Payne v The Queen [2007] NTCCA 10

PARTIES:	PAYNE, Roseanne Rita
	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:	CA 12 of 2006 (20520811)
DELIVERED:	20 AUGUST 2007
HEARING DATES:	14 AUGUST 2007
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL AND RILEY JJ
APPEAL FROM:	MARTIN (BF) AJ, 16 JUNE 2006

CATCHWORDS:

APPEAL – CRIMINAL LAW
Appeal against sentence – multiple counts of stealing, forgery and uttering – whether sentence manifestly excessive – fresh evidence not available at sentence – appeal allowed – re-sentenced.

Criminal Code Act 1983 (NT) s 210, s 233, s 258, s 260, s 276B and s 285

Dooley v The Queen [2003] NTCCA 6, applied
Damaso v The Queen (2002) 130 A Crim R 206; *Daniels v The Queen* [2007] NTCCA 9, referred to.

REPRESENTATION:

Counsel:

Appellant:	P Elliott
Respondent:	F Hardy

Solicitors:

Appellant:	Collier & Deane
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Payne v The Queen [2007] NTCCA 10
No. CA 12 of 2006 (20520811)

BETWEEN:

ROSEANNE RITA PAYNE
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL AND RILEY JJ

REASONS FOR JUDGMENT

(Delivered 20 August 2007)

The Court:

Introduction

[1] The appellant pleaded guilty to a series of offences of dishonesty including stealing. The learned sentencing Judge imposed a total sentence of six years and fixed a non-parole period of three years.

[2] On appeal, the appellant submitted that the head sentence and non-parole period were manifestly excessive. In addition the appellant relied upon fresh evidence which was not available at the time of sentence.

[3] At the conclusion of the hearing of the appeal the Court allowed the appeal and set aside the sentence. The Court imposed a sentence of five years

imprisonment commencing 13 June 2006 and ordered that the sentence be suspended on conditions of supervision after the appellant had served a period of 14 months commencing 13 June 2006. In other words, the sentence was suspended immediately.

[4] We now set out our reasons for allowing the appeal.

Facts of Offending

[5] On 6 April 2004 the appellant commenced employment as a Primary Health Care Access Program administrative assistant with the Central Australia Remote Health Division of the Northern Territory Department of Health and Community Services. She worked from an office in Alice Springs.

[6] The Remote Health Program commenced in March 2004 and is responsible for managing the primary health care access program for three remote Aboriginal health zones which receive funding. It is a program of health system reform designed to improve access to and provision of appropriate primary health care services for Aboriginal and Torres Strait Islander people at the local level. The program aims to empower individuals and communities to take greater responsibility for their own health.

[7] Part of the implementation of the program involved steering committees (called reference groups) formed for each zone which were made up of community members nominated by their respective communities. The reference groups met from time to time and it was the responsibility of the appellant to organise such meetings and arrange for payment of members

attending those meetings. The appellant was required to follow a particular process in obtaining cash and arranging payment to each member. Not surprisingly, the appellant was required to complete documentation for the recording of such payments.

[8] The first zone meeting for a particular area occurred on 28 July 2004. On 26 July 2004 the appellant correctly completed the necessary records and obtained the cash for distribution to the reference group members. Appropriate distribution occurred.

[9] The appellant's offending began immediately after the first meeting. On the same day as she completed the necessary paperwork for the first meeting to which I have referred, the appellant also completed paperwork for the meeting of a different zone. On 30 July 2004 she obtained cash which was intended for payment to members at a meeting scheduled for 3 August 2004. The meeting was cancelled and the offender stole the cash. In order to cover the theft the appellant forged a record relating to payments to members.

[10] The appellant pleaded guilty to seven series of offences of stealing and forging and uttering which resulted in the theft of almost $350,000 over the period July 2004 to April 2005. The amounts involved in each series were as follows:

Counts 1, 2 and 3 -	$1,885.50
Counts 4, 5 and 6 -	$3,746.86

Counts 7, 8 and 9 -	$2,021.58
Counts 10 and 11 -	$2,763.80
Counts 12 – 15 -	$2,709.48
Counts 16 – 20 -	$2,562.90
Counts 22 – 24 – rolled up counts between October 2004 and April 2005 -	$329,147.05

[11] Count 21 was an offence of unlawfully accessing data with intent to gain a benefit personally. The appellant intercepted an email communication to her supervisor intended to alert the supervisor as to the frequency and amounts of payments being collected by the appellant for the program. Purporting to be the supervisor, the appellant replied to the communication advising that all payments were in order. She then deleted the records of those emails. Subsequently the appellant sent further emails in the name of her supervisor advising that another payment was about to occur.

Personal Circumstances/Reason for Offending

[12] The appellant is an Aboriginal woman. At the time of sentence in June 2006 she was a single mother aged 22 years caring for her one year old child. The sentencing Judge had been given limited information about the appellant's childhood which, on the information available to the sentencing Judge, was correctly described by his Honour as not "an ideal upbringing". As will

appear later in these reasons, the information conveyed to his Honour was grossly inadequate.

[13] Counsel informed the sentencing Judge that the appellant dropped out of school at about year 10 level, following which she did some work at the Centre for Applied Technology in Alice Springs as a receptionist as well as undertaking a traineeship for receptionist work. Counsel advised his Honour that the appellant had a problem with alcohol, but ceased drinking when she became pregnant and replaced the drinking with gambling. Against that background the appellant commenced her offending. In substance counsel conveyed to the sentencing Judge that the appellant had a problem with gambling and stole to gain funds for that purpose and to help others who sought money from her. Counsel put to his Honour that ultimately the appellant had nothing to show for the money she had stolen.

[14] The offences under consideration were not the first offences of dishonesty committed by the appellant. On 17 July 2003 the appellant was dealt with for offences of stealing and furnishing false information committed in the period March - May 2002. The appellant was responsible for receiving and banking cheques and cash received by her employer from Aboriginal community stores. The sentencing Judge was informed that the appellant took the cash and purchased clothes. The appellant was convicted and released upon entering into a bond for a period of 12 months. That bond expired shortly before the appellant commenced re-offending.

Manifestly Excessive

[15] For the offences of stealing and forging and uttering, the sentencing Judge imposed an aggregate sentence of five years and seven months imprisonment. On count 21 in respect of unlawfully accessing data, his Honour imposed a sentence of ten months imprisonment, five months of which he directed be served concurrently with the aggregate sentence of five years and seven months. In this way his Honour arrived at an effective head sentence of six years in respect of which he fixed the minimum non-parole period of three years.

[16] There is no error apparent in the approach of the sentencing Judge. His Honour correctly apprehended the facts of the offending and plainly took into account all the matters that had been put to him by way of mitigation. In particular, his Honour had regard to the young age of the appellant and the hardship she would suffer by reason of being separated from her child. His Honour made an allowance in the order of 20 per cent to reflect the appellant's pleas of guilty and that was an appropriate allowance.

[17] On the hearing of the appeal, counsel for the Director of Public Prosecutions conceded that the total head sentence of six years was manifestly excessive. On the basis of the material presented to the sentencing Judge, we do not agree.

[18] In order to demonstrate a sentencing range applicable for the type of offending under consideration, the parties placed before the Court a

schedule of sentences imposed for similar crimes in recent years. Not all relevant sentences were included in the schedule. We emphasise that if it is intended to rely upon a series of sentences as establishing a sentencing range for a particular type of offending, the material should be comprehensive and should include all relevant sentences. The use of statistical material was discussed by this Court in *Damaso v The Queen* (2002) 130 A Crim R 206 at 216. Generally as to the question of "tariffs" and sentencing ranges, we refer to the observations in the joint judgment of Martin (BR) CJ and Riley J in *Daniels v The Queen* [2007] NTCCA 9. Those observations are applicable to the matter under consideration.

[19] Notwithstanding that the summary of sentences was incomplete, we are well aware of the general range of sentences imposed in recent years for the types of crimes under consideration. Having regard to that general range, on the basis of the material placed before the sentencing Judge we are of the view that the sentence of six years is not outside the relevant sentencing range. It is undoubtedly a severe sentence, but while near the top of the range it is nevertheless within the proper range of the sentencing discretion.

Additional Material

[20] The appellant was sentenced on 16 June 2006. At that time, unbeknown to the appellant, she had very recently become pregnant. The pregnancy was discovered on 25 July 2006 as a consequence of medical tests conducted after the appellant was imprisoned. The appellant gave birth to a baby girl

on 10 March 2007. The baby has continued to reside in the Alice Springs Correctional Centre with the appellant. As a consequence of the nature of the present facilities and crowded conditions in the female dormitory, the Superintendent of the Correctional Centre has determined that after the child commences crawling it will be necessary for the child to leave the prison. This is likely to happen in the very near future.

[21] The Crown concedes that the fact of pregnancy which existed at the time of sentencing is fresh evidence relevant to the exercise of the sentencing discretion. The circumstances in which Courts of Appeal will permit fresh evidence to be led on appeal where there was no error by the sentencing Judge in determining sentence were discussed in the judgment of Riley J, with whom Angel and Mildren JJ agreed, in *Dooley v The Queen* [2003] NTCCA 6. As Riley J explained in *Dooley*, "[t]he basis for receiving the new evidence is to be found in demonstrating the true significance of facts in existence at the time of sentence" [31]. In particular, if the fresh evidence would probably have altered the sentence imposed had it been before the sentencing Judge, it is in the interests of justice that appellate courts receive such evidence and reconsider the sentence.

[22] There is no suggestion that the appellant deliberately became pregnant in an endeavour to avoid being sentenced to imprisonment. Had the sentencing Judge known that the appellant was pregnant, his Honour would have been required to take into account the future consequences of the pregnancy. First, it is inevitable that imprisonment will bear more harshly upon an

offender who is pregnant. Secondly, following the birth of the child, although the child would be able to remain with the appellant for a few months, necessarily the circumstances of introducing a new baby to the world while in custody would be less than ideal.

[23] Thirdly, and importantly, if the sentencing Judge had known of the pregnancy, his Honour would have been required to take into account that approximately six months after the birth of the child the appellant would experience the extremely traumatic event of being separated from her child. In turn, this would lead to an inquiry as to the likely psychological effect upon the appellant of such a separation.

[24] In these circumstances, it is not difficult to envisage that had the sentencing Judge known of the pregnancy, his Honour is likely to have imposed a lesser sentence. In particular, it is probable that his Honour would have fashioned a sentence which enabled the appellant to be released before an enforced separation from her baby occurred.

[25] Fresh evidence as to sentence having been admitted, this Court is required to consider the question of sentence afresh. In those circumstances, the Court is required to consider all material relevant to the question of sentence. This includes material which does not qualify as fresh evidence because, with reasonable diligence, it could have been obtained at an earlier time and been placed before the sentencing Judge.

[26] Additional material that might not fit the category of fresh evidence concerns the appellant's mental state at the time of her offending. In substance, the material establishes that at the time of the offending the appellant was suffering from a severe psychological depression coupled with a compulsion to gamble. As the matter of sentence is to be considered afresh, it is unnecessary to determine whether, strictly speaking, this category of additional material is fresh evidence and whether, if it is not fresh evidence, it would have been received by this Court because it reflects upon the significance of facts that were in existence at the time of sentence.

[27] The sentencing Judge was told that the appellant had a "problem" with gambling. This submission grossly understated the true situation. In addition, counsel informed the sentencing Judge that about a year before the offending commenced the appellant lost an aunt to whom she was close and found the death very distressing. Counsel described the effect as "quite depressing" for the appellant. As will appear later in these reasons, that submission was a significant misstatement as to the true position.

[28] Shortly after the appellant was incarcerated, she was examined and tested by a forensic psychologist, Mr Joblin. In the course of his examination, Mr Joblin obtained significantly more information concerning the appellant's background than was placed before the sentencing Judge. In particular, the appellant was raised in a family that was exposed to severe alcohol abuse, violence and aggression. The appellant recalls the family

having to leave the house and sleep in parks or other locations to avoid her father's aggression.

[29] Significantly, during her schooling the appellant was singled out for abuse and bullying which included ridicule for the clothes she wore. The appellant's mother was working hard to provide food for the family, but there was little else for the family including proper clothes. In the view of Mr Joblin, because the appellant was psychologically vulnerable, "she experienced such negative attention profoundly". Mr Joblin expresses the opinion that during her schooling the appellant became seriously depressed and sought to answer the depression with alcohol which became a very important part of her life. The excessive use of alcohol ended when the appellant became pregnant and alcohol was replaced by gambling. This occurred because the appellant ceased associating with those who drank alcohol whom she considered her friends and began looking for another source of psychological reward. Ultimately the appellant became a compulsive gambler and became driven by "an overwhelming and uncontrollable impulse to gamble".

[30] In the opinion of Mr Joblin, the appellant was unable to cease her gambling or to control it notwithstanding that while gambling was psychologically satisfying, it also produced anxiety because the appellant knew what she was doing was wrong and was forced to lie to her family about her circumstances. This emotional conflict resulted in the appellant developing feelings of self reproach, guilt and regret.

[31] Mr Joblin concluded that for many years the appellant has suffered from psychological depression. The depression rendered her psychologically vulnerable and formed the basis of her difficulties with alcohol and then with gambling. At the time Mr Joblin saw the appellant in July 2006, she was suffering from a severe psychological depression which could not be adequately treated while she remains in custody. Mr Joblin brought these matters to the attention of the correctional services authorities and subsequently in May 2007 a psychiatrist, Dr Hickey, saw the appellant at the Alice Springs Correctional Centre. Although Dr Hickey did not have the benefit of Mr Joblin's report, essentially he confirmed the diagnosis by Mr Joblin.

[32] Both Mr Joblin and Dr Hickey agree that the appellant has insight into her condition and the need for treatment. Both agree that the appellant needs intensive ongoing treatment and that with treatment her prognosis for successful rehabilitation will be significantly enhanced.

[33] The appellant continues to suffer from a major depressive condition. She is also experiencing unresolved grief in respect of the death of her aunt. In the view of Dr Hickey, if the appellant is separated from her youngest daughter, she will experience more grief and her current depression will be made "much worse in the short term with possibly risk of self-harm". Having regard to the report of Dr Hickey and the prospect of the appellant being separated from her young daughter, in a report of 17 May 2007 Mr Joblin agrees with the view of Dr Hickey and expresses serious concern about the

consequences for the appellant if separated from her youngest daughter given her current “fragile psychological state” and “susceptibility to suicide”.

[34] As we have said, it is unnecessary to decide whether the evidence concerning the appellant’s compulsion to gamble and her depression at the time of offending is, strictly speaking, fresh evidence. However, in conjunction with the fresh evidence concerning the existence of pregnancy at the time of sentence, the evidence concerning the likely effect of separation from her baby daughter upon the appellant’s fragile psychological state is fresh evidence. It provides a compelling case that had the sentencing Judge known of the pregnancy and this effect of separation, his Honour would have fashioned a sentence resulting in the release of the appellant before such separation occurred.

Conclusion

[35] The relevance by way of mitigation of matters such as a gambling addiction and a major depression are well known. Not surprisingly, criminal courts are very cautious in allowing the existence of an addiction to gambling to be used as a factor of mitigation for crimes of stealing in the same way as courts are cautious about permitting addiction to drugs to be used as a factor of mitigation in respect of crimes of theft and robbery. It is not uncommon for such addictions to underlie the commission of crimes of dishonesty.

However, in some circumstances addiction may be given some weight in mitigation, particularly if it distorts the thought processes of the offender.

[36] Speaking generally, when a psychological state is causally linked to the commission of the crimes, it is always a matter of relevance to determination of the appropriate sentence. What weight can be given to that condition depends on a number of factors, including the seriousness of the offending and the degree of connection between the psychological state and the commission of the offences. In our view the evidence establishes a direct causal link between the psychological state of the appellant on the commission of the offences. This state adversely affected the ability of the appellant to think rationally and to resist the compulsion to gamble.

[37] The appellant has now served 14 months of the sentence. She has suffered the penalty of actual imprisonment, coupled with the separation from her first young child. She continues to suffer from a severe psychological depression and faces the prospect of being separated from her second child who is now aged only five months. The appellant requires intensive counselling and treatment which she is unlikely to receive in gaol.

[38] In reaching the view that the appeal should be allowed and the sentence altered to permit the immediate release of the appellant, we are conscious of the need to ensure that our interference is not misinterpreted. First, we emphasise that the mere fact of pregnancy at the time of sentence will not necessarily lead to leniency or a sentence that does not require service of a

period of imprisonment, including service of imprisonment requiring birth while in custody and subsequent separation from the baby. Each case must be determined according to its particular circumstances, including the seriousness of the criminal offending involved.

[39] Secondly, the criminal courts have repeated on many occasions over the years that offenders with young families must realise that if they commit serious crimes they will be sent to gaol notwithstanding that incarceration will result in separation from their young family and difficulties in securing proper care for their children. The appellant provides a good example of the operation of that principle. She was imprisoned and separated from her very young child.

[40] The observations we have made are of general application. They are, necessarily, subject to those rare and exceptional cases in which the combination of circumstances demonstrates that the overall interests of justice both justify and require a compassionate approach and the extension of greater than usual leniency to the offender. This is one of those rare cases.

[41] As we have mentioned, the appellant has insight into her problems and is a very good candidate for rehabilitation. The best interests of the public will now be served through the rehabilitation of the appellant under supervision in the community which will secure the future protection of the public. The appellant will be reunited with her young child from whom she has been

separated for approximately 14 months and will not be separated from her five month old daughter thereby avoiding the inevitable damage to the appellant's fragile psychological condition. Under supervision, the appellant will be able to care for her family and undertake the treatment required to secure her rehabilitation.

[42] For these reasons, we allowed the appeal and substituted a sentence of five years imprisonment to be suspended after the appellant had served a period of 14 months commencing 13 June 2006. The conditions of suspension required that for a period of three years and ten months from the date of her release, the appellant be under the supervision of the Director of Correctional Services and obey the reasonable directions of the Director or a probation officer including directions as to residence, associates, employment and counselling and treatment including counselling and treatment for depression, addiction to alcohol or other drugs and gambling. The requirement to obey directions as to counselling and treatment included obeying directions as to undertaking and complying with residential programs.
