Cooper v Parsons [2012] NTSC 34

PARTIES:	COOPER, Kris
	v
	PARSONS, Matthew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 39 of 2011 (21016181)
DELIVERED:	28 May 2012
HEARING DATES:	26 and 27 April 2012
JUDGMENT OF:	MILDREN J

CATCHWORDS:

CRIMINAL LAW – Sentencing – time spent in custody – not exclusively referable to present offending – circumstances where sentence should be backdated discussed.

CRIMINAL LAW – Sentencing – proportion of sentence to operative period – short suspended sentence with operative period of two years – whether disproportionate.

Hampton v The Queen [2008] NTCCA 5; *Nottle v Trenerry* (1993) 113 FLR 242; *Isaac v Pryce & Ors* [2001] NTSC 35; applied.

R v McHugh (1985) 1 NSWLR 588; followed.

R v Palliaer (1983) 35 SASR 569; *Turner v Trennery* [1997] 1 NTSC 21; *Gumurdul v Reinke* (2006) 161 A Crim R 87; *Dinsdale v The Queen* (2000) 202 CLR 321; *Atkinson v Eaton* [2010] NTSC 72; referred to.

REPRESENTATION:

Counsel:

Appellant:	J. Brock
Respondent:	D. Dalrymple

Solicitors:

Appellant:	Northern Australian Aboriginal Justice Agency
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Judgment ID number:	Mil12514
Number of pages:	18

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

Cooper v Parsons [2012] NTSC 34
No. JA 39 of 2011 (21016181)

BETWEEN:

KRIS COOPER
Appellant

AND:

MATTHEW PARSONS
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 28 May 2012)

Factual History

[1] On 25 June 2010 an information was laid against the appellant charging him with two counts of stealing, one count of unlawfully damaging property with the circumstance of aggravation that the damage was caused when preparing to commit a crime, and one count of aggravated unlawful entry. The appellant appeared in the Court of Summary Jurisdiction on 18 August 2010 and was referred to the Alcohol Court established under the *Alcohol Court Act* 2006 (now repealed).

[2] After reports had been received by the Alcohol Court, the learned Magistrate placed the appellant on a good behaviour bond for twelve months in relation

to the two stealing counts, but in relation to the other counts convictions were recorded, an aggregate sentence of imprisonment for four months suspended forthwith was imposed, and an alcohol intervention order was made. Under s 18 of the *Alcohol Court Act*, an alcohol intervention order can only be made if the Alcohol Court is satisfied that a sentence of imprisonment would be an appropriate sentence if the alcohol intervention order were not to be made. Under s 20 of that Act, the Court was also required to impose a sentence of imprisonment that is wholly or partly suspended.

[3] Subsequently the court entertained an application under s 112 of the *Sentencing Act* to reopen the proceedings presumably because it was thought that the sentences imposed were not in accordance with law. Presumably this was because the offences, apart from the stealing offences, were "aggravated property offences" as that term was defined by s 31 of the *Sentencing Act* at the relevant time. Accordingly s 78B of the *Sentencing Act* applied, which meant that a wholly suspended term of imprisonment could only be imposed if the court ordered the appellant to a home detention order, or if there were exceptional circumstances in relation to the offence or the offender.[1]

[4] Subsequently the appellant was re-sentenced on 14 April 2011. In relation to the two stealing counts the appellant was placed on a no-conviction good behaviour bond with an operative period of twelve months and in relation to

[1] See s 78B (3).

the remaining counts he was also placed on a no conviction good behaviour bond with an operative period of eighteen months. A little over two months later, on 20 June 2011, the appellant committed the offences of stealing and unlawful entry at night whilst armed.

[5] On 7 July 2011 the appellant was charged with a breach of his bail and escaping lawful custody. Four further counts of breaching bail were also alleged in relation to dates between 13 July 2011 and 25 August 2011. On 25 August 2011 the appellant's bail was revoked and he was remanded in custody until 7 November 2011 when he was granted bail by the Supreme Court in relation to the offences committed on 20 June 2011 which had by then reached the Supreme Court by way of an ex-officio indictment.

[6] So far as the breach of bail matters are concerned he was fined in relation to each of those matters. He was also sentenced to imprisonment for seven days for the escape from lawful custody.

[7] The Supreme Court matters proceeded before me on 15 November 2011.[2] On those charges the appellant was convicted and sentenced to an aggregate sentence of imprisonment for twelve months on each count backdated to commence on 12 September 2011 with the balance of the sentence outstanding as at that date suspended on conditions. I also fixed an operative period of twelve months from 29 December 2011 for the purposes of s 43 of the *Sentencing Act*. The effect of that was that if the appellant

[2] Matter No. 21119924.

committed another offence punishable by imprisonment or breached any of the conditions of the order suspending the sentence during the period of twelve months he was liable to be brought before the Court and the Court may well order that the appellant serve the whole or some part of the balance of the sentence held in suspense.

[8] In the course of sentencing the appellant I was made aware of the appellant's previous criminal history and noted that the offending in this case was a breach of the good behaviour bonds which had been imposed. At the same time as sentencing the appellant, I also sentenced a co-offender who at the time of the offending was eighteen years of age with no criminal history and of positive good character. In his case I recorded a conviction and ordered an aggregate sentence of eighty hours of community service. I noted however that the appellant played a lesser role in the offending than his co-offender.

[9] Although at the time I was about to sentence the appellant I was asked to deal with the breaches of bonds I declined to do so. No formal application had been made for me to deal with the breach of bonds under s 15 of the *Sentencing Act* and whilst I could have dealt with those matter under s 15 (3C) of the *Sentencing Act*, the application was made late, and after I had reserved and was ready to hand down sentence.

[10] In any event, the matter of the breach of bonds was then brought before a Magistrate, Mr Trigg SM, that same day. It is not clear to me whether the

breach matter was dealt with by the Magistrate sitting as the Court of Summary Jurisdiction or by the Magistrate sitting as the Alcohol Court or quite what the situation was, but no point has been taken about that. When Mr Trigg SM heard the application relating to the breach of bond matters, he did not have the benefit of my sentencing remarks but as the same counsel who had appeared before me also appeared before him, they were able to advise him of the relevant matters that I had taken into account.

[11] After hearing submissions, the learned Magistrate found that the appellant was in breach of the bonds. He revoked both bonds and proceeded to re-sentence the appellant. In relation to the first stealing charge the appellant was found guilty, convicted and fined $300 plus a $40 victim levy and allowed 28 days to pay. In relation to the remaining counts, he was found guilty on each count, convicted on each and sentenced to imprisonment for an aggregate period of four months which was backdated to commence on 28 November 2011. The learned Magistrate ordered that the balance of the sentence be suspended forthwith and he set an operational period of two years from 29 November 2011 during which time the appellant is not to commit another offence punishable by imprisonment. The learned Magistrate did not impose any conditions in relation to the order suspending the balance of the sentence.

Grounds of Appeal

[12] The appellant has appealed against the orders imposed by Mr Trigg SM on the following grounds:

(1) The learned Magistrate erred in failing to take into account the principle of totality;

(2) The learned Magistrate erred in failing to take into account time spent in custody;

(3) The learned Magistrate erred in not considering community work as a potential sentencing option; and

(4) The sentences are manifestly excessive.

[13] In dealing with this matter the learned Magistrate was well aware of the options that were open to him. These included taking no action, or extending the operative period of the bond, making a community service order, suspending the sentence on a home detention order, imposing a partially suspended sentence, or imposing a sentence which was to be wholly served. It is plain that his Honour rejected all of the options except the option to impose an actual sentence of imprisonment with only one day to serve, with the balance to be suspended. It appears from his Honour's sentencing remarks that his Honour took the view that the offending was too serious to warrant any other disposition particularly as the breaches had occurred so soon after the imposition of the bonds. The offences with which

I had sentenced the appellant constituted the breaches, and of course those offences were more serious than the offending which had originally been dealt with in the lower court. The maximum penalties for the original offences in matter number 21016181 were seven years imprisonment for the two stealing offences, seven years imprisonment for the aggravated unlawful damage and fourteen years for the aggravated unlawful entry.

Ground 1 - The Magistrate erred in failing to take into account the principle of totality

[14] In my opinion there is no substance at all to this submission. The learned Magistrate in his sentencing remarks clearly took the totality principle into account. In his remarks on sentence the learned Magistrate specifically said that he was:

> ".....involved in a re-sentencing not only this matter but I am also taking into account the sentencing imposed this morning by Mildren J and looking at the totality of the offending across the board in what would be a fair disposition for all the offending. Clearly, I am not re-sentencing in relation to the matter Mildren J dealt with this morning. I cannot and would not, but in my view it is a matter I need to take into account to try and ensure that there is a sentencing across the two files which would reflect the appropriate totality for both matters."

[15] The thrust of the written submissions which counsel submitted on this ground really went to another ground, which was that the sentence was manifestly excessive. What was being submitted was that the fact that the appellant got a significantly more severe sentence from me than his co-offender was a consequence of this prior record, and also that the offending

was committed at the time when he was on a good behaviour bond. Those matters were in fact put to the learned Magistrate which as the learned Magistrate noted in argument "makes it aggravated," referring to the offences with which I had dealt. Therefore it cannot be said that he was not alive to the fact that the breaches were matters which made the offending more serious.

The learned Magistrate erred in failing to take into account time spent in custody

[16] In this case the learned Magistrate backdated the sentence by only one day.

[17] When I dealt with Mr Cooper it is clear that he was granted bail on the Supreme Court matters on 21 June 2011. His bail was revoked on 25 August 2011 subsequent to his arrest for breaching his bail conditions. He was in custody until he was granted fresh bail on 7 November 2011 by me. I also backdated his sentence to take into account all of the time that he had spent in custody from 25 August until the date of this sentence. This meant that he had the benefit of having all of that time in custody taken into account when I sentenced him.

[18] I accept an argument that was put by Mr Brock that technically some of that time may be accounted for in relation to the breach of bail matters as well. The learned Magistrate in his sentencing remarks went into the question of the period of time the appellant had spent in custody in some detail and concluded that it had appeared that the appellant was in custody in relation

to the breach of bond matters from 28 September until 7 November. His Honour remarked that whilst he was not sure whether strictly that should have happened (because the breach of bond proceedings was not then on foot) his Honour said that "the reality is, it has happened, and I think that the defendant can be given the benefit of that. So he has in fact spent some time in custody on this file which therefore needs to be taken into account in at least some way."

[19] What is plain is that there was no pre-sentence custody in relation to the breach of bond matters which was exclusively referrable to those matters. As a matter of desirable sentencing practice, no period of pre-sentence custody needed to be backdated at all by the learned Magistrate, although he had the discretion to do so, as he saw fit.[3]

[20] The fact of the matter is the learned Magistrate said he would take into account some period of this time. Although he only backdated the sentence one day I am not satisfied that error has been shown.

[21] It is not the usual practice to backdate a sentence when time has already been taken into account in relation to another matter, and the circumstances under which that course should be taken are rare and exceptional.

[3] *Nottle v Trenerry* (1993) 113 FLR 242 at 244; *R v McHugh* (1985) 1 NSWLR 588 at 590-591; *Isaac v Pryce & Ors* [2001] NTSC 35 per Thomas J.

Appeal Ground 3 – The learned Magistrate erred in not considering community work as a sentencing option.

[22] The facts indicate the learned Magistrate did consider community work as a potential sentencing option but rejected it. The learned Magistrate provided no reason as to why he rejected that option except that it is plain that he regarded the offending as too serious to be dealt with in that manner.

[23] The learned Magistrate had regard to the facts of the offending which gave rise to the imposition of the bonds. He observed that as to the stealing on 27 April 2010 it was a "pretty basic plan to steal alcohol." The appellant and his co-offender went to Coles Liquorland, secreted a bottle of Jim Beam Bourbon down the front of their shorts and left without paying. They were captured on CCTV footage. It was a "fairly simplistic and basic dishonesty offending which occurs far too often but not at the most serious in terms of offending behaviour. Not particularly well planned, it was basically low grade dishonesty offending." The learned Magistrate dealt with the next offending which occurred about a week later and he said "it was more sophisticated. It was a plan with the co-offender, the same one, to again steal alcohol, this time in the early hours of the morning. The premises were shut and they have gone there and they have broken in, causing damage in the process, and stolen quite a substantial amount of alcohol. Some eleven one litre bottles of spirits, totalling over $600, and all of which was consumed and none recovered."

[24] The learned Magistrate noted that during this period the appellant was attending at Danila Dilba and was also taking part in the Hope City Church. Mr Greg Donald who is connected to both of those organisations had arranged for the appellant to receive some counselling, particularly addressing alcohol issues, and the learned Magistrate referred to the fact that at Mr Donald's encouragement the appellant handed himself in to the police which the Magistrate regarded as being a matter going to the appellant's credit. He observed that it was no doubt in relation to the combination of those features and the hopeful expectations that the appellant would not re-offend that no conviction bonds were imposed. The learned Magistrate then referred to the fact that a little over two months after entering into the bond the appellant was involved in the offending which was dealt with by me. As his Honour observed the appellant had broken the bonds very soon after entering into them by re-offending in a similar and even more serious way. The learned Magistrate was well aware that since the appellant's release on bail on 7 November 2011 a condition of his bail required him to reside at the Sunrise Centre which was a twelve week residential and day program run by Salvation Army Drug and Alcohol Services. He was also aware that under the terms of the suspended sentence which I imposed that it was a condition of that sentence that he continue to complete the Salvation Army Drug and Alcohol Residential Rehabilitation Program.

[25] No criticism is directed at the learned Magistrate's decision to re-sentence the appellant. No submission was made that there were exceptional circumstances which would warrant a disposition outside of the minimum sentencing requirements of s 78B of the *Sentencing Act*. The available options to the learned Magistrate were in those circumstances community service, home detention, a partially suspended sentence, or a sentence which was not suspended. No submission was made that a home detention order was appropriate, and in the circumstances in which the appellant was then living that is not surprising. This effectively left open only the other alternatives. When one considers the provisions of s 7 of the *Sentencing Act* community work orders are in order of seriousness as a disposition, between a fine and a suspended sentence whether wholly or partly.

[26] Counsel for the appellant submitted that the learned Magistrate erred in treating a custodial disposition as the starting point. Reference was made to a number of authorities to the effect that the proper approach to sentencing is to decide first whether there is any appropriate alternative to imposing a sentence of imprisonment and it is only if the answer to that is in the negative to then decide what is the proper term to be imposed and once that is done to decide whether it would be appropriate or inappropriate to suspend the term either wholly or partly.[4]

[4] See *R v Palliaer* (1983) 35 SASR 569, 571; *Turner v Trennery* [1997] 1 NTSC 21 at [28]; *Gumurdul v Reinke* (2006) 161 A Crim R 87 at paras [29[-[30].

[27] In this case the learned Magistrate during the course of submissions commented that the starting point for the offending in this case was somewhere in the order of six plus months. That does not mean that the learned Magistrate, when he actually came to consider the appropriate disposition, did not turn his mind to whether community service was a proper option. Merely because the Magistrate gave an indication during the course of submissions that he was contemplating imposing a sentence of imprisonment does not disclose error. All the Magistrate was doing was flagging to counsel for the appellant that the objective circumstances of the offending warranted such a disposition. At that stage the learned Magistrate had not heard all of the submissions made by the appellant's counsel. It is well accepted practice that if a Magistrate is thinking of taking the serious course of imprisonment as an option, the Magistrate should indicate that to give the appellant's counsel an opportunity to persuade him otherwise. There is nothing in the Magistrate's actual sentencing remarks which indicated anything to the contrary. Indeed the structure of the sentencing remarks indicates that he had considered the possibility of community work but had rejected it because in his opinion a period of imprisonment was warranted for the majority of the offending.

[28] In my opinion no error has been established on this ground and the ground must be dismissed.

Ground 4 – The sentences are manifestly excessive

[29] As has been observed by high authority a sentence is or is not unreasonable or plainly unjust. It is a conclusion which has been reached because it is plainly apparent. It does not depend on attribution of identified specific error in the reasoning of the sentencing by the Magistrate and frequently does not admit at any amplification except by stating the respect in which the sentence is excessive.[5]

[30] Notwithstanding those observations, counsel for the appellant, Mr Brock referred to some specific features of the case which he submitted did not warrant the imposition of an actual sentence of imprisonment.

[31] First he referred to *Atkinson v Eaton*[6] where Blokland J observed that "it is important that bonds not be treated as one and the same as suspended sentences." The point that was being made by Mr Brock was there was such a significant disparity between the original sentence which consisted of a non conviction good behaviour bond to a sentence of four months imprisonment albeit suspended, and which manifested error.

[32] Mr Brock submitted that the learned Magistrate acknowledged the appropriateness of the sentence imposed on 14 April 2010 and identified the features that justified the degree of leniency reflected in that sentence. These factors were:

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[5] See *Hampton v The Queen* [2008] NTCCA 5 at para [24]; *Dinsdale v The Queen* (2000) 202 CLR 321 at 325.
[6] [2010] NTSC 72 at 17.

- The appellant was 18 years at the time of the offences;
- Priors were limited and not directly related to this type of offending;
- This was the first offence to be dealt with in the adult jurisdiction;
- The appellant facilitated the prosecution by handing himself in and taking responsibility for it;
- The plea of guilty was entered into at the first available opportunity; and
- There were identifiable indicators of a genuine desire and progress in the area of rehabilitation.

[33] It was submitted that these mitigatory features remained as relevant at the time of re-sentence as at the time of the original sentence, and although the learned Magistrate had to balance those factors against the re-offending dealt with by the Supreme Court, the learned Magistrate also had to take into account as well as the serious nature of the offence before the Supreme Court, the following further matters of mitigation at the time of re-sentence:

- The appellant was placed in incredibly stressful personal circumstances and unstable accommodation;

- The appellant had since then taken significant steps towards rehabilitation including his entry into the Sunrise Program; and

- Due to no fault of his own there was a significant delay between the offending, sentencing and the re-sentence and during that time he was subject to bail conditions and remand.

[34] It was submitted that the custodial sentence was such a jump from the original disposition as to represent a disproportionate response which failed to properly take into account the significant mitigating factors of both the original offending and the subsequent mitigating factors, and demonstrated that the penalty imposed was excessive.

[35] I do not think that Justice Blokland was intending to lay down any principle of law which is applicable in all cases. Such a rule would not be consistent with s 15 (4) of the *Sentencing Act* which sets out the alternatives available to the court when dealing with a breach of bond under s 15. In particular s 15 (5) provides that in determining how to deal with an offender under s 15 (4) (c) the court must take into account the extent to which the offender has complied with the order before its cancellation or its expiration.

[36] As the learned Magistrate rightly pointed out, the appellant breached the orders within a very short period after the order had been imposed by re-offending in a like manner and a more serious manner. Also as the learned Magistrate had pointed out, the appellant had been given a very lenient sentence when re-sentenced by Ms Hannam CSM. Continued leniency after

serious breaches of orders undermines the integrity of court orders and in my view is not appropriate when there has been a serious breach within a very short period of time, unless there are very exceptional circumstances.

[37] In my view a sentence of imprisonment for a short period of time which was virtually wholly suspended was not manifestly excessive.

[38] The only matter of which I have some concern is that the learned Magistrate imposed an operative period of two years which, it was submitted, was grossly disproportionate to the sentence which was imposed.

[39] I accept the proposition that an operative period should not be so long and as to be disproportionate in that manner. It would not be right, for example, to impose a sentence of imprisonment for a short period of time and suspend most of the sentence upon an operational period of many years. Clearly that would be excessive. There are cases which deal with the fixing of operational periods which are less than the balance of the head sentence but there are none which deal with operational periods which operate well beyond the balance of the head sentence. I do not think that any hard and fast rule can be laid down. The purpose of the operational period is two-fold. It is to provide an opportunity for the prisoner's rehabilitation but at the same time it operates as a special deterrent from re-offending. In fixing the operational period it is necessary for a court to have regard to all of the circumstances of the case. In the circumstances of this case, I think two years is long, but I do not think it exceeds the bounds of a proper

discretionary sentence albeit that it is probably at the limit of what would be fair and just.

[40] I am not satisfied that the appellant has established that the sentences imposed were manifestly excessive. I would therefore dismiss this ground.

Conclusion

[41] The appeal is dismissed.
