PARTIES:	**TYDAY, Mark Thomas**
	v
	MALEY, Kevin Gerard
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NOS:	No. JA 8 of 1995
DELIVERED:	Darwin, 29 May 1995
HEARING DATES:	18 May 1995
JUDGMENT OF:	Angel J

CATCHWORDS:

APPEAL AND NEW TRIAL - Appeal - General principles - In general and right of appeal - Criminal law - Justices - Against sentence - General principles - Whether non-parole period required - Relevant considerations

Parole of Prisoners Act 1971 (NT) s4

Veen v The Queen (No 2) (1988) 164 CLR 465, applied

R v Mulholland (1991) 102 FLR 465, followed

R v Omar (1991) 55 A Crim R 373, referred to

Punch v The Queen (1993) 9 WAR 486, referred to

Grayson v The King (1920) 22 WALR 37, followed

Sullivan v The Queen (1987) 26 A Crim R 205, followed

Marshall v Llewellyn (SC (NT) - Kearney J - 3 May 1995), doubted

REPRESENTATION:

Counsel:

Appellant: John Lawrence

Respondent: Michael Fox

Solicitors:

Appellant: Glen Dooley NAALAS

Respondent: No instructing solicitor

Judgment category classification: A

Judgment ID Number: ang95004

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. JA8/1995

IN THE MATTER of the Justices Act

AND IN THE MATTER of an appeal against a sentence imposed by the Court of Summary Jurisdiction at Darwin

BETWEEN:

MARK THOMAS TYDAY
Appellant

AND:

KEVIN GERARD MALEY
Respondent

CORAM: ANGEL J

REASONS FOR DECISION

(Delivered 29 May 1995)

Appeal pursuant to s163 of the Justices Act.

On 21 February 1995 the appellant pleaded guilty before the Darwin Court of Summary Jurisdiction to unlawful entry of a building with intent to steal contrary to s213 of the

Criminal Code and stealing contrary to s210 of the Criminal Code. Each crime carries a maximum penalty of seven years' imprisonment. The appellant was sentenced to 15 months' imprisonment for the unlawful entry offence and three months' imprisonment for the stealing offence, such terms to be served concurrently. The Court of Summary Jurisdiction, in the exercise of its discretion declined to fix a non-parole period.

The appellant's notice of appeal dated 22 February 1995, contained five grounds of appeal, viz:

> "1. That the learned Magistrate erred in failing to fix a non-parole period;
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> 2. That the learned Magistrate erred in that he gave excessive weight to the principles of general and specific deterrence;
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> 3. That the learned Magistrate erred by failing to give effect to the prospects of rehabilitation of the appellant;
>
> 4. That the learned Magistrate erred by placing excessive weight on the appellant's prior criminal record;
>
> 5. That the sentence imposed was manifestly excessive."

At the hearing of the appeal, by leave, the appellant added a further ground of appeal that the learned Magistrate failed to take any or sufficient account of an alleged "gap" between the present offences and the appellant's prior offences.

When sentencing, the learned Magistrate remarked as follows:

> "In this matter the defendant has pleaded guilty to charges of unlawfully entering and stealing. On 23 November he went to 85 Cavanagh Street and tried to pull the rubber surrounds from a toilet bathroom window; that was an external window to the building. In attempting to remove the glass the glass broke and he cut his right hand.
>
> The defendant removed the glass; he got in; inside he located a cash box containing $380; took the box; left the premises; and discarded the cash box, keeping the money. Damage was caused in effecting entry, damage, I am told, to the value of $220 although no repair quotation has been provided.
>
> Unfortunately, there was not much assistance given by the prosecution in this matter, as to how the defendant was apprehended and what reason he gave to police for breaking in. In relation to the second point Mr Dooley [who appeared for the appellant before the learned Magistrate] has been able to assist in that regard.
>
> The difficulty with this case is, that when the defendant unlawfully entered he did so as a person who had been in trouble, on my calculation, 59 times before for unlawful entry and once for attempted unlawful entry, also 16 times before for stealing. So when he unlawfully entered and stole on this occasion he did so not as a first offender but a person who had been in trouble 59 times before for unlawful entry.
>
> In relation to those 59 times, there were three court appearances. He's had for unlawful entry three previous court warnings for unlawful entry type offences, in May 1989 at the Perth Children's Court for break in and steal. He received a warning when he was convicted and fined $100. And in the Perth District Court on 31 August 1989 he received a warning when he was convicted and placed on three years probation and ordered to perform 240 hours community service for 35 counts of break, enter and steal and eight counts of break and enter with intent.
>
> Then in September 1991 he appeared in this court, the Darwin Court of Summary Jurisdiction, I suspect before Mr McCormack in view of the fact that I have seen a presentence report which was requested on 12 September 1991, where he received a conviction and a gaol term, in

effect, comprising nine months imprisonment for, amongst other things, 15 charges of unlawful entry, another 14 charges of unlawful entry and a charge of attempted unlawful entry. So the point I'm trying to make is, he's had three court appearances, 59 charges, and that hasn't stopped him from unlawfully entering and stealing on this occasion."

The learned Magistrate, having said that the appellant was "entitled to some leniency, but not much", and having referred to the appellant's good current employment and the fact that the appellant was living a stable life with his Aunt and Uncle, said:

"They are the things that I take into account when I consider leniency or how to deal with the defendant lightly. However, there are other factors here that militate against leniency. One I have already mentioned, when he unlawfully entered he did so as a person who had been in trouble 59 times before for unlawful entry or unlawful entry type offences. He knew it was wrong because in relation to those 59 times he had had three previous court appearances, two in 1989 and one in 1991. By virtue of his court appearances he knew it was wrong but that didn't stop him from doing it again."

The learned Magistrate also said:

"In this case I'm of the view that a gaol term is appropriate. There has to be a gaol term to get across the message that people who get warnings delivered to them by the court for unlawful entry and stealing must not do it again. The obligation not to re-offend, the obligation to remain law abiding remains for a person's life. It's not one that, for example, wears off after three years or six years or ten years. I would have thought that Mr McCormack would have brought home to the defendant that he had to get his life on to the straight and narrow and, unfortunately, he's only done that part way.

He shows that he can hold work, get a good reference. Unfortunately, even in the context of knowing that there's work around the corner, he re-offends. It seems to me that there has to be something done to bring home

> to the community and bring home to the defendant himself, that people cannot offend, offend again, offend when they've had warnings in the past.
>
> I am of the view here that a gaol term is appropriate. I have to direct my mind as to whether or not that gaol term is suspended. The rationale for suspending gaol term[sic] is to give a person one last chance. I am of the view in this matter that it is not appropriate to give the defendant one last chance. The reason, again, is the message has to be sounded. People in the community have to be shown that they cannot offend, offend again, offend again. The time has to come when the ultimate sanction in the form of an actual term of imprisonment will be imposed to show people in the community who get court warnings, that they cannot offend and not suffer the consequences.
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> I am conscious of the fact that I'm taking Mr Tyday away from his employment. I'm conscious of the fact that that could interfere with his prosects of rehabilitation but, nonetheless, this is a case where I feel general deterrence and specific deterrence overwhelms the principle of rehabilitation. So Mr Tyday is convicted.
>
> On the charge of unlawful entry he is sentenced to imprisonment for 15 months with hard labour. On the charge of stealing he is sentenced to imprisonment for three months with hard labour, which is concurrent with the sentence of 15 months. And I decline to set a non-parole period, bearing in mind the defendant's antecedents, specifically his prior criminal history involving unlawful entry and stealing."

It was argued that whilst the appellant's prior record was relevant, the learned Magistrate erred in placing too much emphasis on that prior record. It was argued that looking at the current offences in isolation, the appellant could reasonably have expected to be sentenced to about three months' imprisonment and that the net sentence of 15 months' imprisonment was simply too much. It was submitted there was a gap between the current offences and the appellant's prior offending and that effect should have been given to the

appellant "going straight" for a period. It was submitted that the current offence "is relatively bland", and that the appellant, having good prospects for work, ought to have been dealt with by way of a home detention order or by way of a suspended sentence and that at least a non-parole period ought to have been fixed.

I can not agree that the learned Magistrate's sentences were manifestly excessive, or that any error has been demonstrated as to the reasoning of the learned Magistrate in arriving at his decision to impose a head sentence of 15 months' imprisonment. The extensive prior criminal record of the appellant in breaking, entering and stealing was a highly relevant sentencing factor. The prior record was relevant to an evaluation of the seriousness of the offences in respect of which the sentences were being imposed. There was no restitution. The appellant has convictions for offences of violence and a breach of a bond since his last break and enter convictions. There is no real or significant 'gap' in the appellant's offending.

It is unnecessary to dwell upon the principles relevant to sentencing recidivists. There has almost been too much 'learning' in this area of discourse and the relevant principles barely sustain the weight of words that has been brought to bear on them. It is, after all, not only

consistent with binding authority, viz: *Veen (No 2)* (1988) 164 CLR 465 and *Mulholland* (1990) 102 FLR 465, and other authorities, viz *Omar* (1991) 55 A Cr R 373 and *Punch* (1993) 9 WAR 486, but with the common understanding of mankind - both criminal and non-criminal alike - that, all other things being equal, A who commits his 54th burglary, deserves and will receive heftier punishment than B, who commits his first burglary.

In so far as *Marshall v Llewellyn* (Northern Territory Supreme Court, Kearney J, unreported, delivered 3 May 1995) says anything to the contrary, I respectfully dissent from it. Counsel for the appellant and counsel for the respondent each said he did not rely upon that decision as being consistent with principle or authority.

The following statement of McMillan CJ (Burnside and Northmore JJ concurring) in *Grayson* (1920) 22 WALR 37 at 38 is an accurate and authoritative statement of the law:

> "... but the law is quite clear, and it has been laid down in a number of cases that it is the practice of criminal courts before passing sentence to enquire into the antecedents of a prisoner, and to punish habitual offenders more severely than those who have not been previously convicted or have not committed other crimes. But it is not right to be guided merely by previous convictions, and if the offence for which punishment is to be awarded does not indicate a deliberate return to crime, and there are circumstances which do not show that the offence was planned beforehand, less weight is to be given to previous offences. More weight should be given to previous convictions for offences of the same character as that for which the offender is to be

> punished than to convictions for offences of a different character.
>
> ...
>
> The learned judge was not only entitled but bound to look at [the offender's] previous history ..."

The appellant's present crimes demonstrated a deliberate return to breaking, entering and stealing and a continuing attitude of disobedience of the law. His antecedent criminal history illuminated his moral culpability in respect of the present offences, demonstrated propensity and a need to impose condign punishment to deter him and other offenders and re-offenders from committing this type of offence which is regrettably prevalent in the Northern Territory. Retribution and the protection of law abiding citizens also justified condign punishment in the present case.

As I have said, the learned Magistrate declined to specify a non-parole period. Counsel for the appellant argued that the learned Magistrate had erred in declining to fix a non-parole period because of the antecedents of the appellant without apparent reference to the nature of the offence, and he referred to *Sullivan and Rigby* (1987) 26 A Crim R 205. In that case the Northern Territory Court of Criminal Appeal considered the principles governing the fixing of non-parole periods. In particular, consideration was given to the provisions of s4(1) and (3) of the Parole of Prisoners Act 1971 NT.

Section 4(1) of Parole of Prisoners Act 1971 (NT) provides that a non-parole period shall be set for prison terms of twelve months or longer with the proviso in s4(3) that "subsection (1) does not apply (a) if the court considers that the nature of the offence or offences and the antecedents of the offender do not warrant the specifying of the lesser term ...".

The court held that the word "and" in s4(3) was conjunctive and that while both the nature of the offence and the accused's antecedents must be considered, each considered separately must warrant a conclusion that a non-parole period should not be fixed before s4(1) is excluded. The statute created a prima facie obligation on a court to specify a non-parole period which should not be declined except on substantial grounds of the character referred to in s4(3). It seems to me, with respect, that in the present case the learned Magistrate did not sufficiently address the task imposed upon him by the statutory provisions in question as authoritatively construed in *Sullivan and Rigby*, and that the learned Magistrate's peremptory reason for declining to fix a non-parole period is sufficiently deficient for this court to interfere and re-consider the matter.

It seems to me the antecedents of the appellant and the nature of the offence, considered jointly or severally, did not justify requiring the appellant to serve the whole of his sentence. The appellant is 23 years of age. A term of imprisonment followed by a period at large subject to conditions, would, in all likelihood, not only benefit him, but the community too.

Rather than fix a non-parole period, pursuant to s5(1)(b) of the Criminal Law (Conditional Release of Offenders) Act, I propose to direct that after the appellant has served six months' imprisonment, the balance of the sentence of 15 months' imprisonment be suspended upon the appellant entering into a bond to be of good behaviour for a period of two years, own recognisance in the sum of $2000.

The appeal is allowed for that purpose and I order accordingly. Otherwise the appeal is dismissed.
