MD v Brown & Ors [2012] NTSC 49

PARTIES:	MD v BROWN, Peter Phillip & ELLIS, Sally & DENNIEN, Jonathon
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 30 of 2012 (21142894) JA 31 of 2012 (21143836) JA 32 of 2012 (21143838) JA 33 of 2012 (21143843) JA 34 of 2012 (21202269)
DELIVERED:	20 JULY 2012
HEARING DATES:	2 JULY 2012
APPEAL FROM:	E MORRIS SM
JUDGMENT OF:	KELLY J

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – *Youth Justice Act* – failing to give appropriate weight to the principles that a youth should only be kept in custody for an offence as a last resort, and for the shortest period of time – fixing a sentence of imprisonment by reference to time spent on remand and available options for release – no miscarriage of justice – appeal dismissed

CRIMINAL LAW – Appeal against sentence – *Youth Justice Act* – appeal against sentences imposed because they are manifestly excessive – sentences not manifestly excessive having regard to the gravity of the offending in all of the circumstances – appeal dismissed

Youth Justice Act
Care and Protection of Children Act

Bartusevics v Fisher (1973) 8 SASR 601, applied.

Jambajimba v Dredge (1985) 33 NTR 19; *Van Toorenburg v Westphal* [2011] NTSC 31, followed.

Carcuro v Norris [2007] NTSC 18; *M v Waldron* (1988) 56 NTR 1; *P (a minor) v Hill* (1992) 110 FLR 42, referred to.

REPRESENTATION:

Counsel:

Appellant:	G O'Brien-Hartcher
Respondents:	C Henderson

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondents:	Office of the Director of Public Prosecutions

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

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JA 30 of 2012 (21142894)
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JA 32 of 2012 (21143838)
JA 33 of 2012 (21143843)
JA 34 of 2012 (21202269)

BETWEEN:

MD
Applicant

AND:

PETER PHILLIP BROWN

AND:

SALLY ELLIS

AND:

JONATHON DENNIEN
Respondents

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 20 July 2012)

[1] In December 2011 MD was 14 years old. She had already committed a number of serious offences, two counts of entering a dwelling house with intent to commit an offence, two counts of property damage and one count

of stealing. One charge of property damage involved "trashing" a school and causing approximately $30,000 worth of damage.

[2] These offences were committed in August 2009 when she was just 12 years old, March 2010 when she was 12 and May 2010 when she was 13. In each case the Youth Justice Court found the offence proven and no conviction was recorded. She was dealt with for all of these offences at the same time and released on a bond to be of good behaviour for 12 months.

[3] MD complied with the conditions of her bond. However, shortly after the 12 months had expired, she committed further offences. Between 4 and 6 November 2011 she unlawfully entered a dwelling house with intent to steal, caused property damage, and stole six bottles of beer. As a result she was charged with intentionally damaging property, unlawful entry of a dwelling house with intent to steal and stealing.

[4] On 1 December 2011 MD threw rocks on a roof of a shop in Katherine, assaulted the proprietor of the shop and yelled obscenities at him, knocked over a rubbish bin full of garbage in the front entrance to the shop and threw a milk crate at a vehicle parked in front of the shop. As a result, she was charged with assault, disorderly behaviour in a public place and using obscene language.

[5] On 10 December 2011 she unlawfully entered another dwelling house with intent to steal and was charged with that offence.

[6] Between 10 and 12 December 2011 MD and some co-offenders broke into a child care centre, emptied the contents of filing cabinets onto the floor, smeared food and food colouring around the kitchen area and set off fire extinguishers, and stole three cameras. Her explanation for this offending was that she was "being stupid and bored". As a result of this incident she was charged with trespass, entering a building with intent to commit a crime, property damage and stealing.

[7] On 17 January 2012 MD and a co-offender broke into a car which had been left at a car park in Katherine. They stole some keys from the car and used them to enter a Unit where they stole a wallet and a mobile phone and some car keys. They used the car keys to drive away in the car they had broken into. They drove into the bush, lost control of the vehicle, and hit a tree and then used the stolen phone to call police to come and pick them up as they were stranded in the bush. As a result MD was charged with interfering with a motor vehicle, stealing from a motor vehicle, aggravated unlawful entry, stealing, unlawful use of a motor vehicle and driving while unlicensed.

The sentencing process

[8] On 21 February 2012 MD pleaded guilty to the above charges and the magistrate ordered a pre-sentence report and adjourned all matters for 6 weeks to enable that to occur. MD was remanded in custody. The learned magistrate also ordered the Department of Children and Families ("DCF") to provide information to Community Corrections in relation to MD's

background and history with the Department and ordered DCF to provide to the court a copy of the last application under the *Care and Protection of Children Act*.

[9] On 5 April 2012 MD received the following sentences.

(a) On file 21143838 (property damage, aggravated unlawful entry and stealing) she was sentenced to an aggregate term of 91 days detention commencing 16 January 2012 without conviction.

(b) On file 21142984 (assault, obscene language and disorderly behaviour) she was sentenced to two months detention also commencing 16 January 2012, that is to say, fully concurrent with the sentence of 91 days.

(c) On file 21143836 (aggravated unlawful entry of a dwelling house) she was sentenced to 60 days detention also commencing 16 January 2012 without conviction, again fully concurrent with the 91 days sentence.

(d) On file 21143843 (aggravated unlawful entry at night, property damage and three counts of stealing) she was sentenced to an aggregate term of 91 days detention commencing 16 January 2012, again fully concurrent with the first 91 day sentence.

(e) On file 21202269 (interfering with a motor vehicle, stealing, aggravated unlawful entry of a dwelling house at night, stealing and aggravated unlawful use of a motor vehicle causing damage in excess

of $1,000) she was again sentenced without conviction this time to an aggregate good behaviour order of 12 months with conditions of supervision.

[10] At the time of sentencing MD had already been in custody for 81 days on remand acknowledged by the learned magistrate to be “quite a long time”. She had originally been granted bail in relation to some of the charges before the Court and had breached her bail by committing the later offences. On the same day that she was sentenced for the above offences she pleaded guilty to four counts of breach of bail.

The appeals

[11] MD has appealed against these sentences:

(a) on files 21142894, 21143836, 21143838 and 21143843 on the ground that the learned magistrate erred in failing to give appropriate weight to the principles that a youth should only be kept in custody for an offence as a last resort, and for the shortest period of time and that the sentences imposed are manifestly excessive; and

(b) on file 21202269 on the grounds that the learned sentencing magistrate erred by failing to adequately consider the principle that a youth should not be withdrawn unnecessarily from her family environment and that the conditions of the bond are unduly onerous. [These grounds of appeal were abandoned at the hearing of the appeals.]

Principles applicable to appeals against sentence

[12] An appellate Court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it can be shown that a 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. The presumption is that there is no error.

The appellant's contention

[13] Counsel for MD contends that the learned magistrate committed an error of principle in arbitrarily fixing the length of the sentence by reference to the amount of time the child had spent on remand and not by reference to the nature and seriousness of the offending and the personal circumstances of the appellant, and, further, that in ordering an additional 10 days to be served, the learned magistrate was effectively "warehousing" MD until the start of the school term rather than imposing a sentence commensurate with the seriousness of the offending. This, it is said, resulted in the learned magistrate failing to give effect to the principle set out in the *Youth Justice Act* that a youth should only be kept in custody for an offence as a last resort and for the shortest appropriate period of time.

[14] If this is indeed what the learned magistrate did it would be an error.

Principles applicable to sentencing children

[15] The principles to be applied in sentencing children, as set out in the *Youth Justice Act* were reviewed by Southwood J in *Carcuro v Norris.*[1] Essentially, before imposing a custodial sentence on a juvenile, the Court must ask itself if there are any other appropriate options. The emphasis is on rehabilitation – turning a delinquent youth into a responsible law-abiding adult. The youth should be kept in the community wherever that is practicable if the protection of the community does not require him or her to be removed from it.[2]

[16] In *P (a minor) v Hill*[3], Mildren J said:

> "The approach of the courts when dealing with juveniles must be cautious, patient and caring, with the interests of the juvenile foremost in mind. Of course there are some offences which warrant an immediate custodial sentence notwithstanding that the offender is a juvenile and notwithstanding, even, that the juvenile has no prior convictions. But these are extremely serious crimes, usually, but not always, crimes of violence where it is right that the need to punish and deter is given particular emphasis: see *R v Williams* (1992) 109 FLR 1 at 7. I do not say, of course, that in the case of a persistent offender, where the crimes are not in the extremely serious category, that it is not appropriate to order detention or imprisonment. But even in such cases, detention or imprisonment should only be used as a last resort, where all other options are inappropriate and the need for deterrence and to protect the community must be given special prominence: see, eg, *Yovanovic v Pryce* (1985) 33 NTR 24."

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1 [2007] NTSC 18 at para [18] to [24].

2 *M v Waldron* (1988) 56 NTR 1 at p 7.

3 (1992) 110 FLR 42.

The respondent's contention

[17] Counsel for the respondent submits that although the learned magistrate did not explicitly state that she was fixing the 91 days by reference to the seriousness of the offending and the personal circumstances of the appellant, I should infer that she did so from the fact that she remanded the appellant in custody on 21 February 2012 knowing that she would be in detention for a further six weeks. The respondent says that I can infer that the learned magistrate considered that 91 days to be actually served was the appropriate penalty for the totality of the offending in the circumstances.

Sentencing submissions and the magistrate's reasoning

[18] At the sentencing hearing on 5 May 2012, submissions from both counsel and the discussions between counsel and the bench largely focused on what future arrangements would be made for MD rather than the structure of the sentence. MD was under a long term protection order until the age of 18, and at the initial hearing on 21 February 2012, the magistrate had ordered the DCF to provide information to Community Corrections for the purpose of the pre-sentence report and also to provide the Court with a copy of the most recent protection order.

[19] At the sentencing hearing, MD's counsel advised the court that MD had expressed a preference for being placed at Brahminy, a facility which provides rehabilitation and education for troubled juveniles. However, it appeared that DCF did not support such a proposal. MD's second preference was to go to school at Woolaning boarding school. Issues then

arose as to where she would stay until the start of school term if that option were to be chosen and where she would stay during term breaks, as the court was told the school operated on a 6 weeks on, 1 week off basis.

[20] The magistrate was told that Brahminy was the longest placement MD had ever had, that she had prospered there and kept out of trouble, that she had been able to do drug and alcohol and anger management counselling there and had built strong relationships with the adults in charge. One of those adults, Alan Brahminy, attended court to support MD (though she was no longer in his care) and MD requested that he be permitted to stay as a support person. He told the court about the programmes that MD had participated in, and that she had been offered a job at a Paspaley site in Arnhem Land when she is old enough because of her performance on a work programme there with Brahminy. She had left Brahminy only because DCF had placed a limit on how long an individual child could stay in the programme.

[21] Initially, MD's responsible adult from DCF was not in Court to support her or to provide the court with any updated information about her, or about why DCF did not support a placement at Brahminy. This is despite the provisions of s 63(1) of the *Youth Justice Act* which provides that a responsible adult in respect of a youth must attend the Court and remain in attendance during proceedings against the youth for an offence. The magistrate accordingly adjourned the case until that person could be found

and brought to court. In the mean time, out of necessity, MD was told by the magistrate:

> "So you'll just need to stay downstairs (ie in the cells) until the DCF worker comes".

[22] When someone from DCF was brought to court, it was not MD's case manager and she was not aware of what long term plans (if any) were in place for MD. The DCF officer gave no explanation to the court as to why DCF was opposed to placing MD with Brahminy other than to say that there was currently an investigation in relation to the programme and "we're not supporting any children being placed there at this time." Asked by the magistrate if she could provide any further information than that, she replied, "No."

[23] The only suggestion the DCF officer provided was to place MD at Anglicare in Katherine until the beginning of Term 2 when she could go to Woolaning boarding school. The DCF officer was aware that MD had asked to go to Farrar House (a residential house with rostered staff) during school breaks but could give no information about how many children lived there or whether MD would be able to stay there.

[24] MD's counsel submitted that Anglicare in Katherine was not an appropriate placement for MD. As the magistrate noted, it was while MD was at Anglicare (under the care of DCF) that she breached her bail and committed the offences for which she was being sentenced. Counsel submitted that

even if Brahminy were not an option for long term placement, MD should be permitted to stay there for a short time until the school term started rather than spending any longer in custody or, failing that, that she go to Farrar House for that short period of time.

[25] In sentencing MD, the magistrate referred to her guilty plea and told her she would get a discount on her sentence because of the plea. She referred to the time MD had spent in custody and said:

> "So you've been in custody quite a long time now, ... and the sentence I'm going to give you is structured to take into account that you've spent a fair bit of time in custody already."

[26] She referred to MD's previous offences, and the seriousness of the current offences, and noted that the amount of property damage was not as great this time. She referred to the fact that MD had received a 12 month good behaviour bond for the last group of offences and that the present offending was not a breach of that good behaviour bond. She referred to the pre-sentence report and noted that MD had received counselling and found it beneficial, and had responded positively to the Brahminy programme. She specifically referred to MD's age (just turned 15 at the time of sentencing; 14 at the time of the offences) and said:

> "What I'm going to do is give you a sentence which means that you're going to be released shortly, not today. I am actually going to be sending you back to Don Dale today, but I'm going to release you the day before school starts. School is going to start on 16 April, so that is the week after Easter and I'm going to release you on the Sunday before that. So hopefully that your carers from DCF can get

you down and ready to start school the next day with your enrolment on 16 April.

But I'm also going to, in relation to one of your files, place you on a good behaviour bond, that's a promise you're making to the court to keep out of trouble, and I'm going to have some conditions on that bond that are around helping to keep you out of trouble. You are going to be on supervision and you are going to be required to do certain things."

[27] She went on to impose the sentences referred to above. In doing so she said:

"I've written your release date there just to make sure, because I've calculated the 91 days from the 16th of the 1st to the 15th of the 4th, but if I've got that wrong then I need to adjust that because what I want you to do is to get out on the 15th of the 4th."

Conclusions

[28] The learned magistrate was in a difficult situation. It seems to me that she was complying with the spirit of the principles applicable to sentencing youths: she was "cautious, patient and caring", and kept "the interests of the juvenile foremost in mind". She was focusing on the future wellbeing of MD with a view to her rehabilitation – taking the period of remand already served as a *fait accompli*.

[29] MD had been on remand for a lengthy period because she had committed further crimes while on bail. It has not been argued that she ought not to have been on remand in the circumstances: she was a persistent offender and it seems to me that the protection of the community did require her to be remanded in custody once she had breached her bail by committing further offences.

[30] The environment in which she had been placed by DCF (and to which DCF proposed returning her until the school term started) was not conducive to her rehabilitation. MD herself recognised that when she submitted to the magistrate, through her counsel, that her preference would be to go to Farrar House in Darwin over Anglicare in Katherine in the interim because she would not be so close to friends there and she would not be so likely to go astray.

[31] The suggestion by her counsel that MD be placed in Farrar House until school term started was not practicable without further information. The DCF officer who finally attended at the sentencing hearing was unable to tell the magistrate even how many children were housed at Farrar House, let alone whether there would have been a place for MD there until school started. Counsel for the appellant submitted that the learned magistrate should have adjourned the matter briefly to enable the option of her being housed at Farrar House until school started to be explored, but MD's counsel made no such application at the sentencing hearing. Moreover the sentencing hearing had already been adjourned twice – once for a little over 6 weeks to obtain a pre-sentence report,[4] and once to enable an officer of DCF to be located and requested to come to court while MD waited in the cells.

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[4] The hearing may in fact have been adjourned 3 times. It was originally adjourned to 3 April 2012, but the transcript shows that the sentencing hearing actually took place on 5 April.

[32] The learned magistrate did not expressly state that she was considering whether there were any appropriate available options other than a custodial sentence. Nor did she expressly state that she considered the objective seriousness of the offending warranted a 91 day custodial sentence in all of the circumstances. It has been said in this Court (and others) numerous times that it is not to be assumed that the failure to mention a sentencing principle means that it has been overlooked.[5] Magistrates are working under pressures which mean that they are simply unable to give the kind of detailed reasons which might be expected of a court delivering a reserved judgment, and sentencing remarks delivered in such circumstances should not be subjected to the same degree of critical analysis as the words in a considered reserved judgment.[6] An appellate court is entitled to assume that a magistrate has considered all matters which are necessarily implicit in any conclusions which he has reached.[7]

[33] On a fair reading of the sentencing remarks as a whole, the learned magistrate may well have fallen into the error complained of by the appellant: that is to say, she fixed the sentence of imprisonment for 91 days by reference to the time the appellant had spent on remand and the time left until term 2 started at Woolaning boarding school. However, regardless of

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5 *Van Toorenburg v Westphal* [2011] NTSC 31 at [23].

6 *Jambajimba v Dredge* (1985) 33 NTR 19, at 22 per Muirhead ACJ.

7 *Bartusevics v Fisher* (1973) 8 SASR 601.

whether this was the case, in the circumstances I consider that there was no miscarriage of justice.

[34] Clearly the sentencing magistrate was obliged to take into account the time already spent on remand. Counsel for the appellant submitted that the magistrate should simply have stated that she had taken into account all relevant factors, including the amount of time spent on remand, and placed MD on a good behaviour bond. Counsel pointed out that MD had complied with the last good behaviour bond she had been given. However, MD did not learn her lesson as a result of the imposition of that bond: shortly after the expiration of the bond, she committed further offences, was bailed, and then committed still further offences while on bail. Just as it was appropriate for MD to be remanded in custody, it seems to me that a custodial sentence of 91 days was not unwarranted. It was not manifestly excessive having regard to the gravity of the offending in all of the circumstances. I therefore dismiss the appeal.

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