Tomlins v Gwynne [2002] NTSC 39

PARTIES:	MARY KRISTY LEE CLAIRE TOMLINS
	v
	COLLEEN MARIE GWYNNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 6/2002 9626884 & 9702422
DELIVERED:	19 June 2002
HEARING DATES:	12 April 2002
JUDGMENT OF:	THOMAS J

CATCHWORDS:

CRIMINAL LAW AND PROCEDURE – sentencing – juvenile offender – whether sentence manifestly excessive – whether sufficient weight was given to the principle of rehabilitation and particular circumstances of the defendant – whether sufficient regard was given to the defendant's previous good character – whether the particular circumstances of the defendant were considered in ordering restitution of monies – appeal dismissed.

Juvenile Justice Act 1999 (NT) s 53, s 55
Sentencing Act 1995 s 90(5)

Simmond v Mill (1986) 38 NTR 31; *M v Waldron* (1988) 56 NTR1, followed.
Arnold v Trenerry (1997) 118 NTR1; *Janima v Edgington* [1995] NTSC 36; *Mawson v Nayda* (1995) 5 NTLR 56; *Cranssen v R* (1936) 55 CLR 509; *Raggett, Douglas & Miller v R* (1990) 50 A Crim R 41, applied.
Strecker v Trenerry [1997] NTSC 6 & 7; *E v SA Police* (1996) 86 A Crim R 141, referred to.

REPRESENTATION:

Counsel:	
Appellant:	G. Bryant
Respondent:	G. Dooley
Solicitors:	
Appellant:	North Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	tho200205
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Tomlins v Gwynne [2002] NTSC 39
No. JA 6/2002 (9626884, 9702422)

BETWEEN:

MARY KRISTY LEE CLAIRE TOMLINS
Appellant

AND:

COLLEEN MARIE GWYNNE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 19 June 2002)

[1] This is an appeal from a sentence imposed upon the appellant in the Juvenile Court at Darwin.

[2] On 4 January 2002 the appellant entered a plea of guilty to the following three charges:

> "1) On the 8th December 1996 at Darwin in the Northern Territory of Australia
>
> 1. Did steal a bicycle, valued at $280 the property of Bonnie Nyari.
>
> Contrary to Section 210 of the Criminal Code.
>
> 2) On the 15th January 1997 at Darwin in the Northern Territory of Australia

i) Unlawfully entered a dwelling house namely 6 Bauer Crescent with intent to commit therein a crime, namely, stealing.

Contrary to s 213 of the Criminal Code.

ii) did steal assorted clothing, makeup, audio tapes, bags, bottles, a crystal ball and a radio cassette player valued at $1850, the property of Sandra Kitchey.

Contrary to s 210 of the Criminal Code."

[3] The agreed facts with respect to the first charge are as follows (tp 3):

"…. at some time between 8.30 am and 12.30 pm on 8 December 1996 the defendant attended the bike racks of Moil School where she selected a man's style mountain bike. She then took the bicycle by undoing a lock and chain that secured it in the racks. Later that evening the defendant in the company of several friends was at the Fire Escape Youth Centre on Trower Road.

At that time the defendant had the bicycle with her and was letting her friends ride it. At about 6.20 pm that same evening, the owner of the bicycle and her father were at the Trower Road Night and Day Pharmacy when they saw a male youth riding the bicycle. When asked by the victim's father about the bike he stated it belonged to a – belonged to the defendant. She was then approached by the father of the victim and spoken to. She stated the bicycle was hers. Police were then called.

The defendant was then arrested and taken to Peter McAulay Centre where a family member was contacted and a formal record of interview was conducted with the defendant. During the interview she declined to comment and was advised she'd receive a summons in relation to the matter. She was then released in the custody of a family member.

At no time did the defendant have permission to take the bike, that being the property of Bonnie Nari (?) was valued at $280. …"

[4] The agreed facts with respect to the other charges are as follows (tp 4):

"… at about 2 pm on Wednesday 15 January 1997, the defendant and a niece of the resident went to the victim's house at 6 Beroona Crescent, Karama, for the purpose of obtaining a radio/cassette player. On finding the victim not at home and the house secure, the defendant entered the premises through a window to the bedroom after tearing and bending a fly screen. The defendant then carried

> out – upon entering into the premises, the defendant carried out cosmetics and clothing and returned to her own premises with the items.
>
> Your Worship, at about 8.40 hours, the victim and police attended the defendant's house at 11 Whitby Court, Karama, and recovered all items listed except for 12 audio cassettes valued at $240 from the defendant's bedroom.
>
> The defendant attended at Casuarina Police Station on Saturday 1 February 1997 and participated in a record of interview. The defendant refused to say anything in relation to the offences during the interview. The co-offender attended at Casuarina Police Station on Saturday 1 February 1997 and participated in a record of interview during which she made full admissions in relation to her and the defendant's involvement in the offences stating it was the defendant's idea to commit these offences.
>
> ……
>
> The co-offender was – removed all the other property while the defendant removed just the clothing and the – when they went back to their residence the defendant had on her the clothing and the cosmetics only. Where the co-offender had the remaining property. All items were taken by both offenders at the same time."

[5] The offences were committed when the appellant was 12 and 13 years old. On the date she was dealt with by the Juvenile Court she was 17 years of age. The appellant had moved interstate following the commission of the offence and whilst on bail. Upon her return to the Northern Territory she attended Court with respect to certain outstanding warrants.

[6] With respect to the first charge the learned chief stipendiary magistrate found the offence proved but without proceeding to conviction discharged the appellant without further penalty.

[7] With respect to charge (2) and (3) the appellant was found guilty on both charges. Without proceeding to conviction she was placed on an order to be of good behaviour for 18 months.

[8] With respect to the last two charges a further order was made that she pay restitution of $120.00 being half the value of the cassettes. His Worship ordered the restitution be paid by instalments of $20 per fortnight. The first payment to be made on 18 January 2002 and each fortnight thereafter till the amount of $120 was paid in full.

[9] The appellant has lodged a Notice of Appeal against this sentence. The Grounds of Appeal are as follows:

> "1. That the imposition on file 9702422 of an order to be of good behaviour for a period of 18 months and an order for restitution of monies was manifestly excessive.
>
> 2. That the learned Chief Magistrate erred in failing to give sufficient weight to the principle of rehabilitation and the particular circumstances of the defendant.
>
> 3. That the learned Chief Magistrate failed to have sufficient regard to the defendant's previous good character.
>
> 4. That the learned Chief Magistrate erred in law in failing to take into account the particular circumstances of the defendant in ordering restitution of monies."

Grounds 1 – 3: That the sentence was manifestly excessive in all the circumstances.

[10] Counsel for the appellant, Mr Bryant, referred to the decisions of *Simmond v Mill* (1986) 38 NTR 31 and *M v Waldron* (1988) 56 NTR 1, as establishing

the principles regarding sentencing of juveniles and young offenders. I accept this submission.

[11] Mr Bryant referred to the very young age of the appellant, namely 12 years of age, when the first offence was committed and 13 years of age in respect of offences (2) and (3).

[12] He submits the appellant should have been afforded a merciful disposition which placed significant weight on her prospects for rehabilitation and the need to avoid the stigma associated with a finding of guilt for offences of this type. It was conceded on behalf of the appellant that whilst the learned chief stipendiary magistrate imposed an appropriate disposition under s 53 of the Juvenile Justice Act 1999, the duration of the undertaking to be of good behaviour was excessive in all the circumstances, having regard to the nature of the offence, the personal circumstances of the appellant at the time of the offence and the fact that the appellant had not committed any further offences at the time of sentence on 4 January 2002.

[13] It was further submitted that the appellant demonstrated her strong prospect for rehabilitation in not reoffending from the time of the offence to the time of the hearing of the plea and that this was a significant factor mitigating against a disposition which required her to be of good behaviour for a period of 18 months.

[14] The principles to be applied in considering an appeal on the grounds that a sentence is manifestly excessive have been set out in a number of authorities. In *Arnold v Trenerry* (1997) 118 NTR 1 at 7:

> "It is incumbent on the appellant to show that the sentence is manifestly excessive.

See also judgment of Kearney J in *Raggett, Douglas & Miller v R* (1990) 50 A Crim R 41 at 47:

> "The law on this aspect is summarised in the case which is the modern locus classicus in Australia, *Tait and Burley* at 476:
>
> > 'An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error (see generally, *Skinner* (1913) 16 CLR 336 at 339 – 340; *Withers* (1925) 25 SR (NSW) 382 at 394; *Whittaker* (1928) 41 CLR 230 at 249; *Griffiths* (1977) 137 CLR 293 at 307 – 310".

[15] The learned chief stipendiary magistrate also considered the consequences of the two offences. With respect to the first charge the appellant was discharged without conviction. With respect to charges (2) and (3) they were of a more serious nature involving breaking into a house and removing a substantial amount of property. His Worship did not record a conviction which may have hindered the appellant's future prospects. The appellant's complaint relates to being placed on an order to be of good behaviour for 18 months.

[16] I do not consider the learned chief stipendiary magistrate proceeded on any wrong principle or wrongly assessed any salient feature of the proceedings. Nor do I consider the sentence itself is so excessive as to manifest error.

[17] Accordingly Grounds (1), (2) and (3) of the appeal are dismissed.

Ground 4: That the learned chief stipendiary magistrate erred in law in failing to take into account the particular circumstances of the defendant in ordering restitution of monies.

[18] Mr Bryant on behalf of the appellant submits that the learned chief stipendiary magistrate could not make an order for restitution unless; (1) the Crown made a formal application; (2) the appropriate supporting documentation accompanied the application detailing the amount of the restitution sought be provided to the Court. This is to avoid arbitrary figures being provided to the Court which do not correlate with the value of the items taken and the amount of restitution sought. The transcript of the proceedings (tp 5) indicates that the prosecutor advised the learned chief stipendiary magistrate that he had no instructions to seek an order for restitution.

[19] The statutory provisions under the Juvenile Justice Act concerning restitution are stated in s 55 which provides as follows:

> "(1) Where the Court thinks fit, it may, subject to subsection (3), make an order for restitution by way of monetary compensation or performance of service in respect of compensation for an offence.

(2) The Court shall, on making an order under subsection (1), have regard to the amount of loss or damage suffered as a result of the offence, and the ability of the offender to make restitution.

(3) Where the Court makes an order under subsection (1) for monetary compensation, it shall not exceed $5,000, and may be paid in a lump sum or by instalments as directed by the Court.

(4) Monetary compensation under this section shall be paid to the Clerk of the Court for distribution in accordance with the order.

(5) An amount payable under this section that is in arrears may be recovered, by the person in whose favour the order to pay the amount was made, as a debt due and payable by the juvenile against whom it was made.

(6) An order made under this section does not preclude any other action or proceedings for damages by a person who suffered loss or damages as a result of an offence."

[20] It is appropriate to note that there is no provision in the Juvenile Justice Act equivalent to s 90(5) of the Sentencing Act which provides as follows:

> "(5) A court shall not make an order under this Division where the person whose property was taken, lost, destroyed or damaged does not consent to the order being made."

See also decision of Mildren J in *Strecker v Trenerry* [1997] NTSC 6 and NTSC 7.

[21] Section 55 of the Juvenile Justice Act provides that if the court thinks fit it may order restitution. There is no provision that it be subject to an application by the Crown or with the consent of the victim.

[22] Mr Bryant on behalf of the appellant complains that there was no supporting documentation to verify the amount sought by way of restitution. However, at the hearing before the learned chief stipendiary magistrate the then counsel for the appellant agreed that it was open to the learned chief

stipendiary magistrate to order restitution. The value of the property was not queried by the appellant's counsel nor did he seek to have the value of the cassettes formally proved. The amount of $240 being the total value of the 12 audio cassettes was part of the agreed facts. In these circumstances the appellant cannot now complain about lack of supporting documentation to prove the value of the cassettes.

[23] The learned chief stipendiary magistrate ordered the appellant pay one half of the $240 namely $120. The agreement on behalf of the appellant to pay $120 was prior to the learned chief stipendiary magistrate delivering his reasons for sentence and imposing sentence on the appellant. Part of the order of the Court was that the appellant pay the sum of $120 to the Clerk of the Court at Darwin by instalments of not less than $20 per fortnight. The first instalment to be made 14 days after the date of the Court order.

[24] Mr Bryant on behalf of the appellant submitted that the learned chief stipendiary magistrate failed to make the proper inquiries in order to properly comprehend the appellant's capacity to pay and to satisfy himself that the appellant had means to comply with the order. See *E v SA Police* (1996) 86 A Crim R 141 at 146.

[25] A transcript of the proceedings before the learned chief stipendiary magistrate on 4 January 2002 reads as follows (tp 7):

> "HIS WORSHIP: What access to funds, does she have, Mr Woodroffe?

MR WOODROFFE: She receive[s] a Youth Allowance, Your Worship, of $225 a fortnight.

HIS WORSHIP: What's the restitution section? You don't want to say anything about the fact that I think it's appropriate she pay back half the value of the cassettes, Mr Woodroffe.

MR WOODROFFE: Well, it's open to Your Worship, but - - -

HIS WORSHIP: I don't need (inaudible) I need an application from the Crown. The Crown can only – I suppose – I'll hear the sergeant on it but at this stage it seems to me that part of the process of reminding people of their responsibility – section 55 I see.

MR WOODROFFE: There's always, Your Worship, the – previously indicated the law reform and miscellaneous provisions if the victim wishes to undertake a civil remedies. There is that possibility. I'd simply be saying, sir, given that she's only 17 and receiving Youth Allowance, it is some limit in funds and all that. She's going to be fully back into work – sorry, back into school within a very short period of three weeks.

HIS WORSHIP: Do you want to say anything, sergeant?

MR MOORE: No, Your Worship.

HIS WORSHIP: Mr Woodroffe, is she about to pay $3 a fortnight out of that allowance?

MR WOODROFFE: She says, yes, sir."

[26] As this transcript did not appear to correlate with the subsequent order made by the learned chief stipendiary magistrate that the appellant pay instalments of not less than $20 per fortnight. I advised the parties I would have my associate listen to the tape in case there had been an error in the transcribing. My associate advised me that there had been an error with respect to the last mentioned question and answer and agreed with the advice provided by Mr Dooley.

[27] Mr Dooley, counsel for the Crown/respondent, advised me by letter dated 18 April 2002, that he had listened to the tape of the proceedings and the following exchange was recorded:

> "HIS WORSHIP: Mr Woodroffe, is she able to pay $20 a fortnight out of that allowance?
>
> (One can then hear what is undoubtedly Mr Woodroffe seeking brief instructions arising from His Worship's question)
>
> MR WOODROFFE: Yes, she says yes, sir."

[28] Mr Woodroffe the then counsel for the appellant had obtained instructions from his client and subsequently advised the learned chief stipendiary magistrate that his client agreed to pay $20 per fortnight. I do not consider it was incumbent upon the learned chief stipendiary magistrate to make any further inquiry as to the appellant's means and ability to pay the sum of $120 in restitution.

[29] Accordingly this ground of appeal is dismissed.

[30] With respect to the appeal I order the appeal be dismissed.

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