Prior v Malogorski [2005] NTSC 52

PARTIES:	RODERICK CHARLES PRIOR
	v
	MARK ANTHONY MALOGORSKI
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 45/05 (20428920)
DELIVERED:	14 September 2005
HEARING DATES:	9 September 2005
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Appellant:	M Johnson
Respondent:	S Geary

Solicitors:

Appellant:	Geoff James
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	tho200506
Number of pages:	11

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

Prior v Malogorski [2005] NTSC 52
No. JA 45/05 (20428920)

BETWEEN:

RODERICK CHARLES PRIOR
Appellant

AND:

MARK ANTHONY MALOGORSKI
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 14 September 2005)

[1] This is an appeal from a decision of a magistrate imposed in the Court of Summary Jurisdiction on 18 August 2005.

[2] On that date the appellant entered a plea of guilty to a charge that on 16 December 2004 did possess child pornography contrary to s 125B(1)(a) of the Criminal Code.

[3] Following submissions by counsel for the appellant and the respondent, the learned stipendiary magistrate convicted the appellant and imposed a sentence of six months imprisonment suspended after two months. The operative period set was two years.

[4] The facts in support of the charge, which were admitted before the learned stipendiary magistrate, are as follows:

> "… the defender was the head engineer for the Hot 100 radio station situated at 4 Peary Street, Darwin City. The defender is now unemployed having been sacked of his duties due to prosecution.
>
> At 5:20 pm 25 June 2004, using a work computer situated in the offenders office within the Hot 100 building, the offender accessed the internet by the company internet hub. After accessing a free web site the offender downloaded an image depicting a pre-pubescent female posing naked and intentionally saved this image on the hard drive of his work computer.
>
> The file was saved to the following file path; c/documents/settings/rodmydocuments/mypictures over the next six months the offender used his work computer and the internet to access various free web sites whereby he downloaded and intentionally saved a number of images of pre-pubescent females all posing naked. Each of these saved images were saved on the hard drive within the same above file path.
>
> On 16 December 2004 the management of the radio station conducted an audit of the offenders computer and located an image which depicted a pre-pubescent female posing and contacted the police.
>
> The computer hard drive was seized by police and interrogated whereby a total of 119 child abuse images were located, each depicting pre-pubescent females aged between about 8 and 14 years of age. All images have been categorized at level 1 accept for two images which are level 2.
>
> On 17 December 2004 the offender was arrested at his home, and later interviewed, he admitted to downloading the material and intentionally saving it to the hard drive of the work computer, he stated that he did not – he did this out of curiosity and not to fuel any sexual desire."

[5] Reference was made to the categories of child pornography and levels of seriousness, these were set out in the sentence of Angel J in *R v Ian Neville Brock* (unreported) SCC 20402654 delivered 2 December 2004 in which his Honour refers to the categories of child pornography and levels of seriousness as set out in the leading English authority of *R v Oliver* [2003]

2 Cr App R (S) 15 (p64). The category in ascending order of seriousness is as follows:

> "(1) images depicting erotic posing with no sexual activity;
> (2) sexual activity between children, or solo masturbation by a child;
> (3) non-penetrative sexual activity between adults and children;
> (4) penetrative sexual activity between children and adults;
> (5) sadism or bestiality."

[6] The principles to be applied in dealing with an appeal of this nature are set out in *Raggett, Douglas & Miller v R* (1990) 50 A Crim R 41. It is not appropriate for this Court to substitute its own opinion for the decision of the learned stipendiary magistrate. This Court can only interfere with the sentencing magistrate's discretion if it is convinced that the sentence was not just excessive or inadequate, but manifestly so.

[7] It is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such to afford convincing evidence that, in some way, the exercise of discretion has been unsound.

[8] The appellant's grounds of appeal are as follows:

Ground 1: The magistrate placed too much emphasis on the increased penalties provided by the Criminal Code Amendment (Child Abuse Material) Act 2004.

[9] On 8 November 2004, an amendment to the Criminal Code came into effect. The amendment involved an increase to the maximum penalty for possession

of child abuse material contrary to s 125B from two years to 10 years imprisonment. It was a very substantial increase in the maximum penalty provisions. In the Second Reading Speech the Attorney-General Dr. Philip Toyne, stated with respect to possess child pornography:

> "This is a significant increase in penalties from the existing offences and is meant to provide courts with sufficient discretion to impose a penalty that is commensurate with the amount and nature of material that is the subject of the prosecution. The increase in penalty also recognises the link between possession of material that depicts children in a sexual manner and the commission of sexual offences against children."

[10] The learned stipendiary magistrate indicated during the course of submissions to him that Parliament, which is elected by the community, had expressed a view as to the seriousness of this offending by increasing the maximum penalty from two years to 10 years imprisonment.

[11] This Court has had an opportunity to view all of the photographs, as did the learned stipendiary magistrate. They were tendered as Exhibit 1 on the plea of guilty in the Court of Summary Jurisdiction.

[12] I agree with the comment made by the learned magistrate after he had viewed the photographs and in the course of his reasons for sentence (p 31):

> "I'm of the view that community outrage at this kind of offending has moved on, even in the last two or three years and in terms of just becoming more and more of something of concern. Having said that, it's true to say that none of the images involved the extremely perverted and deviant forms that are described in other categories as known and described by the superior courts. I accept that, by way of mitigation that this position was not intended for profit, distribution or otherwise showing around to anyone else."

[13] In his submission to this Court, Mr Johnson on behalf of the appellant, made extensive reference to the sentence of Angel J in *R v Ian Neville Brock* (supra) and his Honour's reference to the English decision in *Oliver*.

[14] The references to the decision in *Oliver* included the fact that the proposals were guidelines only for sentences and that custodial sentences should only be imposed when necessary.

[15] Mr Johnson also drew my attention to the statement in *Oliver* as quoted in *R v Brock*:

> "We agree with the Panel that the custody threshold will usually be passed where any of the material has been shown or distributed to others, or, in cases of possession, where there is a large amount of material at level 2, or a small amount at level 3 or above."

[16] Angel J then adopts with approval, the specific factors set out in *Oliver*'s case, which are, the specific factors capable of aggravating the seriousness of a particular offence:

> "(i) If the images have been shown or distributed to a child.
>
> (ii) If there are a large number of images. It is impossible to specify precision as to numbers. Sentencers must make their own assessment of whether the numbers are small or large. Regard must be had to the principles presently applying by virtue of Canavan, Kidd and Shaw [1998] 1 Cr Appellant R (S) 243.
>
> (iii) The way in which a collection of images is organised on a computer may indicate a more or less sophisticated approach on the part of the offender to trading, or a higher level of personal interest in the material. An offence will be less serious if images have been viewed but not stored.
>
> (iv) Images posted on a public area of the Internet, or distributed in a way making it more likely they will be found accidentally by

computer users not looking for pornographic material, will aggravate the seriousness of the offence.

(v) The offence will be aggravated if the offender was responsible for the original production of the images …

(vi) The age of the children involved may be an aggravating feature …"

The Court goes on to say:

Some conduct may manifestly (that is to say, apparently from the image) have induced fear or distress in the victim."

[17] I adopt with respect the assessment of Angel J that *Oliver*'s case provides appropriate guidance to courts in the Northern Territory and that there should be a universal approach to the problem.

[18] Mr Johnson for the appellant agrees that the learned magistrate had conceded none of the aggravating features referred to by the court in *Oliver* applied to this appellant. It is the argument for the appellant, as presented by Mr Johnson, that the learned magistrate failed to take sufficient note of the fact the appellant has not gone past the "custody threshold" as discussed in *Oliver*.

[19] I agree from a reading of the cases, that the offending in *R v Brock* and in the decision of *Oliver,* was far more serious than that of this appellant, as was the offending in the recent decision of Southwood J in *The Queen and CB* delivered 31 August 2005.

[20] I do not accept the submission on behalf of the appellant that the learned magistrate did not take sufficient note of the fact the appellant had not gone past the "custody threshold" for imprisonment.

[21] The learned stipendiary magistrate correctly expressed where, in the category of seriousness, this offence fell. His Honour was required to have regard to the recent substantial increase in the maximum penalty provisions for this offence under the Criminal Code and to the provisions of s 78BB of the Sentencing Act which required a term of actual imprisonment to be imposed.

[22] I do not accept the argument that the learned magistrate placed too much emphasis on the increased penalties provided by the Criminal Code Amendment (Child Abuse Material) Act 2004.

[23] This ground of appeal is dismissed.

Ground 2: The sentence was manifestly excessive

[24] I accept that many of the arguments put forward on behalf of the appellant under Ground 1 are applicable to this ground of appeal.

[25] There are more serious examples of this type of offending that come before the Court. However, I agree with the submission made by Mr Geary, on behalf of the respondent, that this offence was of a serious nature for the following reasons.

1) There were a large number of photographs, totalling 119.

2) The pictures were not downloaded on the spur of the moment, but over a period of approximately six months.

3) The images were downloaded at work, breaching the trust of the employer.

4) There were only two Category 2 pictures, however, all 119 pictures amount to sexual exploitation of children.

[26] I also agree with the submissions made by Mr Geary, on behalf of the respondent, that the children depicted in these photographs are being subjected to a form of abuse. They are victims who have been exploited for an unlawful purpose. The appellant was well aware that what he was doing was unlawful. He downloaded such photos over a substantial period of time. The photos are in, what appears to be, in an artificial or studio setting and appears to be professionally presented.

[27] The learned stipendiary magistrate had before him a number of documents which were tendered on the plea in mitigation. These included a reference from Mr Ron Lawford, a past president of the Rotary Club of Darwin South, setting out Mr Prior's great contribution to the community in a voluntary capacity. There are statements from close members of the appellant's family as to the high regard and affection in which he is held by family and friends. There was also a report from consultant psychiatrist Dr N. McLaren which sets out the circumstances of the offending, and the background and history of the appellant in considerable detail. I quote one paragraph from page 5 of the report:

> "There is nothing in the information available to me to indicate that your client requires treatment of any form. I accept his assurances that the devastation his action has wrought upon his life will be quite sufficient to prevent a repetition."

[28] The learned stipendiary magistrate acknowledged all of these matters when he said during the course of his reasons for sentence (tp 32):

> "… This man is entitled to draw upon a well of good credit, in terms of his own background to mitigate an otherwise appropriate sentence. He is 57, he's a devoted and caring family man of positive good character and long community service. His family have stuck by him, he is loved and I do think it's very unlikely he will offend like this again. He's pleaded guilty and he's cooperated with the authorities."

[29] Mr Johnson on behalf of the appellant submitted that Mr Prior had already suffered a complete disruption to his life as a consequence of his offending. This included loss of employment. He now has employment in Queensland and has had to leave home and find temporary accommodation. He has suffered disgrace and humiliation. He has had to give up all that is important to him including his membership of the Rotary Club and his sporting activities. He has suffered shame and guilt with respect to the effect this matter has had upon his family.

[30] Mr Johnson referred to a decision in the Appeal Court, High Court of Justiciary in Scotland in the matter of *James Brannan McGaffney v Her Majesty's Advocate* [2004] Scott High Court 27 delivered 6 May 2004. This decision specifically states that the consequences to the appellant of his loss of employment, the loss of good name and the fact he had to sell his house

and move away, should have been taken into account in the sentence. The Court noted that the Sheriff who had imposed the sentence had regarded these matters as irrelevant, when in fact they ought to have been taken into account.

[31] In the appeal before this Court, it is not suggested the learned magistrate found the matters which affected the appellant were irrelevant. The complaint is, that there is no indication the learned stipendiary magistrate did take them into account. In addition to the factors which the learned magistrate specifically mentioned he was taking into account, he went on to say:

> "I've listened very carefully to all the submissions by Mr Johnson and I've taken into account his eloquence in what he's had to say together with the appropriate submission from the prosecutor and all the documentary material."

[32] I agree with Mr Johnson's basic submission, that these factors are matters to be taken into account in determining the ultimate sentence. I note that on 18 August 2005, Mr Johnson made very complete and detailed submissions to the learned stipendiary magistrate in which he raised all of these matters.

[33] Immediately upon completion of the submissions, the learned stipendiary magistrate embarked upon giving his reasons for sentence and imposing a sentence. I am not prepared to find that the magistrate did not take into account these matters, even though he may not have identified each and every one of them. In his reasons for sentence, his Honour does make

sufficient reference to matters in mitigation to indicate that he was well aware there was a great deal to be taken into account when sentencing this offender. In the context of this case I am not able to conclude that the learned stipendiary magistrate was in error because he did not mention each and everyone of the matters he took into account.

[34] This was a serious offence. From the circumstances of the offence and taking into account the mitigating factors, the sentence does not appear to be manifestly excessive.

[35] For these reasons I would dismiss this ground of appeal.

[36] The order of this Court is that the appeal be dismissed.

———————————————————