Yovich v Peach & Gokel [1999] NTSC 4

PARTIES:	STEVEN ALF YOVICH v DAVID PEACH AND NOEL GOKEL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE JUVENILE COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 56-60 of 1998 9806482, 9800628, 9805380 9807093 & 9801002
DELIVERED:	3 February 1999
HEARING DATES:	14 December 1998
JUDGMENT OF:	Bailey J

REPRESENTATION:

Counsel:

Appellant:	C. Thomson
Respondent:	G. O'Rourke

Solicitors:

Appellant:	NAALAS
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	bai99004
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IN THE SUPREME COURT OF
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Yovich v Peach & Gokel [1999] NTSC 4
No. JA 55-60 of 1998
9806482, 9800628, 98053809807093 & 9801003

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence imposed in the Juvenile Court at Darwin

BETWEEN:

STEVEN ALF YOVICH
Appellant

AND:

DAVID PEACH AND NOEL GOKEL
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 3 February 1999)

[1] On 14 December 1998, I upheld an appeal against sentence by the juvenile appellant, set aside sentences imposed by the Juvenile Court on 15 May 1998 and, in substitution, imposed concurrent sentences of probation for a period of nine months with effect from 14 December 1998. I indicated that I would publish my reasons in due course.

[2] The appellant was convicted upon his own pleas of the following offences and received the following sentences:

Offence	**Date of Offence**	**Sentence**
Unlawful Entry	18.1.97	2 months detention.
Stealing	18.1.97	(backdated to 1.4.98)
Unlawful Entry	11.11.97	
Stealing	11.11.97	2 months detention
Aggravated Criminal Damage	11.11.97	(cumulative to above)
Receiving	19.12.97	7 days detention (concurrent to above)
Unlawful Entry	8.1.98	2 months detention (cumulative to above)
Unlawful Interference with a motor vehicle (13 Counts)	1.4.98	2 months detention
Criminal Damage (4 Counts)	1.4.98	(cumulative to above)

[3] The effective sentence was one of eight months detention, backdated to 1 April 1998. The learned magistrate, Mr Gillies, constituting the Juvenile Court, ordered that the entire sentence be fully suspended upon the appellant entering a good behaviour bond for a period of two years. He also ordered that the appellant be subject to probation for a period of nine months.

[4] Mr Thomson, who appeared on behalf of the appellant before me (but not before the Juvenile Court), sought to rely on two grounds of appeal, namely:

(a) that the sentence was manifestly excessive in all the circumstances; and

(b) that the learned magistrate had erred in law by failing to take account of the parity principle as it applies to co-offenders.

[5] It is unnecessary here to set out full details of the appellant's offences. The offences follow a familiar pattern of opportunistic and poorly executed unlawful entries to houses and cars with the object of stealing portable items of value. The appellant was encouraged to commit the offences by older, but certainly no wiser, associates. In the case of the offences of 1 April 1998, the appellant acted as a look out while six other boys broke into motor vehicles. The appellant subsequently panicked and ran away. In the case of the unlawful entry of 8 January 1998, the appellant followed three co-offenders into a private house. He was apprehended at the scene after feeling tired and falling asleep there.

[6] The appellant was born on 8 September 1983 and accordingly was 13 years old at the time of the January 1997 offences and 14 years old at the time of all other offences and at the date of his sentencing.

[7] The offences of 1 April 1998 were committed in breach of bail for earlier offences and in consequence of that breach and the reluctance of the appellant's father to have him return to the family home, the appellant was remanded in custody (to Don Dale Centre). When he appeared before Mr Gillies on 24 April

1998, he was further remanded in custody for the purpose of obtaining pre-sentence reports. By this stage, the appellant's father was agreeable to the appellant returning home, but the learned magistrate took the view that the detention of the appellant was necessary to "protect the community". In total the appellant spent forty-four days in Don Dale Centre before appearing before the Juvenile Court for sentence on 15 May 1998.

[8] The appellant had no history of offending prior to the proceedings before Mr Gillies. The pre-sentence reports showed that the appellant had had a difficult childhood. The available information also suggested that the appellant's alcoholic mother had left the family home when he was 3 ½ years of age and had maintained minimal contact with the appellant. The appellant's father had not displayed the interest and concern in the appellant's upbringing which the appellant was entitled to expect. The appellant's father initially refused to contact his son after his remand to the Don Dale Centre. This was apparently because he wanted his son to experience a detention centre and accordingly "think twice about offending again in the future". The appellant had a poor academic record at secondary school, with a history of frequent truancy.

[9] Before Mr Gillies, counsel for the appellant submitted that the time that the appellant had spent in the Don Dale Centre was adequate punishment for the appellant's offences. It was also pressed that one of the appellant's co-offenders (a sixteen year old) in the offending of 1 April 1998, after pleading guilty to 47 offences before a differently constituted Juvenile Court, had

received a total of one week's detention before being discharged on a good behaviour bond. Other juvenile co-offenders involved in the offences of 1 April 1998 received either probation or release on good behaviour bonds.

[10] The learned magistrate in his reasons for sentence expressly referred to the fact that he took into account the appellant's pleas of guilty. He recognised that the appellant had some prospects for rehabilitation, having regard to his age and some favourable comments which had emerged in the course of mitigation. The learned magistrate described the decision to suspend the eight months detention as giving the appellant "a chance". However the learned magistrate also observed:

> "To my mind, this juvenile is a person where [sic] the community richly needs to be protected from him".

[11] This observation is in keeping with the general thrust of the learned magistrate's comments to defence counsel in the course of hearing mitigation. There were repeated references by the learned magistrate to the need for the public to be protected from the appellant and the failure of the appellant to abstain from offending while on bail for earlier offences. At times, the learned magistrate's comments to counsel, in my view, were intemperate and sarcastic. For example, the learned magistrate referred to the following passage from a report prepared by Forensic Mental Health Services:

> "(The appellant's) presentation is flat in effect and he states that he is sad and frightened. He is depressed about his current situation and expresses resentment about his length of incarceration on remand, particularly when his co-offenders spent little time in detention.

[12] The learned magistrate's observation was:

> "Poor boy (tut, tut, tut)".

[13] The learned magistrate also observed in relation to the above passage:

> "Listening to you (i.e. defence counsel) probably explains why he has the attitude that was mentioned in the report...".

[14] Comments of this type from the bench are entirely unnecessary and inappropriate. Counsel for the appellant, correctly, was emphasising the sentencing principles applicable to juveniles and submitting that the sentence to be imposed upon the appellant should bear some parity to those imposed upon his co-offenders.

[15] In his sentencing remarks, the learned magistrate claimed to have a "rough idea" of the principles relevant to sentencing of juveniles. If so, it is not readily apparent from his treatment of this appellant.

[16] The focus of sentencing in the Juvenile Court is, of course, one of rehabilitation. As Maurice J in *Simmonds v Hill* (1986) 38 NTR 31 observed (at 33):

> "In the Juvenile Court the retributive aspect of sentencing is, at best, of secondary importance. Even lower in the scale, if, indeed, it has any place at all, is deterring others. The overwhelming concern is the young offender's development as a law-abiding citizen. The court should be at pains to ensure that its sentences do not alienate its young clients. Particularly is this so in the case of a first offender".

[17] I consider that the sentences imposed on the appellant were entirely inappropriate given the appellant's young age and lack of prior convictions. As was pointed out in *R v Homer* (1976) 13 SASR 377 at 382-3:

> "…in the case of a juvenile… the Court is trying to find out what is the best means of turning this delinquent juvenile into a responsible law-abiding adult and that has really got nothing to do with the seriousness of the crime… and no useful comparison can be made between an order made under a non-punitive system and a sentence imposed upon an adult."

[18] The learned magistrate made no reference to the period in excess of six weeks that the appellant had spent in custody. He made no detailed enquiries of the Crown as to the sentences and reasons for such sentences imposed upon the appellant's co-offenders. While paying lip service to the applicable principles for sentencing under the Juvenile Justice Act, I consider that the sentences imposed by the learned magistrate are explicable only by reference to principles of retribution and deterrence (both personal and general).

[19] The pre-sentence reports make it clear that the appellant's father and the appellant himself had made substantial efforts towards improving their relationship and working towards the appellant's rehabilitation.

[20] In all the circumstances, the sentences imposed were manifestly excessive. This was particularly so in the light of the appellant's remand in custody for more than six weeks. As a first offender, I do not consider that there was any justification for remanding the appellant in custody for such a period. The most likely effect of such a remand would be to allow the appellant to come under

the influence of hardened juvenile offenders who would damage the appellant's prospects for rehabilitation.

[21] In addition to the above matters, the sentences imposed on the appellant cannot stand in the light of the decision of the Court of Criminal Appeal in *Bynder v Gokel*, unreported decision of 29 September 1998. That case establishes that the Juvenile Court has no power to backdate a sentence, nor impose sentences on a cumulative basis except in circumstances which are not applicable to the present case.

[22] For the above reasons, I set aside the sentences imposed upon the appellant and substituted concurrent sentences of probation for a period of nine months with respect to each of the appellant's twenty four offences. For the avoidance of doubt, I add that the imposition of probation on a juvenile for the number and character of offences in the present case is not a guide to appropriate sentences for future cases of a similar nature. It is apparent that the sentence for a juvenile must be tailored to individual circumstances with a view to encouraging the offender's rehabilitation. In a particular case, it may well be that a custodial sentence (suspended or not) might be appropriate even for a juvenile in the case of repeated serious offending spread over months.

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