

R v JW [2013] NTSC 80

PARTIES: THE QUEEN

v

JW

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 21236570

DELIVERED: 19 December 2013

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JUDGMENT OF: HILEY J

CATCHWORDS:

CRIMINAL LAW – mental impairment – fit to plead – charges of stealing and destroying a building by using fire - plea of not guilty by reason of mental impairment – custodial supervision order – no practicable alternative to prison – period of supervision – meaning of “the appropriate sentence if he had been found guilty of the offence charged” – relevant factors – cognitive deficits – difficulties in medicating offender – protection of community

Criminal Code 1983 (NT), Part IIA, s 43C, s 43G(1)(b), s 43I(2)(a), s 43O, s 43ZA, s 43ZG, s 43ZJ, s 243(1).

R v Morton [2010] NTSC 26, applied.

R v Ajax (2006) 17 NTLR 80, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	D. Jones
Defendant:	J. Hunyor & G. O'Brien-Hartcher
Department of Health:	E. Clarke

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	North Australia Aboriginal Justice Agency
Department of Health:	Solicitor for the Northern Territory

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

R v JW [2013] NTSC 80
No. 21236570

BETWEEN:

THE QUEEN

AND:

JW
Defendant

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 19 December 2013)

Introduction

- [1] On 2 December 2013 I made a custodial supervision order and ancillary orders in relation to the Defendant (**JW**). These are my reasons.
- [2] **JW** was indicted for 2 offences committed on 8 September 2012 at Stuart Park in the Northern Territory of Australia, namely causing damage to a building by using fire, contrary to s 243(1) of the *Criminal Code*, and stealing a wallet, \$60 in cash and a mobile phone having a total value of \$370, the property of Brian Robertson, contrary to s 210(1) of the *Criminal Code*.

- [3] On 8 March 2013 I requested a report pursuant to s 43O of the *Criminal Code* regarding JW's fitness to stand trial. Concerns had been expressed about JW's fitness to stand trial, primarily because of his schizophrenia. In his report of 20 April 2013 Dr Kevin Smith, a forensic psychiatrist employed by the Department of Health, provided extensive detail regarding JW, including his social and personal history, his past psychiatric history, and his current psychiatric condition. Dr Smith concluded that JW was fit to plead. He also concluded that JW was fit to enter a plea of not guilty by reason of mental impairment.
- [4] The defence of mental impairment was raised, and application was made for JW to be further examined the purposes of a report being made to the Court on the question of JW's mental impairment. On 10 May 2013 I made orders under s 43G(1)(b) for that to occur. In his report of 20 June 2013 Dr Smith provided further details regarding JW, and concluded that JW was suffering from mental impairment in the sense of s 43C of the *Criminal Code* at the time of his offending behaviour. He also recommended that if the Court finds JW not guilty by reason of mental impairment he be declared liable to supervision pursuant to s 43I(2)(a) of the *Criminal Code*.
- [5] On 25 July 2013, I found that JW was not guilty of the offences because of mental impairment pursuant to s 43C of the *Criminal Code*. I then made a declaration under s 43I(2)(a) of the Code that JW is liable to supervision under Division 5 of Part IIA of the Code. I made interim orders under s 43I(3). In particular I made orders for a further report from Dr Smith

under s 43ZJ which would also include a suggested plan for JW's supervision into the future. I also ordered that JW continue to be remanded in custody in prison as I was not satisfied that there was any practical alternative given the circumstances of JW.

- [6] In his report of 22 August 2013 Dr Smith noted some noticeable deterioration in JW's mental state as a result of him not taking his medication. However, on the last two occasions when Dr Smith saw JW he was more settled and no longer appeared threatening and he indicated that he would continue to take his medication. Dr Smith expressed a number of concerns about JW's ongoing condition, including that "JW is a person of high intelligence who could pose a very high level of risk to the community if [he] goes untreated." He said, "Because of the difficulties experienced in medicating him recently it is only possible to recommend custodial supervision for JW at this stage." He also said:

"In my opinion Mr W shows no signs of being willing to comply with the essential conditions of a Non Custodial Supervision Order. He would be very likely to leave the NT as soon as possible, just as he was attempting to do when arrested at Darwin Airport. He would then become untreated and this would result in an unacceptably high level of risk to the community."

- [7] Dr Smith made the following recommendations:

"9.1 A Custodial Supervision Order with custody at DCC is recommended for Mr W.

9.2 Mr W must be obliged to accept the medications recommended for treating his mental illness by FMHS. If he refuses his depot medication it is recommended that authorisation be given

for his transfer by prison officers to an approved mental health facility (JRU) for his injection to be given. It is not recommended that Mr W be forced to have depot medication given at DCC, as it must be clear to him that this is a Health issue rather than a Justice issue.

9.3 Mr W must be obliged to accept regular reviews by FMHS and he must be willing to accept counselling and psycho-education as considered appropriate. Mr W must cooperate with any medical investigations required. Mr W must be willing to report any concerns he has about the verbal behaviour of other prisoners to FMHS, rather than act on them in an aggressive manner.

9.4 Mr W must do everything in his power to achieve a lower security rating and obtain a job in the prison.”

[8] On 20 September 2013, I heard submissions from counsel as to the appropriate orders to be made under Division 5 of Part IIA of the Code. It was not in contest that I should make a custodial supervision order pursuant to s 43ZA of the Code and that JW should be committed to custody at the Darwin Correctional Centre (DCC), there being no practicable alternative given the circumstances of the offender. I am satisfied that those concessions were properly made. I have also had regard to the principle and matters referred to in ss 43ZM and 43ZN of the Code.

[9] The next step is for me to determine the length of the term of the order to be fixed in accordance with s 43ZG of the Code and what ancillary orders are also required.

[10] Section 43ZG(1) of the *Criminal Code* requires the Court, when it makes a supervision order, to fix a term in accordance with subsections (2), (3) or (4)

“that is appropriate for the offence concerned and specify the term in the order”.

[11] Section 43ZG(2) provides:

“Subject to subsections (3) and (4), the term fixed under subsection (1) is to be equivalent to the period of imprisonment or supervision (or aggregate period of imprisonment and supervision) that would, in the Court's opinion, have been the appropriate sentence to impose on the supervised person if he or she had been found guilty of the offence charged.”

[12] Section 43ZG(4) provides that where the supervised person was charged with the commission of multiple offences the Court must fix the term by reference to the offence carrying the longest maximum period of imprisonment. Accordingly I must fix the term in accordance with the arson offence under s 243(1) of the Code, which offence carries a maximum penalty of imprisonment for life.

The offending - relevant circumstances

[13] The Agreed Facts were as follows:

1. The offender, [JW] (DOB 30/3/82), was released from Berrimah prison on the 23 August 2012. Shortly after his release he squatted in a vacant house at 8 Voyager Street, Stuart Park. The owner of the premises Jennifer Hanlon was unaware that the offender was living in the premises.
2. On the night of Friday, 7 September 2012 the offender went out drinking and throughout the night consumed a large quantity of alcohol, predominantly beer and bourbon.
3. Sometime around 5am on Saturday, 8 September the offender met Brian Robertson outside the Commonwealth Bank on Smith

Street. Brian Robertson had been out drinking at various premises from about 5:30pm the previous day, ending up at the Throb nightclub where he remained until closing.

4. The offender and Brian Robertson struck up a conversation and then caught a taxi together to 8 Voyager Street Stuart Park. They eventually ended up upstairs in a bedroom where they engaged in some sexual activity. Robertson eventually fell asleep.
5. While Robertson was asleep the offender took Robertson's wallet containing about \$60 in cash and his mobile phone and then left the premises and commenced to walk towards Darwin city.
6. The offender caught a taxi in the vicinity of Woolworths and asked to be driven to the Shell service station on Daly Street where he purchased a Bic lighter and a Shell branded 5 litre fuel tin which he filled with 4.57 L of unleaded petrol. He paid cash for these items. This was shortly before 9 am.
7. The offender was then driven in the same taxi and was dropped off in the vicinity of the intersection of Geranium Road and Ramirez Street, Stuart Park. He then walked back to 8 Voyager Street.
8. The offender entered the premises where he poured petrol on the top landing of the stairs and the upper stairs of the staircase. The landing was directly adjacent to the doorway of the bedroom in which the offender had left Robertson sleeping. The offender did not look into the bedroom to see if Robertson was still there.
9. The offender then went downstairs and soaked a tea towel with petrol, accidentally spilling some onto his own feet and lower legs. He then placed the fuel tin with the remaining petrol back on the staircase.
10. The offender then went to a small storage room under the staircase where he threw the petrol soaked towel onto a pile of papers which he then lit with the Bic lighter.

11. When the offender lit the tea towel he also caused the petrol that he had spilled on himself to ignite and this caused burns to his feet and lower legs. The offender ran away from the premises.
12. The fire that the offender had lit under the stairs spread up, through and along the stairs. There was a small explosion which was loud enough to wake up Robertson.
13. By this time the fire on the stairs had self-extinguished but there was a flame coming from the spout of the fuel tin that had been left on the stairs.
14. Robertson found a cloth which he then used to smother the flames coming from the petrol can which he then picked up and carried down and outside the premises.
15. Robertson then went back inside to look for his clothes, phone, wallet and shoes. He couldn't find them. He made his way back downstairs and he saw flames coming from the storage area underneath the stairs. He made some unsuccessful attempts to extinguish those flames. He then heard a neighbour yell that the fire brigade had been called. Robinson left the premises and waited outside.
16. The fire brigade was in attendance within a short time and quickly extinguished the fire. There was damage caused by fire to the stairs, the storage room underneath the stairs, adjacent walls and ceilings. The damage was estimated to be in the vicinity of \$50,000.
17. At about 3pm that day the offender presented himself at the Royal Darwin Hospital emergency ward seeking treatment for burns to his feet and lower legs. He advised the hospital staff that he had walked into a campfire. He remained in hospital and received treatment for approximately 3 weeks.
18. The offender was apprehended by police on 3 October 2012 at Darwin airport. The offender had checked into a flight bound for Perth.

19. The offender was arrested and conveyed to Darwin watch house where he later participated in an electronic record of interview where he made admissions as to lighting the fire.
20. Amongst other things he said in that interview that at the time he set fire to the house “I wasn’t sure if the person was inside or not”. He described how he had returned to the house with Robertson who was sleeping in the upstairs bedroom when he left the premises. The offender described how he went and purchased the petrol and then returned pouring the petrol around the stairs and then setting fire using a petrol soaked tea towel.
21. The offender said that he didn’t check whether anyone was upstairs when he started to pour the petrol. He thought someone may be upstairs. Asked why he would light a fire when someone might be upstairs he replied “I don’t like gay people”. He later said “I seem to be getting all sort of mixed messages, I suppose, not mixed messages as unlike mental disorder, but is just like one minute I can talk to someone next minute I feel fucken robbing them.” The offender said that he thought the fire might wake him up but then agreed that smoke could stop a person from waking up.
22. The offender was then charged and remanded in custody.

[14] The lighting of the fire was particularly serious in several respects. The fact that the offender went to the Shell service station in Daly Street and purchased 4.57 L of petrol and a cigarette lighter and then returned to the house at 8 Voyager Street indicates that the fire was planned and not opportunist. This is also evident from the fact that when he got back to the house he poured petrol on the top landing of the stairs and the upper stairs of the staircase, then soaked a tea towel with petrol and then threw the petrol soaked tea towel onto the pile of papers in the storage room underneath the staircase before setting fire to the papers. Of greatest

concern is the fact that the offender should have been and probably was aware that Mr Robertson was still asleep in the bedroom adjacent to the top landing of the stairs where he first poured petrol. And, there was substantial damage caused to the property.

Personal circumstances

- [15] JW was born on 30 March 1982. His parents separated when he was aged two. His mother, an Aboriginal lady from Marble Bar, WA, had a history of depression. After his parents separated he was raised by his father. He told Dr Smith that his father was depressed and was drinking a lot. When he was about 13 JW was expelled from boarding school, where he had been subject of bullying and being called “homosexual”.
- [16] When he was 18 he was admitted to the Graylands Hospital in Perth twice. He was diagnosed as having paranoid schizophrenia and he was treated with antipsychotic medication for about 2 years. He remained untreated for the next 12 years. He was re-diagnosed in December 2012 while he was in remand for the present offences.
- [17] Between 2000 and 2005 he worked in various jobs in north-west Australia. He had a relationship from 2005 which ended in 2009. He told Dr Smith that he did some studies at a university in Perth in 2008 and 2009.
- [18] He then moved to Canberra. In February 2010 he committed a robbery and he was convicted and sentenced by the Australian Capital Territory Supreme

Court to 2 years and 6 months imprisonment, suspended after serving 12 months.

[19] On 5 different occasions in 2011 he was convicted in the South Headland Magistrates Court for offences which included stealing, damaging property, trespass and burglary.

[20] On 21 January 2012 he committed eight offences of causing damage to property. He was sentenced by the Darwin Court of Summary Jurisdiction to 7 months in prison where he remained until shortly before this offending.

[21] Dr Smith refers to these offences and to observations and conclusions of various other experts concerning JW's unsatisfactory mental state which may well have contributed towards him committing those offences.

[22] JW made admissions in relation to the present matters soon after he was arrested by police and has agreed to the facts which make out the commission of these offences. Consequently there was no need for a trial and for Mr Robertson and others to attend to give evidence. Dr Smith says that JW is not remorseful for his actions. I propose to discount the sentence that I would otherwise impose by about 18%.

Sentencing considerations

[23] The fact that Parliament has fixed a maximum penalty of life imprisonment for the crime of arson demonstrates the seriousness of such a crime. Of

course there will be a wide range of circumstances in which such a crime is committed and hence a wide range of appropriate sentences.

[24] Counsel referred me to the remarks of Mildren J, Martin (BR) CJ and Thomas J agreeing, in *Ajax v The Queen* (2006) 17 NTLR 80 at 81 [34]:

“[34]... I think something needs to be said about the current level of sentencing for offences of this kind. Arson is potentially an extremely serious offence as it carries a maximum penalty of imprisonment for life. The current level of sentences are, in my view, too lenient and need to be increased significantly. The offence of arson, of course, is an offence which can be committed in a wide variety of circumstances. The extent to which a sentencing court needs to impose a deterrent sentence will often be determined by factors, such as the value of the property destroyed, whether the property was occupied at the time particularly at night by persons who are asleep, the level of risk to other persons in neighbouring properties as well as to police and fire fighters involved in checking the premises for occupants and in fighting the fire, whether the offender was intoxicated at the time, whether the owner of the property will suffer any consequential loss over and above the destruction of the property itself (for example in the case of business premises by the loss of profits due to disruption to the business), whether or not anyone was in fact injured or killed as a result of the fire and if so the number of victims and the extent of those injuries. Matters going to mitigation will often include cooperation with the authorities, pleas of guilty, lack of prior convictions and in the case of Aboriginal persons in particular, may include the fact that the defendant has been brought up in an impoverished section of society which has become dysfunctional through the effects of alcohol or other drug misuse. These of course are not intended to be a complete list of all of the aggravating or mitigating factors which the sentencer will be required to consider.”

[25] As I have already said, this particular offence did involve a degree of planning and could well have resulted in serious injury or even death to Mr Robertson. JW’s response that he does not like gay people when asked why he would light a fire when someone might be upstairs suggests that his

dislike of gay people justified his reckless conduct. It did not. JW was solely responsible for the fire and consequent damage. He was also solely responsible for stealing Mr Robertson's wallet, cash and mobile phone.

[26] Fortunately Mr Robertson was not injured and no one else was living in the house at the time. JW himself suffered burns to his feet and lower legs which resulted in him spending 3 weeks in hospital.

[27] I accept, with respect, the views expressed by Mildren J in *R v Morton* [2010] NTSC 26 to the effect that cognitive deficits of the kind that JW had and has must be taken into account during the sentencing process. At [50] – [51] his Honour said:

“[50] The established authorities show that where a crime is committed by a person with cognitive defects which were present and operating at the time of the crime, the offender is not or may not be a suitable vehicle for general deterrence, in the sense that a sentence fully reflecting general deterrence should be sensibly moderated.¹ Similarly, the moral culpability of the offender may be reduced and this would affect the punishment that is just in all the circumstances, and denunciation is less likely to be relevant.² In *R v Verdins*, the Court of Appeal of Victoria provided further guidance in such cases; whether or not specific deterrence should be moderated or eliminated as a sentencing consideration depends on the nature and severity of the symptoms of the condition as exhibited by the offender and the effect of the condition on the offender's mental capacity at the time of the offence. On the other hand, the existence of the condition at the time of sentencing or its foreseeable recurrence may mean that a given sentence may weigh more heavily on the offender than it would a person of normal health. Where there is a serious risk of imprisonment having a significant adverse effect on the prisoner's mental health, this will be a factor tending to mitigate punishment.³ Further, *Verdins*⁴ made it abundantly clear that these principles are

¹ *Waye v The Queen* [2000] NTCCA 5; *R v Verdins* (2007) 16 VR 269 ('*Verdins*').

² *R v Tsiaris* [1996] 1 VR 398; *Verdins* at 277, [32].

³ *Verdins* at 277, [32].

⁴ *Verdins* at 272, [6].

not confined to cases of serious psychiatric illness and any one or more could apply to a mental impairment, mental disorder or abnormality whether or not the condition in question could be described as a serious mental illness.

[51] In cases of diminished responsibility, the High Court has held that the principle of proportionality applies to all cases, i.e. a sentence should not be increased beyond that which is proportionate to the crime merely to protect the community from the risk of recidivism.⁵ However, that does not mean to say that the Court can disregard or give inadequate weight to the need to protect the community.⁶ The risk of recidivism may in fact be so strong that the mental disorder might not be treated as a mitigating factor, but as a reinforcement of the need for the longest possible sentence.⁷

[28] JW's situation is somewhat complex because his offending occurred at a time when he had not been taking medication. It does appear that on occasions, particularly when he is taking his medication, he does have some insight and would understand the seriousness of what he has done.

[29] I agree that general deterrence and denunciation is of less relevance in his case because of his mental impairment at the time when he committed the crimes. However I do consider that the sentence is capable of acting as a specific deterrent to some extent, particularly in light of his propensity for committing property related offences. Also he must be punished for what he has done. Regrettably I think it is too early to attempt to assess his prospects of rehabilitation.

[30] Of considerable importance is the need for protection of the community. In his report of 22 August 2013 Dr Smith expressed concern about the fact that

⁵ *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 472 ('*Veen*').

⁶ *Veen* at 473-474.

⁷ *Veen* at 474-477.

“JW has still not accepted his diagnosis and ... does not wish to be on medication.” Dr Smith also expressed concern about JW’s ongoing hostility against homosexuality. He also said:

“Mr W is a person of high intelligence who could pose a very high level of risk to the community if [he] goes untreated. He is capable of serious antisocial behaviour, and he was avoiding outstanding arrest warrants in two other jurisdictions when he was imprisoned for irrational and destructive behaviour in Darwin in January 2012. After serving a custodial sentence for that offending behaviour it was only a matter of weeks before his current offending behaviour took place.

...

In my opinion Mr W shows no signs of being willing to comply with the essential conditions of a Non-Custodial Supervision Order. He would be very likely to leave the NT as soon as possible, just as he was attempting to do when arrested at Darwin Airport. He would then become untreated and this would result in an unacceptably high level of risk to the community.”

[31] In all the circumstances, I consider that an appropriate sentence for the arson offence would have been imprisonment for 4 years, after the discount of about 18%. I would have backdated the sentence to the date when JW went into custody, namely to 3 October 2012.

[32] To the extent that it is necessary to identify what sentence would be appropriate in relation to the offence under Count 2, I would impose a sentence of one month’s imprisonment to be served fully concurrently with the sentence on Count 1.

[33] Section 43ZG(4B) permits the Court to decide the term fixed under 43ZG(1) as taken to have commenced from the time the supervised person was first

taken into custody for the relevant offence. Accordingly I fix a term, for the purposes of s 43ZG(1) of the *Criminal Code* of 4 years, commencing 3 October 2012.

[34] The effect of fixing this term is that a mandatory review will not be required until sometime between 3 April 2016 and 3 July 2016 (that is, between 3 and 6 months before the expiry of the term that I have fixed under s 24ZG(1)).⁸ Counsel for JW requested me to fix a date for the mandatory review, preferably on or soon after 3 April 2016. However there will be annual reports to the Court as required by s 43ZK, which may trigger a review to determine whether JW should be released from the supervision order.⁹ Also, s 43ZD permits the Director of Public Prosecutions or JW to apply to vary or discharge the orders at any time upon 14 days' notice. In any event, I propose to make an order that reflects the requirements of s 42ZG(5) and to adjourn the matter for review in about one year's time. I do not consider that there would be any utility in fixing a particular date for mandatory review at this stage.

[35] I have also raised with counsel the possibility of making further orders similar to Orders 2 to 7 made by the Court in *R v Morton* [2010] NTSC 26 and given liberty to apply for further orders once counsel have had the opportunity to seek instructions and consider the desirability of such orders.

⁸ See s 43ZG(5).

⁹ See s 43ZH(1).

Orders

[36] I make the following orders:

1. JW is subject to a custodial supervision order and is committed to custody at the Darwin Correctional Centre (DCC).
2. In accordance with s 43ZG(1) of the *Criminal Code*, a term of four years is fixed commencing from 3 October 2012.
3. A mandatory review of this order pursuant to s 43ZG(5) of the *Criminal Code* shall take place no later than 3 July 2016.
4. The Appropriate Person as defined by s 43A of the *Criminal Code* shall prepare and submit a report to the Court on the treatment and management of JW's mental impairment, condition or disability by not later than one year from the date of this order and thereafter at intervals of not more than 12 months until this order is revoked or expires (and JW is released unconditionally).
5. This matter is adjourned for periodic review at 10am Monday 8 December 2014.
6. Any publication relating to this matter is not to use JW's full name, just his initials.
7. Liberty to apply.

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