix sentences that reflected the gravity of the offending. The fact that the damage was not of a highly significant order in monetary terms is not the only factor that influences the gravity of the offending. (In any event at a

[13] No 36 of 1995.
[14] Paras 18 & 19.

value of $500 for the first offence and about $800 for the second offence, it is not insignificant either). The circumstances and the motivation of the offender are also significant. I have set out above the factors His Honour carefully considered in an assessment of the gravity of the offending. I agree with the observation put in submission that His Honour spent much time going through the criminal antecedents of the offender, however His Honour carefully left those to one side to consider separately the proportional gravity of the offending. (His Honour's approach in my view was clearly consistent with *Veen v The Queen* (No 2)).[15] His Honour was being asked to consider, among other dispositions a partially suspended sentence. Previous responses to Court Orders and previous convictions have some relevance to assessing whether community release in any form is appropriate. His Honour needed to consider the prior record from that perspective. The Appellant could not draw on any well of previous good character, and unfortunately for him, not even a gap of any significance in his offending history.

[26] Some complaint is made that general deterrence should not have been a significant component of the sentence as, it was argued, the Appellant was extremely drunk and therefore did not represent an effective vehicle for general deterrence. Further, it was argued the offence itself was not seen as prevalent offending in the community. Although prevalence may heighten the need for general deterrence, it is not a pre-requisite for considering

[15] 1987 – 1988 164 CLR 46.

general deterrence which in almost every case informs and underlines the sentencing process.

[27] In terms of the subjective considerations of the Appellant. There does not appear to have been a great deal that could be said that was positive in relation to the Appellant. The Appellant presents with a tragic personal history. No doubt the dreadful stressors of his early life have played a role in his current circumstances. It must have been obvious the Appellant was a serious alcoholic. There was no serious plan put forward or request for assessments to be done that might address this problem. His Honour was told the Appellant intended to leave the Northern Territory. While the Appellant's personal situation is deeply troubling, and regrettably a familiar circumstance of persons before the Courts, there was no tangible way that I can ascertain His Honour could have factored the Appellant's circumstances into a sentencing disposition that would have been conducive of rehabilitation, such as a suspended sentence. The prospects for the Appellant were obviously not good. I note His Honour did inquire at the outset whether there would be an application under the *Alcohol Court Act* (NT). In the presence of counsel for the Appellant the prosecutor told His Honour there would not be. His Honour in my view was not closed to the idea of some form of alternative order, but in the face of persistent offending it is understandable that without a tangible plan concerning rehabilitation it would be difficult to justify a non-custodial sentence or a significant reduction of the terms by way of suspended sentences.

[28] Some criticism is made of the way the learned Magistrate dealt with intoxication. Intoxication could hardly be said to be mitigating in this case. This was persistent offending, fed apparently by being intoxicated in difficult circumstances. These factors were relevant to many of the Appellant's previous convictions. In *Pappin v The Queen*,[16] the Court of Criminal Appeal (NT) said:

> As with addiction to other drugs, there is no general rule that intoxication by reason of the consumption of alcohol is an aggravating or mitigating factor…(citations omitted). In some circumstances, it may operate on the sentencing process in both ways or it may be a neutral fact.

[29] His Honour was at pains to define the level of seriousness of the offending. It was clear alcohol would not be viewed a mitigating factor; justifiably so in this particular case.

[30] I am unable to find the actual sentences imposed were manifestly excessive. It must be shown not merely that the sentence is excessive, but that it is manifestly so. I am unable to conclude that this is so.

[31] Appeal Dismissed.

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[16] (2005) NTCCA 2.