Taylor & Noble v Gokel [2001] NTSC 57

PARTIES:	TAYLOR, JAMES EDWARD v GOKEL, NOEL JOHN NOBLE, DAVID WILLIAM v GOKEL, NOEL JOHN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA4 and JA5 of 2001
DELIVERED:	13 July 2001
HEARING DATES:	11 July 2001
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellants:	S. Cox
Respondent:	G. Dooley

Solicitors:

Appellants:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecution

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

Taylor & Noble v Gokel [2001] NTSC 57

IN THE MATTER OF the *Justices Act* AND IN THE MATTER OF the *Criminal Code*

AND IN THE MATTER OF appeals against sentences handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

No JA4 of 2001

JAMES EDWARD TAYLOR
Appellant

AND

NOEL JOHN GOKEL
WRespondent

No JA5 of 2001

DAVID WILLIAM NOBLE
Appellant

AND:

NOEL JOHN GOKEL
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 13 July 2001)

[1] The appellants appeal against sentences imposed upon them in the Court of Summary Jurisdiction on 15 December 2000. On that occasion they each pleaded guilty to having unlawfully entered the premises of Carla Furnishers with intent to commit the crime of stealing. They also pleaded guilty to having stolen goods to the value of $3194 the property of Carla Furnishers.

[2] The circumstances of the offences were the subject of agreement before his Worship. On the evening of Saturday 25 November 2000 the appellants borrowed a motor vehicle from a friend. They used the vehicle as transport in an attempt to obtain drugs. They did not have any money to enable them to purchase drugs and they decided to break and enter premises to obtain property in the hope of exchanging it for drugs. At about 11.30pm they drove to the premises of Carla Furnishers on the Stuart Highway in Winnellie. They gained entry to those premises through an unlocked side door. They removed three DVD players, four VCRs and an air conditioner valued at $3194. They loaded the equipment into the vehicle and left the area. The property was then sold to unidentified persons. Mr Noble obtained $80 and used the money to buy drugs. Mr Taylor sold items to unidentified persons and obtained $250 in cash and a bag of cannabis which, it seems, was worth about $100.

[3] The appellants were both co-operative with the authorities. Mr Noble attended at the office of his solicitor on 30 November 2000 in relation to these matters and then surrendered himself to police. He entered into a record of interview with the police and made full admissions as to his involvement. In relation to Mr Taylor the police attended at his premises on 1 December 2000 and he went with them to the police station. He freely admitted his involvement in the offending. Both appellants made very early pleas of guilty and they were each dealt with by the court some three weeks after the offences were committed.

[4] Upon their pleas the appellants were each convicted and sentenced to six months imprisonment. The sentence imposed upon Mr Taylor was not suspended in whole or in part. His Worship directed that the sentence imposed upon Mr Noble be suspended after four months because of the less serious nature of his record of prior convictions and the fact that his last offence for dishonesty had occurred some 18 years before.

[5] In imposing sentence upon the appellants his Worship noted that they were each "mature aged men" (they were aged 36 and 37 years) who had committed the offences because they were "broke and wanted to purchase some drugs". Although it had been submitted that the offences were "spontaneous and not planned" his Worship did not accept that description in its entirety. His Worship noted that the offences may not have been planned until that evening but the appellants were driving around late at night with the intention of "doing a break". They entered the premises concerned unlawfully and stole items that were readily saleable and which were in fact sold that night. They were fortunate to find premises where they could obtain entry through an unlocked door. The items they stole were valued at more than $3000.

[6] His Worship noted that this kind of offending is prevalent in Darwin. In his remarks he emphasised the need for general deterrence. His Worship observed that these were not youthful offenders, they each had prior criminal records and they each stole to enable them to obtain drugs.

[7] Prior to imposing sentence the learned sentencing Magistrate recorded the personal circumstances of each of the appellants and gave reasons for distinguishing between them in the sentencing process.

[8] The appellants appeal against each sentence on the basis that the sentence is manifestly excessive. They also appeal on the basis that his Worship:

(a) failed to take into account their co-operation with the police,

(b) failed to take into account the pleas of guilty made at the earliest opportunity and

(c) failed to take into account the period of time that had elapsed since each appellant had last had a relevant conviction.

[9] The presentation of the appeal to this Court made it clear that the principal complaint was that the sentences were manifestly excessive. The remaining grounds of appeal were addressed as explaining how that situation may have arisen.

[10] Before I deal with the principal ground of appeal I propose to address the other grounds.

Co-operation and Early Pleas

[11] It was submitted that his Worship failed to take into account the co-operation with the police by each of the appellants. It was further submitted that, although reference was made to the co-operation provided by each

appellant, insufficient weight was accorded to that co-operation. The extent to which an offender has assisted law enforcement agencies in the investigation of an offence is a matter that must be taken into account in the sentencing process; s 5(2)(h) of the *Sentencing Act*. The level of co-operation is relevant both to the imposition of the sentence and to the consideration whether any part of the sentence should be suspended.

[12] In these matters it was agreed that Mr Noble surrendered himself to police and made full admissions. Whilst it was not suggested that Mr Taylor had surrendered himself to police, there was no dispute that once he was contacted by police, he co-operated fully.

[13] The fact that this level of co-operation occurred was acknowledged by his Worship in his sentencing remarks. He noted that:

> "They both attended – well, both were seen by police and made full records of interview and co-operated."

[14] It was also submitted that the learned sentencing Magistrate failed to take into account the fact that each appellant made a plea at the earliest opportunity. It was submitted that the sentences imposed did not reflect any discount for an early plea of guilty, nor was that fact mentioned by his Worship when he considered whether or not to suspend any part of the sentence of each of the appellants.

[15] The attention of his Worship was specifically drawn to the decision of the Court of Criminal Appeal in *Kelly v R* (2000) NTCCA 3 and that occurred

just before his Worship proceeded to sentence. The opening remarks of his Worship recorded that there was a plea of guilty "at a very early opportunity". He subsequently stated that he took "into account that they have pleaded guilty at a very early opportunity".

[16] Whilst his Worship did not quantify the discount allowed for the plea of guilty in each case, and it would have been helpful had he done so, there is no obligation imposed upon him to do so.

[17] As was acknowledged by the respondent in the proceedings before me the proceedings before his Worship were succinct and to the point. The sentencing remarks made by his Worship were presented in summary form and there was little or no elaboration on the way in which he gave effect to the matters of mitigation that he identified. This was so in relation to the co-operation of each of the appellants with the authorities and the early plea of guilty made by each of the appellants.

[18] It is necessary to bear in mind that much of the business of the Court of Summary Jurisdiction is conducted in circumstances that do not present the opportunity for providing detailed and considered reasons for decision. In *Hill v Arnold* (1976) 9 ALR 350 Muirhead J acknowledged the "difficulties and pressures under which our Magistrates are working" and that position remains the same today. Muirhead J noted that it was important that Magistrates give "at least a succinct account of their main reasons for decisions, especially when sentencing a person to prison". In *Janima v*

Edgington (NTSC, 6 September 1995, unpublished) Mildren J noted that "an appellate court is entitled, when considering the evidence and the reasons given, to assume that the Magistrate has considered all matters which are necessarily implicit in any conclusions which he has reached." In the present case whilst the learned sentencing Magistrate has been succinct in his reasons and has not expanded upon matters that he has taken into account he has clearly had in mind the issues of co-operation and the existence of an early plea. I see no reason to conclude that he has failed to accord due weight to those matters.

The Conviction Free Periods

[19] The final matter of specific complaint was the submission that his Worship failed to take into account the period of time since the last relevant convictions of each appellant.

[20] In the case of Mr Taylor the information provided revealed that his criminal history stretched back to 1979. It included a number of drug related offences and a dishonesty offence in 1991. There was also a conviction in February 1994 for burglary and stealing and, in relation to that matter, Mr Taylor was sentenced to 12 months imprisonment. Apart from one other minor offence in 1994 that was the last of his convictions.

[21] In the case of Mr Noble the information revealed that he had a record stretching back to 1982 when he was given a bond for an offence of break, enter and steal. He has some subsequent convictions but none for offences

of dishonesty. There was, as Ms Cox for the appellant pointed out, an 18 year gap between the last dishonesty offence of Mr Noble and the present offence.

[22] It is clear that his Worship considered the gap between the last relevant conviction and these offences in relation to each appellant. In the case of Mr Taylor he observed that "as recently as 1994 he was sentenced to 12 months imprisonment for burglary and stealing" and went on to say that he was before the court for similar offending and "knew the price to be paid for getting caught".

[23] His Worship proceeded to contrast the position of Mr Taylor with that of Mr Noble in relation to whom he noted that "he is in a slightly different situation than Taylor because he has not been before the courts before in any relevant sense for dishonesty, except 18 years ago. He has got a string of minor offences through the '80's into the early '90's and so far as he is concerned I will suspend some of that sentence".

[24] His Worship did not spell out how it was that he took into account the period free from conviction in relation to the head sentence of each appellant. That does not mean that he did not do so. His Worship indicated that he took all matters into account when fixing the head sentence of six months in each case. There is nothing in the sentences imposed or in his remarks that suggests he did not have regard to these matters. He contrasted the appellants with offenders who have "no prior record". He expressly

used that conviction free period as a basis for extending leniency to Mr Noble in the suspension of part of his sentence. His Worship did not see the position of Mr Taylor in the same light and declined to suspend any part of the sentence. He must be taken to have regarded the period during which Mr Taylor was free from conviction as not a sufficiently significant period as to warrant that leniency in all the circumstances of this matter. This approach was open to his Worship on the basis of the information presented to him.

Manifestly Excessive

[25] The principal complaint made in respect of the sentences was that they were manifestly excessive in all of the circumstances. Each appellant acknowledged that the offence was prevalent and that the goods taken were readily saleable items. However it was suggested that there existed a number of considerations that made the offending less serious than might otherwise have been the case.

[26] It was pointed out that there was no damage done in gaining entry to the premises. The premises were open. That is so and is a matter commented upon by his Worship.

[27] It was submitted that there was no evidence of planning. I do not accept that submission and note that the agreed facts included the acceptance by the appellants of the assertion made by the Crown that the appellants had decided “to do a break to obtain property in the hope of exchanging it for

drugs". Although there may have been no detailed plan it cannot be suggested that the appellants were doing other than searching for an opportunity to enter premises to steal goods. It was not a "spur of the moment" offence in that there was time for the appellants to consider their positions and desist. I accept that the operation was not one that could be described as sophisticated and I also accept the submission that "there was no organised fencing operation involved in the disposal of the goods". However many offences of this kind that come before the courts cannot be regarded as sophisticated and I note that the appellants were able to readily dispose of the goods that they stole, notwithstanding that there was no evidence of an organised fencing operation. Leaving aside the presence of the unlocked door this offence is not an unusual example of its kind.

[28] A submission was made that the value of the property taken was not a large amount. The limited amount of property removed may reflect the fact that alarm bells commenced to ring when the appellants entered the building. In any event, whilst there are many cases in which far greater amounts are stolen, the fact remains that the taking of goods to the value of $3194 cannot be said to be trivial.

[29] The principles applicable to an appeal against sentence are well known. The exercise of the sentencing discretion will not be disturbed on appeal unless error in that exercise is shown. There is a presumption that there has been no error. The appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence was insufficient or

excessive. It interferes only if it can be shown that the sentencing Magistrate 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 Magistrate said in the course of proceedings or the sentence itself may be so excessive or inadequate as to manifest such error.

[30] The onus rests upon the appellant to demonstrate the sentencing discretion of the learned Magistrate was improperly exercised. As to the allegation that the sentence was manifestly excessive the appellants need to establish that the sentence is out of all proportion to any view of the seriousness of the offence which could reasonably be taken: *Cranssen v R* (1936) 55 CLR 509 at 520.

[31] Ms Cox, who appeared on behalf of both appellants, pointed out that his Worship must have had in mind a starting point of somewhere between 11 and 12 months imprisonment for each appellant. This follows from the fact that he imposed a sentence of six months imprisonment. In so doing the effective order of imprisonment was nine months taking into account the abolition of remissions (see s 58 *Sentencing Act*). If an allowance was made for the plea of guilty and the co-operation of the appellants with the authorities then the starting point for the sentencing process must have been of the order suggested.

[32] In these matters it is acknowledged by the appellants that the offences were serious. They occurred in circumstances where there was a degree of planning in that the appellants proceeded with a view to entering premises and stealing property for subsequent sale or exchange. The items stolen were selected on the basis of their ready saleability and they were sold promptly with the proceeds used to purchase drugs. These offences are commonplace in our community and cause predictable and considerable hardship to the owners of commercial premises. Whilst these particular offences cannot be said to be at the most serious end of the scale they are also not trivial. The maximum penalty on each count for each appellant is imprisonment for 7 years.

[33] In relation to the appellants it is to be noted that they each have prior criminal records. The criminal history of Mr Taylor is more serious and recent than that of Mr Noble and this was recognised in the sentencing process. Neither of the appellants has the advantage of being able to claim to be a youthful offender. The offending was motivated by the desire to obtain drugs.

[34] Whilst the sentences imposed may be regarded as being in the upper end of the permissible range of sentences, in all of the circumstances it seems to me that they were within the range available to his Worship. Further, whilst others may have structured the sentences differently, the approach adopted by his Worship does not demonstrate error. He has considered the need for parity in sentencing but has also appropriately distinguished between the

two appellants. He has referred to and has expressly taken into account the matters which the appellants now say he failed to take into account.

[35] I am unable to see that his Worship has erred in the manner claimed by each appellant or at all, and I dismiss the appeal.

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