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IN THE COURT OF CRIMINAL APPEAL
IN THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. CA 1 of 1991

ON APPEAL FROM SUPREME COURT No. 9 of 1990

BETWEEN:

EUGENE ARNOLD GRAY

Applicant

AND:

THE QUEEN

Respondent

CORAM: ASCHE CJ, NADER and GRAY JJ.

REASONS FOR JUDGMENT

(Delivered the 6th of June 1991)

ASCHE CJ: This is an application for leave to appeal against sentence.

The applicant pleaded guilty to four charges of receiving property knowing it to have been obtained by stealing. Although the perpetrator or perpetrators of the thefts is not known or at least not revealed to this court or to the learned trail judge, it is clear from the circumstances described by the prosecutor and not denied by the applicant, that the thefts were committed at different times and places. It is clear also, and so appears in the four separate indictments, that the applicant received the property at different times. I am not persuaded that the learned

trial judge erred in failing to treat the offences as part of a single enterprise (c.f. Hoad (1989) 42 ACR 312). In my view he was amply justified in imposing cumulative rather than concurrent sentences. Insofar as the applicant's case argues to the contrary I reject it.

An argument put to this court although not to the learned trial judge was based on the fact that the applicant was of aboriginal origin. The applicant is neither uneducated or unsophisticated. This is amply demonstrated by his written statement to the court, to which both this court and the learned trial judge were referred. The learned trial judge said to the applicant, "You clearly are intelligent enough to live your life in an honest manner but so far have chosen not to."

When one examines the material put before his Honour as to the personal circumstances of the applicant, his prior convictions (which include convictions for dishonesty) and the nature of the charges to which he pleaded guilty I can find nothing to suggest that his Honour was wrong in that assessment. It appears to me that his Honour was entirely correct in treating this as a case where the applicant was to be treated no differently from any other ordinary member of the community, capable of exercising an unfettered choice to obey or disobey the law. He chose the latter course. On 27 October 1986 he had been convicted of three offences, larceny; attempted dwelling house breaking and larceny; and dwelling house breaking and larceny. He received cumulative prison sentences of 6 months, 9 months and 9 months respectively with a non-parole period of 1 year. In those circumstances it could hardly be argued that, in committing the present offences, he

did not appreciate the consequences. Furthermore his written statement to the court, while it contains a number of matters which may certainly be put to his credit, contains nothing of contrition or acknowledgment of wrongdoing and the final statement that "I have changed considerably to the way I was 4-5 years ago" seems contradicted by the facts if it is meant to mean that he has changed for the better. The learned trial judge was correct in observing, "Your plea shows no degree whatsoever of contriteness or frankness".

Before dealing with the further submissions of counsel it is convenient to set out briefly the circumstances of each offence.

Count 1

On 25/10/89 receiving one Australian mint coin value $25.

Count 2

On 22/11/89 receiving two diamonds valued at $1355.

Count 3

On 26/11/89 receiving sapphires, pearl necklace, gold chain and earrings valued at $511.

Count 4

Receiving sapphires valued at $12,684.

All these articles had been obtained by four separate breaking and entering offences into four separate private homes. Most but not all of the property was recovered when the police executed a search warrant on the applicant's premises on 5 January 1990.

The learned trial judge imposed sentences of 6 months, 12 months, 18 months and 3 years imprisonment respectively to be served cumulatively and with a non-parole period of 2½ years.

On behalf of the applicant it was put before the learned trial judge that the applicant was aged 28; that he had pleaded guilty; that while he had a number of prior convictions there had been nothing substantial since October 1986; that he had formed a de facto relationship with a woman who was prepared to stand by him; that he therefore now had prospects of rehabilitation. Reference was also made to the applicant's written statement to the court in which he set out a number of community activities he had undertaken over the years. Counsel for the applicant also complained to his Honour that the applicant had received some unfavourable and unfair publicity. As his Honour rightly pointed out this was not a matter which would or could in any way influence the court in sentencing, and the applicant had appropriate remedies open to him.

A perusal of his Honour's sentencing remarks makes it plain that while his Honour did not accept the submissions of counsel for the applicant, he did

consider them. The conclusions formed by his Honour seem to me open on the material before him and within the ambit of his discretion. That being so it is not open to this court to displace them. In this court, counsel for the applicant particularly joins issue with his Honour's remark that the applicant "can be given no credit for being a good prospect for rehabilitation". However plainly enough his Honour is not saying that there is no prospect whatsoever of rehabilitation but rather that the omens are unfavourable. His remarks must be viewed in the context of his earlier comment that, "I cannot accept any assertions that you will begin to live your life in an honest way, having regard to your prior behaviour". I am unable on the material before the court to find that his Honour was so much in error in that view that an appeal court is bound to correct it.

Counsel for the applicant then submits to this court that the sentences, taken as a whole are manifestly excessive.

His point is that the maximum sentence for this offence is 7 years and that a total sentence of 6 years must therefore, in all the circumstances, be excessive. This however neglects the fact that this was not one offence but four, each carrying a maximum of 7 years and each a separate enterprise. Looked at in that way the learned trial judge cannot be said to have imposed unduly severe sentences individually because the highest sentence he has imposed is that of 3 years for the last offence.

That brings one finally to the principle of totality and it is submitted that the learned trial judge failed to take proper account of this principle. At first

impression there might seem to be some difficulty in discovering a rationale behind the four separate sentences of varying lengths. His Honour however has specifically stated that he took into account the principle of totality, and though, if I may respectfully say so, it might have assisted this court if he had elucidated further just how he had applied the principle, I consider that on examination of the individual circumstances of each count and the sentences imposed makes clear what his Honour had in mind.

One commences with the observation that in light of the applicant's prior record and the view which his Honour took of the seriousness of the offences (with which I would respectfully agree) it cannot be said that any individual sentence was in itself excessive. His Honour then tailors the sentences to the amounts involved and the repetitiveness of the offences. One cannot, in my view, suggest that there is anything wrong in principle with the sentence of 6 months for the first offence involving property worth $25 and the sentence of 3 years for the fourth offence involving property worth $12,684. The explanation for the apparent discrepancy between the second and third offences, insofar as the penalty for the second, involving property worth $1355, was less than the penalty for the third, involving property worth of the lesser value of $511, can, in my view, be found partly in the fact that his Honour was taking the view that a third repetition indicated a somewhat greater degree of criminality than the second precisely because it was a further step in a planned and persistent course of criminal conduct. However it is probable that the question of totality also influenced his Honour here in an overall reduction in both cases for what might otherwise call for severer penalties.

While another judge might not have proceeded in quite the same way, that, of course, is not the test and in my view and taking the sentences overall I am not persuaded that his Honour erred in his discretion or imposed a total sentence which was manifestly excessive.

I would refuse leave to appeal.

NADER J: I agree.

GRAY AJ: I agree.