BB v The Queen [2014] NTCCA 13

PARTIES:	BB
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CCA 25 of 2013 (21310156 and 21310166)
DELIVERED:	15 AUGUST 2014
HEARING DATES:	9 APRIL 2014
JUDGMENT OF:	BLOKLAND J, BARR AND HILEY JJ
APPEAL FROM:	KELLY J

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence –Youth under 13 years – Aggravated robbery – Property offences – Suspended sentence of detention – Manifestly excessive term – Objective factors considered – Submissions asserting "unplanned, impulsive and unsophisticated" offending – Personal antecedents of offender significant – Age of offender – Lack of prior convictions – Weight given to guilty plea – Utilitarian value of offender's co-operation – Appeal allowed – Resentenced – Length of suspended sentence reduced.

Sentencing Act 1995 (NT) ss 5(2)(e); 40(3).
Youth Justice Act 2005 (NT), ss 4(c); 69; 81(2)(b), (d); 81(5); 81(6); 82(1)(b); 83(1)(f), (i); 83(2)(b); 98(3).

Barlow v The Queen (2008) 184 A Crim R 187; *Dinsdale v The Queen* (2000) 202 CLR 32; *House v The King* [1936] 55 CLR 49; *JKL v R* [2011] NTCCA 7; *Kelly v The Queen* (2000) 10 NTLR 39; *Nona v The Queen* [2012] NTCCA 3; *R v Gurruwiwi* (2008) 22 NTLR 68; *R v Percy* [1975] Tas SR 62; *R v Ryan* (2006) 167 A Crim R 241; *R v Wilson* (2011) 30 NTLR 51; *Shannon v Cassidy* (2012) 31 NTLR 188; *Stevens v Giersch* (1976) 14 SASR 81; *Whitehurst v The Queen* [2011] NTCCA 11, applied.

Freiberg, Arie, *Fox and Freiberg's Sentencing, State and Federal Law in Victoria* 3rd Edition (Thomson Reuters, 2014)757, citing *R v Zamagias* [2002] NSW CCA 17.

REPRESENTATION:

Counsel:

Appellant:	I Read SC
Respondent:	D Dalrymple

Solicitors:

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

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

BB v The Queen [2014] NTCCA 13
No. CCA 25 of 2013 (21310156 and 21310166)

BETWEEN:

BB
Appellant

AND:

The Queen
Respondent

CORAM: BLOKLAND J, BARR AND HILEY JJ

REASONS FOR JUDGMENT

(Delivered 15 August 2014)

The Court:

Introduction

[1] This is an appeal against sentences imposed on the appellant on 24 September 2013. Leave to appeal was granted by a judge of this Court on 5 February 2014.

[2] The appellant is a youth who was aged 12 years and 11 months at the time of committing the offences. He was 13 years old at the time of sentencing.

[3] After pleading guilty to eight counts on an ex-officio indictment, the appellant was sentenced to a total term of detention for two years and three months, suspended forthwith. The term of two years and three months was

imposed for the offence of aggravated robbery. A concurrent aggregated term of nine months detention was imposed on the remaining counts. The suspended sentence of detention was subject to a number of conditions fixed under the *Sentencing Act*. An operational period of two years and three months was set. Convictions were not imposed for any of the offences. In addition to the suspended term of detention, an order for restitution was made in respect of the aggravated robbery count, the most serious of the charges, in the sum of $2500, to be paid at the rate of $50 per fortnight.

[4] In sentencing the appellant to a period greater than 12 months, the learned sentencing Judge exercised powers available to the Supreme Court under the *Sentencing Act* and the *Youth Justice Act*. Section 82(1)(b) of the *Youth Justice Act* allows the Supreme Court to order that a youth be detained in a detention centre for a period not exceeding the period of imprisonment for which such an offence would be punishable if committed by an adult. Had the Supreme Court sentenced solely under the powers available to the Youth Justice Court, the court would have been subject to the constraints set out in s 83(2)(b) of the *Youth Justice Act.*[1] As the appellant was less than 15 years of age, pursuant to s 83(2)(b) *Youth Justice Act,* the maximum sentence that could have been imposed by the Youth Justice Court was twelve months detention. Although the sentencing disposition 'detention' is not available under the *Sentencing Act,* s 82(1)(b) of the *Youth Justice Act* operates to

[1] See discussion by Riley J (as he then was) in *R v Gurruwiwi* (2008) 22 NTLR 68 at [52]-[53].

permit the Supreme Court to order detention for a term not constrained by the limitations of the *Youth Justice Act*.

[5] The appellant committed the eight offences, the offence of aggravated robbery and a series of seven property offences, and another three property offences which were also taken into account, over a period of five days from 3 March 2013. The primary focus of this appeal was the sentence for the offence of aggravated robbery, committed on 3 March 2013. The appellant argued that the sentence for the property offences was also excessive.

[6] The facts relevant to the robbery charge were that the appellant was with a large group of youths who had congregated at the Wagaman public oval. At almost 9:00pm the appellant and another three youths separated from the larger group and approached the victim and his wife who were taking their regular evening walk.

[7] When the group of youths approached the victim and his wife, the appellant said to them: "do you have any money?" Another asked them for a "light". The victim told the appellant they did not have any money and that they were just out walking. One of the youths asked: "Where do you come from?", and the victim replied that he came from India. The tone of the exchange became threatening. A number of the offenders were swearing at the couple. One of the youths asked the victim what he had in his pocket and patted the victim's shirt and short pockets. One of the youths (GS) stood in the victim's path and punched the victim to the face below his left

eye. The punch was forceful. The victim put his head down to protect his face.

[8] The appellant kicked the victim in the ribs and punched him to the face, connecting with the jaw area. Other offenders joined in the assault. The victim was punched and kicked between 7-10 times. During the assault, the appellant noticed the victim was wearing a gold plated bracelet. He said, "give me your bracelet", and one of the others started to pull it off of his arm. The bracelet was digging into his skin so the victim helped to take it off, hoping the youths would go away. The appellant also noticed the victim was wearing two gold rings and said "give me that". Another offender tried unsuccessfully to pull the rings off of the victim. All offenders ran from the scene. The victim and his wife rang police.

[9] After the robbery, the appellant and co-offenders walked to Woolworths at Casuarina where they unlawfully entered, stole a hammer worth $25, and caused damage to a door worth $2000.

[10] Three days later the appellant and the same group were out at night. They broke into the Nightcliff Sports Club to steal alcohol at the request of an older male. Alcoholic drinks valued at $300 were stolen and later consumed. The appellant and co-offenders then walked to a friend's place to sleep. On the way the appellant removed a pole from a Hilux vehicle and used it to smash the window of a Holden Commodore while the co-offenders smashed other windows. The appellant then smashed the windscreen of a

smaller vehicle and the co-offenders caused other damage to the same vehicle. The cost of replacing the windscreen to this vehicle was $344.

[11] Following that offending, at about 4:00am the appellant and two co-offenders decided to go back to the Nightcliff Sports Club and steal more alcohol. They broke in through the same door and took more alcohol. At 7:00am the same group went to the Charles Darwin University campus. They threw rocks at some buildings, smashing a large window; at another building they smashed a number of smaller windows and a glass door. The estimated cost of the damage was $8000. The group left the campus after being interrupted by a security guard.

[12] The appellant was spoken to by police on the 5 March 2013 in relation to the robbery. He denied participation in the robbery. On 8 March 2013 he made various admissions to the offending.

Ground One: The sentence is in all of the circumstances of the offending and the circumstances of the appellant, manifestly excessive.

[13] The principles governing an appeal of this kind are well established. An appellant who relies on this ground of appeal must show that the sentence was "clearly and obviously and not just arguably excessive".[2] It is not enough that the appellate court considers that had it been in the position of the primary judge it would have imposed a different sentence. It must

[2] *Whitehurst v The Queen* [2011] NTCCA 11 at [14], per Riley CJ.

appear that the sentence is such that some error has been made in exercising the discretion.

> "It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court at first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred".[3]

[14] In our opinion this ground is made out. We have closely considered the careful arguments put on behalf of the respondent. In relation to the aggravated robbery charge, counsel for the respondent pointed out the inherent seriousness of such a charge. We acknowledge aggravated robbery is generically a serious offence. It carries a maximum penalty of life imprisonment. Here the aggravating features were that it was committed in company and the victim suffered harm. On behalf of the respondent the sentence was described as stern but not excessive.

[15] The offending had significant adverse consequences for the victim and his wife. They became fearful, as a result of which they curtailed their usual evening walking activities. The victim suffered physical injury to his face and back causing swelling and pain for about a week. As well as the bracelet having an estimated value of $3000, it had cultural significance to the victim, similar in nature to a wedding ring. Punishment, general deterrence and denunciation clearly have relevance in sentencing for cases

[3] *House v The King* [1936] 55 CLR 499 at 505.

of this kind. However, the appellant had not previously been dealt with by the courts and was of such a young age that in our opinion a strong case existed for moderating the usual operation of those principles, notwithstanding the seriousness of the offending conduct.

[16] The learned sentencing Judge acknowledged the most important factor relevant to sentencing the appellant was rehabilitation. This clearly informed the decision to fully suspend the sentences of detention imposed for each offence. In relation to the aggravated robbery charge, we agree this was an appropriate case for suspension of any term however, in our opinion, when all of the relevant factors are accorded their proper weight, the length of the sentence was manifestly excessive, bearing in mind the young age and immaturity of the appellant. It is not to the point that the sentence was suspended and that the appellant may never be called on to actually serve the term of two years and three months detention. There remains a possibility he could be called upon to serve the term, particularly if he is found to be in breach of conditions which were set pursuant to the *Sentencing Act*. The legislative regime for dealing with breaches of suspended sentences is less flexible under the *Sentencing Act* than the *Youth Justice Act*.[4]

[17] The first determination to be made when setting a suspended sentence is whether a sentence of imprisonment (or detention) and not some lesser sentence is considered the appropriate disposition. The second question is

[4] *Shannon v Cassidy* (2012) 31 NTLR 188, Riley CJ at [24].

whether the term set should be suspended for a period set by the court.[5] As the imposition of a sentence involving incarceration is a significant punishment in itself, in principle "[t]he length should be no greater than the length of the sentence of imprisonment that would have been imposed if no suspension were permitted."[6] An aspect of this principle that is reflected in the *Youth Justice Act*, and when sentencing youths generally, is that not only should custody be used as a last resort, but for the shortest possible time.[7]

[18] The appellant argued the provisional starting point of three years detention in all of the circumstances reflected error. The appellant also contended that the 25% discount was insufficient to adequately reflect the appellant's guilty plea, remorse and agreement to give evidence against his co-offenders. The respondent submitted that the reduction of 25% referred to in the sentencing remarks was not solely referrable to the plea of guilty but also reflected the appellant's co-operation by agreeing to give evidence against his co-offenders. The appellant argued that whatever factors the expressed reduction may be referrable to, the provisional starting point of three years detention reflects error in all of the circumstances. In our opinion this is not

[5] *Sentencing Act* s 40(3); *Dinsdale v The Queen* (2000) 202 CLR 321, Gaudron and Gummow JJ at [15]; Kirby J at [79]; see also *R v Ryan* (2006) 167 A Crim R 241 at [31]-[32].
[6] See "Fox and Freiberg's Sentencing State and Federal Law in Victoria" Arie Freiberg, Third Edition at 757 citing *R v Zamagias* [2002] NSW CCA 17 at [26]-[27]; *Barlow v The Queen* (2008) 184 A Crim R 187 at [59]; *R v Percy* [1975] Tas SR 62, 73; *Stevens v Giersch* (1976) 14 SASR 81, 82.
[7] Section 4(c) *Youth Justice Act*.

a matter that may readily be resolved by reference to the "starting point" or the expressed reduction for the plea of guilty and co-operation.[8]

[19] It is the combination of principles relevant to sentencing such a young offender and the particular circumstances of this appellant that persuade us that although no specific error has been identified, the term of detention set is excessive. When a youth is dealt with by the Supreme Court, generally he or she will have the benefit of ameliorated sanctions consistent with principles expressed in the *Youth Justice Act*. These include the principle of the use of custody as a last resort and for the shortest appropriate time,[9] having regard to the youth's age and maturity[10] and any history of offences previously committed,[11] and whether the youth has taken steps to make amends with any victims.[12]

[20] In addition to relying on the inherent seriousness of offending of this type and the impact of the crime on the victim, the respondent submitted the court should reject the appellant's submission that this offending was unplanned, impulsive and unsophisticated. Accepting for the sake of argument that there was some planning by way of discussion between the offenders to form a common intention to rob in order to obtain money to buy cannabis, the planning could not have been elaborate or long standing.

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[8] *Kelly v The Queen* (2000) 10 NTLR 39; *JKL v R* [2011] NTCCA 7 at [28]; *R v Wilson* (2011) NTLR 51 at [40]; *Nona v The Queen* [2012] NTCCA 3 at [28].
[9] Sections 4(c), 81(6) *Youth Justices Act*.
[10] Section 81(2)(d) *Youth Justice Act*. Section 5(2)(e) *Sentencing Act* also requires the age of an offender to be taken into account by the Court.
[11] Section 81(2)(b) *Youth Justice Act*.
[12] Section 81(5) *Youth Justice Act*.

While we would not describe the offending as "impulsive", it may properly be regarded as unplanned and unsophisticated.

[21] The offending was serious for the reasons we have already discussed, but it was not sophisticated offending. No weapons were used, the offending was of short duration and the harm to the victim did not include features that are present in more serious examples of offending of this generic type.

[22] When the objective factors are combined with the appellant's personal antecedents, in particular his age, lack of prior convictions, pleas of guilty to all offences on an ex officio indictment and co-operation with police to the point of agreeing to give evidence against co-offenders, we conclude the sentence of two years and three months detention demonstrates error in setting the term. It is also significant that at such a young age the appellant had spent 13 days in detention on remand.

[23] The appellant submitted the aggregate sentence of nine months for the remainder of the counts was also excessive. Those counts could have been dealt with in the Youth Justice Court, however, the appellant, by co-operating with both the Youth Justice Court and the Supreme Court elected to have all matters dealt with together. Because of the serious nature of count one, that could only take place in the Supreme Court. The appellant's co-operation in this way had utilitarian value to both the Youth Justice Court and the Supreme Court. Given the appellant's age and that this was the first time he was dealt with before a court, the imposition of a sentence

of detention, for the property offences, notwithstanding it was ordered to be suspended, in our opinion was manifestly excessive.

[24] The respondent pointed out that the appellant had previously been subject to youth diversion for stealing when he was eleven years of age. The sentencing remarks make reference to the diversion process. Given the appellant's age when he participated in the diversion procedure, it could not be regarded as a factor of significance in this instance. It did not amount to a previous finding of guilt or a conviction. The appellant was entitled to be sentenced without qualification on the basis that he had no previous findings of guilt. A term of detention was excessive for the balance of the charges. Further, all of the offending occurred during a brief five day interval in the appellant's life in March 2013 when he fell into bad company following an argument with his grandmother with whom he had been living at the time.

[25] Ground one will be allowed. The appellant will be re-sentenced on all matters. The order for restitution was an order made in addition to sentence and has not been the subject of appeal. That order will remain in place.

[26] In our opinion the issues raised in the remaining grounds do not advance consideration of this matter further than the ground we have dealt with. We do not propose to deal with the remaining grounds.

Re-sentence

[27] As we have said, the offending involved in the aggravated robbery was serious. It was committed in company at night and involved kicking and punching the victim several times, threatening and swearing at the victim and his wife, stealing the gold plated bracelet and the attempted stealing of the victim's two gold rings. Apart from the physical injuries sustained, the victim and his wife were fearful for their safety, and are now scared to go for evening walks in their own neighbourhood.

[28] However the offending was not as serious as many robberies are. It did not involve weapons or substantial planning, it was not protracted and it did not result in significant or permanent physical injury to the victims.

[29] Whilst offending of this nature would normally attract a significant term of imprisonment, there are a number of significant mitigating factors in relation to this offender.

[30] The primary factors are his youth (12 years and 11 months old at the time of the offending) and the lack of any prior criminal history before the Courts.

[31] We consider that the property offences subject of counts 2 to 8 should in such circumstances be dealt with by proceeding, without conviction, pursuant to s 83(1)(f) of the *Youth Justice Act*.

[32] Prior to committing these offences the appellant had been living with his grandmother in Palmerston so that he could go to school in Darwin. His

parents were living and working at various places in and near Alice Springs. He had an argument with his grandmother on the telephone about him spending too much time with acquaintances who were involved in smoking and drinking. Following the argument he did not go home that night but stayed at the house of one of his co-offenders. This was the night before the robbery. He said that he felt under pressure from his co-offenders to participate in the offending.

[33] He initially placed all the blame on his co-offenders, saying that he just went along with them. However when he was interviewed by the police on 8 March he provided considerable detail about the offending and his co-offenders. He also promised to give evidence against his co-offenders if required. He also told police he was a "little bit sorry" for what he had done during the robbery. For the purpose of re-sentencing this court has been provided with fresh material concerning the appellant's co-operation. The appellant has now given evidence at the committal and trial of a co-offender.

[34] The appellant was in detention following his arrest on 8 March and was granted bail on 20 March 2013. He has been on bail since then. He spent a total period of 13 days in detention in relation to these offences.

[35] A psycho-social background report prepared by Gerard Waterford, a counsellor/social worker employed by Central Australian Aboriginal Congress in July 2013, recorded that the appellant was enjoying and benefiting from "very good and thoughtful support from his parents, his

football mentors, school teacher, and other members of the Larambah community." He was coping well with school and enjoying his football. He was attending school every day with his (younger) brother and sister. The author said that the appellant would benefit from counselling and mentoring and that he would benefit from continuing to be engaged in sport and healthy social activities.

[36] A reference was provided by Max Yffer, a senior psychologist at Central Australian Aboriginal Congress, on 11 September 2013. He too was positive about the appellant's prospects of rehabilitation. He said that the appellant accepted that he had done the wrong thing, particularly regrets his part in the assault on the victim, is very ashamed of his conduct and feels bad for all the stress that his actions have caused his family as a result. He said that the appellant "appears to have momentarily got caught up in the 'wrong crowd'", is genuinely remorseful for having caused harm to the victims, and is "determined to now be a good role model for his younger siblings and others and is keen to act with a greater sense of responsibility and purpose".

[37] A detailed pre-sentence report was prepared by Jesyjames Carr, a Probation and Parole Officer with the Department of Correctional Services, on 10 September 2013. The report also referred to the fact that the offending occurred during that short period when he was staying with his grandmother and got into bad company, and that the appellant admitted that he made poor choices and appears remorseful. The author said that the appellant "appears

to be genuinely motivated to change his behaviour, acknowledging his offending and non-compliance with his guardian's requests was unacceptable". He has good family support and is engaged in community activities and sporting commitments. The author assessed the appellant as suitable for supervision and recommended that he be placed under the supervision of a probation and parole officer and follow all reasonable directions as to supervision, reporting, residence, education, employment and associates, and that if directed he participate and complete counselling.

[38] A letter was also provided by the Department of Education and Children's Services, which included some materials regarding some poor behaviour on the part of the appellant in September 2011, a letter from the Assistant Principal of Rosebery Middle School (where the appellant was enrolled between 19 February and 2 May 2013) and a letter from the Principal of the Larambah School together with a number of attachments with the appellant's performance there. In short it does seem that the appellant was experiencing some behavioural issues during the short time that he was at school in Darwin, which included the time when he committed these offences, and when he first went to school at Larambah. The Larambah materials indicate that his behaviour improved since soon after he arrived there, he is showing willingness to learn, he appreciates the support given to him by his family, he values his family and spends a lot of time with them including his younger sister and 2 younger brothers and that he has not been in any trouble in the community.

[39] This Court has now received a "Youth Progress Report" from Alice Springs Community Corrections and updated submissions from counsel for the appellant. Overall the appellant is progressing well. Although there have been some disruptions in respect of family relationships, the appellant is currently complying on a satisfactory basis and engaging positively with school and friends. Given all of the material before us, we see no need to request a further report pursuant to s 69 of the *Youth Justice Act*.

[40] We consider that the appellant's prospects of rehabilitation are strong, particularly in light of his progress since he was released on bail and the ongoing support of family and others. Whilst punishment, general deterrence and specific deterrence are always important, we consider that the conditions and time of his detention of 13 days and the conditions and duration of his bail and suspended sentence, coupled with the sentence that we will impose, satisfy those sentencing factors. We also consider that he should be given a significant discount, of about one third, on account of his early admissions and co-operation with the police, his early pleas, his remorse and his subsequent co-operation by giving evidence against one of his co-offenders. We also have regard to the fact that the appellant has been under supervision since 24 September 2013.

[41] Having regard to all of the above factors, we consider that he should be sentenced without conviction to 12 months detention for the aggravated robbery offence (pursuant to s 83(1)(i) of the *Youth Justice Act*), fully suspended. He will be under the supervision of Correctional Services for

6 months on the conditions set out in the pre-sentence report (pursuant to s 98 of the *Youth Justice Act*). For the purposes of s 98(3) of the *Youth Justice Act* we would also specify the period of 12 months as the period during which the appellant must not commit any further offences.

[42] On counts 2 to 8, without conviction, pursuant to s 83(1)(f) of the *Youth Justice Act*, the appellant is to give security in his own reconnaissance in the sum of $100 to be of good behaviour for 6 months from today.

[43] The order for restitution in the sum of $2500 remains.

Orders

[44] The appeal is allowed. The sentence imposed by the Supreme Court on 24 September 2013 is quashed.

[45] The appellant is re-sentenced as follows:

> Count 1, without proceeding to conviction 12 months detention, fully suspended. Pursuant to s 98 the period specified that the appellant must not commit any further offences is 12 months from today. For the first six months of that period the following conditions apply:
>
> (1) To be under the supervision of a Probation and Parole Officer and follow all reasonable directions as to supervision, reporting, residence, education, employment and associates;

(2) If directed, participate and complete counselling as directed by a Probation and Parole Officer.

Counts 2-8, without proceeding to conviction the appellant is released on giving security in his own recognisance in the sum of $100 to be of good behaviour for six months commencing today.
