Parmbuk v Garner [1999] NTSC 108

PARTIES:	GLEN PARMBUK v DONALD GARNER
TITLE OF COURT:	SUPREME COURT OF NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM JUVENILE COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 60/99
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JUDGMENT OF:	Bailey J

REPRESENTATION:

Counsel:

Appellant:	M. Little
Respondent:	J. Whitbread

Solicitors:

Appellant:	NAALAS
Respondent:	

Judgment category classification:	C
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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Parmbuk v Garner [1999] NTSC 108
No. (9909849) JA 60/99

BETWEEN:

GLEN PARMBUK
Appellant

AND:

DONALD GARNER
Respondent

CORAM: Bailey J

REASONS FOR JUDGMENT

(Delivered 14 October 1999)

[1] This is an appeal against a sentence imposed by the learned Chief Magistrate on 7 July 1999.

[2] The appellant, a juvenile both at the date of his offences and sentencing, was convicted upon his own pleas of the following offences:

(a) aggravated unlawful use of a motor vehicle (the circumstance of aggravation being the damage caused was to the value of $14,183.40) [218(1) and (2)(c) of the *Criminal Code*].

(b) driving a motor vehicle on a public street whilst not being the holder of a licence to do so [s.32(1)(a)(1) of the *Traffic Act*];

(c) driving a motor vehicle at a speed and in a manner dangerous to the public [s.30(1) at the *Traffic Act*];

(d) being the driver of a motor vehicle, failed to stop the said vehicle when required to by a police officer [s.65(1) of the *Motor Vehicles Act*];

(e) aggravated criminal damage (the circumstance of aggravation being that the loss caused by such damage was approximately $5,000) [s.251 of the *Criminal Code*]; and

(f) dangerous act – driving a vehicle head on towards a police vehicle at speed on a narrow dirt road causing the police vehicle to take evasive action and causing serious actual danger to the lives of the public [s.154(1) of the *Criminal Code*].

[3] With respect to the offences referred to in para.[2] (a), (b), (c), (e) and (f) the learned Chief Magistrate imposed an aggregate sentence of twelve months "imprisonment" (as to which see later) backdated to 14 May 1999. It was ordered that the sentence of imprisonment be suspended after six months subject to the condition that the appellant submit to the supervision of the Department of Correctional Services for a period of 18 months (from 7 July 1999). With respect to the offence referred to in para.[2](d) the learned Chief Magistrate recorded a conviction but imposed no further penalty.

[4] The circumstances of the offences were summarized by the prosecution and agreed on behalf of the appellant in the following form:

> "Sir, the facts are that in the early hours of Tuesday 4 May this year the defendant had an argument with his girlfriend and in an agitated state he went to Top Camp. The defendant attended the residence for Bonifus Perjic(?) and approached the Port Keats store's white Toyota Landcruiser ute which was parked in the yard. The registration number of that is 474.308.
>
> The defendant then entered the vehicle and using a spare key he started the engine and drove off with the vehicle. The defendant then drove the vehicle around the community at great speed making donuts and skids at various locations around the community. The defendant then drove to the Port Keats Club and picked up a co-offender, Norman Dumoo, who was waiting outside.
>
> The defendant then drove with the co-offender seated in the front passenger seat and while the vehicle was driven around the community the co-offender seated on the passenger window ledge hanging out of the window used a metal wheel brace to belt the panels of the passenger side door and make a loud noise.
>
> As the defendant drove the stolen vehicle around the community the co-offender continually belted the door panel while he cheered and yelled loudly causing the majority of the community to come outside of their houses and watch and cheer the defendant's driving.
>
> As police followed the vehicle around the community the vehicle increased it's speed to the extent where police had to stop following the vehicle due to the resident's safety. The defendant continued doing donuts causing clouds of dust and young children running around the road following the defendant's driving causing police to fear that someone was going to be run over.
>
> At this stage police were considering getting a firearm and forcing the vehicle out of Port Keats and shooting out one of the tyres to stop the defendant's vehicle due to the extreme danger to the public and the defendants in the vehicle.

The vehicle was stopped on the roadway at Port Keats near the Dumoo houses. Police approached the stolen vehicle in a police vehicle. Without warning the stolen vehicle reversed toward the police vehicle and collided with the bullbar of the police vehicle.

At one stage the defendant drove the vehicle over several metre high concrete pillars in between the old clinic and staff house at speed causing extensive damage to the vehicle's undercarriage. The stolen vehicle then drove off at high speed between houses narrowly missing children running for safety.

Police were continuing to follow the defendant's vehicle, warning the public to stay clear of the roads. The police vehicle followed at a safe distance when the driver of the stolen vehicle failed to negotiate a corner and ran head on in to a 6 foot chain mesh fence. The police vehicle again was driven up to the rear of the stolen vehicle.

The police vehicle was stopped to the rear and left of the stolen vehicle with their blue lights activated and the siren sounding. When police were alighting from the police vehicle the stolen vehicle, without warning, was reversed at speed side swiping the driver's side of the police vehicle causing extensive damage.

The value of damage is estimated at $5,000. The police vehicle had to be sent to Darwin immediately due to problems with its steering as a result of the collision. And sir, that left the police at Port Keats with only one vehicle.

The stolen vehicle was then driven off at speed, failing to stop. A short time later police were driving their police vehicle down a track near the dump. The stolen vehicle was driven towards the police vehicle at speed. To avoid a head on collision the police vehicle was placed in reverse and driven backwards at speed.

When the stolen vehicle continued to drive directly at the front of the police vehicle, the police vehicle was reversed off the roadway in to the scrub. The stolen vehicle narrowly missed the front of the police vehicle, causing officers to fear for their lives, and continued to drive round the community at high speeds.

During the morning the defendant continually drove in to the football oval and at high speeds proceeded to do donuts and drove off when

police approached them. At 7.30am after driving around the community for 3 ½ hours the defendant abandoned the vehicle a the barge landing in Port Keats due to the engine being seized. The offenders then swam across the creek and in to the scrub.

Later in the morning the defendant was brought to the Port Keats Police Station by concerned family members where he was arrested. Later in the afternoon the defendant took part in a record of interview and made full admissions to the offences. When asked his reason for unlawfully using the vehicle he replied: 'I had an argument with a girlfriend.' When asked why he did not stop when called upon he replied: 'I was angry.' When asked why he drove at speed head on towards the police vehicle he replied: 'To have an accident.'

The defendant was charged and refused bail. At no time did the defendant have any permission to steal or damage any of the property mentioned and at the time of the offences the streets of Port Keats were public streets and the defendant does not hold a driver's licence. And, sir, the defendant has been in custody since 4 May".

[5] The appellant's criminal record was tendered by the prosecution. In addition to several offences of dishonesty, this disclosed that the appellant had been found guilty of the following similar offences on the dates indicated:

1 December 1998 - drive unlicensed
- unlawful use of a motor vehicle
- criminal damage

2 January 1998 - drive manner dangerous
- drive unlicensed
- unlawful use of a motor vehicle

28 November 1997 - unlawful use of a motor vehicle

7 October 1997 - unlawful use of a motor vehicle
- criminal damage

2 September 1997 - unlawful use of a motor vehicle
- criminal damage
- attempted criminal damage.

[6] The appellant had previously received sentences of release on a good behavior bond, community service orders, fines and detention in a juvenile detention centre for periods ranging from 14 days to 6 months.

[7] The learned Chief Magistrate in sentencing the appellant had the benefit of a pre-sentence report. In his reasons for sentence, the learned Chief Magistrate stressed the very serious nature of the offences committed by the appellant during the incident of 4 May 1999. His Worship emphasized that the incident had extended over several hours, members of the appellant's community and police officers had been put at risk and damage of around $20,000 had been caused. The learned Chief Magistrate expressed doubts as to the sincerity of the appellant's remorse having regard to his record of similar offences involving motor vehicles and comment in the pre-sentence report that the appellant was worried about the prospect of receiving traditional punishment from his family and members of his community. His Worship indicated that the appellant's case was one calling for an element of general deterrence. After referring to the need to promote the appellant's vocational opportunities, in particular by encouraging the appellant to improve his English language ability by taking advantage of educational opportunities in Don Dale Detention Centre, His Worship explained that the appellant's sentence would be a combination of "imprisonment" followed by a period of supervision while subject to a partly suspended sentence.

[8] The appellant was born on 10 October 1982. Accordingly, his seventeenth birthday was to occur some five months after the date fixed for the

commencement of his sentence (14 May 1999). In referring to "the time that you will spend in Don Dale" it seems clear enough that the learned Chief Magistrate intended to sentence the appellant to a term of detention rather than "imprisonment". In the course of submissions at the appeal, this Court was informed that the appellant in fact had remained at Don Dale Detention Centre until his seventeenth birthday (10 October 1999) and was then transferred to Berrimah prison.

[9] Ms Little on behalf of the appellant relied on the following appeal grounds:

(a) that the learned Magistrate placed undue weight on the prosecutor's comments regarding sentence;

(b) that the learned Magistrate paid insufficient regard to the social and environmental circumstances of the appellant;

(c) that the learned Magistrate place undue emphasis on retribution and general deterrence and accordingly placed insufficient weight on the rehabilitation of the juvenile appellant;

(d) in all the circumstances the sentence was so manifestly excessive as to constitute an error of law; and

(e) (following a grant of leave to add an additional ground of appeal) the learned Magistrate erred in:

(i) sentencing the appellant to an aggregate sentence; and

(ii) sentencing the appellant to an aggregate sentence which included two property offences which cannot be served concurrently with sentences of detention or imprisonment for non-mandatory periods.

[10] In addition a number of other grounds of appeal were referred to but were either not pressed or are such that it is not necessary to refer to them for present purposes.

[11] It is convenient to turn first to the additional ground of appeal (para. [9](e) above) concerning the learned Chief Magistrate's imposition of an aggregate sentence for five of the appellant's offences. Ms Whitbread, counsel for the respondent, immediately conceded that his His Worship was in error in adopting such an approach.

[12] Two of the appellant's offences (aggravated unlawful use of a motor vehicle and aggravated criminal damage) were "property offences" within the meaning of the *Juvenile Justice Act* and, accordingly, subject to the provisions of Division 3 of Part VI of the Act dealing with repeat property offenders. The appellant was a juvenile who had previously been dealt with by the Juvenile Court for one or more property offences and was liable to serve a period of not less than 28 days detention for the two new property offences pursuant to sub-section (6) of section 53AE. Sub-section (9) of section 53AE relevantly provides:

> "(9) The mandatory period of a period of detention imposed under subsection …(6) is not to be served concurrently with either of the following:
>
> (a) a period of detention for another offence that is not a property offence regardless of when the sentence for the other offence was imposed;
>
> (b) …… ".

[13] It follows from these provisions that the learned Chief Magistrate was in error in imposing an aggregate sentence with respect to the appellant's two new property offences and the three other offences of driving unlicensed,

driving at a speed and in a manner dangerous to the public and dangerous act.

[14] Aside from the specific provisions dealing with property offences (one effect of which is to prohibit imposition of an aggregate sentence covering property and non-property offences), the *Juvenile Justice Act* contains no specific provision for the imposition of aggregate sentences (cf s.52 of the *Sentencing Act* and see *Bynder v Gokel* (1998) 8 NTLR 91 at 102). Accordingly, the learned Chief Magistrate was also in error in imposing an aggregate sentence with respect to the three non-property offences of the appellant.

[15] It follows from the above that it is necessary, as a minimum, to re-structure the appellant's sentence to accord with the provisions of the *Juvenile Justice Act*. Of course, it does not necessarily follow that any re-structuring of the appellant's sentence would result in an outcome different to that intended by the learned Chief Magistrate. However, before turning to the other grounds of appeal, I note that His Worship appears to have been under a misapprehension as to his sentencing powers in the Juvenile Court.

[16] At the conclusion of submissions on behalf of the respondent, during which the police prosecutor, Mr Murphy urged the learned Chief Magistrate to impose a "substantial period of incarceration" on the appellant, His Worship observed:

> "And the maximum's twelve months in this jurisdiction, isn't it?".

Mr Murphy confirmed the learned Chief Magistrate's view of the maximum sentence available under the *Juvenile Justice Act*. However, as *Bynder v Gokel*, supra, makes clear at p104:

> "… the Juvenile Court cannot make any order where a juvenile is sentenced to an effective term, or terms, of detention exceeding 12 months ***except to the extend permitted by*** ss 53(2), 92(2) and (now) ***s.53AE(2A)*** of the *Juvenile Justice Act*". (emphasis added).

[17] Section 53AE has been repealed and replaced since the judgment in *Bynder v Gokel* was delivered, but not in any material respect for the purposes of the above passage. That judgment (at p.102 and 103) holds that the Juvenile Court may order a juvenile to be detained or imprisoned for a period exceeding 12 months where, *inter alia*, section 53AE (dealing with repeat property offenders) is applicable and accumulation of sentences results in a custodial sentence in excess of twelve months. In the present case, counsel for the respondent has not suggested that the learned Chief Magistrate's misunderstanding as to the limits of his sentencing powers has led him into error. In re-sentencing the appellant, I do not propose to increase the appellant's effective sentence. I will now turn to the remaining grounds of appeal.

[18] Ms Little submitted that the learned Chief Magistrate placed undue weight on the police prosecutor's comments regarding sentence. The gravaman of this ground of appeal is that, the prosecutor, having referred to the agreed facts in the terms which I have quoted at paragraph [4] above, made

submissions as to an appropriate disposition in colourful and somewhat emotional terms in which he sought to embellish those agreed facts.

[19] For present purposes, I do not consider that is necessary to canvass this ground of appeal in any detail. Ms Little conceded that she was not able to identify anything in the sentencing remarks of the learned Chief Magistrate which supported the contention that His Worship had given undue weight, or indeed any weight, to the prosecutor's comments. In the circumstances, there is no validity in this ground of appeal.

[20] Similarly, I do not consider that there is any validity in the ground of appeal that the learned Chief Magistrate paid insufficient regard to the social and environmental circumstances of the appellant. The main thrust of this complaint was that His Worship had not paid any, or any sufficient, regard to the possibility of the appellant being subjected to traditional punishment at the hands of his family or members of his community. This was not an issue raised by the defence, but rather emerged from comments in the pre-sentence report prepared at the learned Chief Magistrate's request. The author of the report had been unable to obtain any details as to the form that traditional punishment or payback might take and no evidence was adduced by the defence in this regard.

[21] In *Munugurr v R* (1994) 4 NTLR 63 (and see also *R v Minor* (1992) 79 NTR 1 at 2) the Court of Criminal Appeal, in relation to submissions that an offender would be subjected to traditional punishment held at p.73:

> "The importance of having evidence put before the Court in proper manner cannot be over-emphasized. The Court must be satisfied that the information which is presented to it is reliable".

The court also observed at p.72 that:

> "statements from the bar table are of little assistance if they are not backed up by evidence from those fully conversant with the language and customs (and we add, views) of the community concerned."

[22] In the present case, the information regarding the possibility of the appellant being subject to traditional punishment fell far short of meeting the criteria suggested above and the learned Chief Magistrate was correct to give this matter little or no weight in arriving at an appropriate sentence for the appellant.

[23] The final grounds of appeal which needs to be canvassed (undue emphasis on general deterrence and retribution, insufficient weight given to rehabilitation and 'manifestly excessive') amount in practical terms to a complaint that the learned Chief Magistrate failed to take into proper account the proper principles for sentencing juvenile offenders.

[24] The proper approach to the sentencing of juveniles is well known and well established. The following passage from the judgment of Martin CJ in *M v Hill* (1993) 114 FLR 59 at 66 provides a helpful summary of the manner in which the Juvenile Court should tackle the difficult and sensitive task of sentencing juveniles:

> "Furthermore, it is well entrenched in the criminal law that there is an essential difference between children and adults when they come before a court exercising criminal jurisdiction. It is often the case, as here, that the offending is explicable, in part, at least, by difficult personal circumstances, immaturity and the growing-up process: see the remarks of Burt CJ in *Noddy v The Queen* [1980] WAR 132 at 133. To all that is to be added, in respect of this appellant, a particular intolerance to racial slurs. Judges of this Court have often had occasion to reiterate the relevant portions of the preamble to the *Juvenile Justice Act* 1983 (NT) which ways that it is an Act relating to: '… the punishment of juvenile offenders … with the intention that juveniles be dealt with in the criminal law system in a manner consistent with their age and level of maturity (including their being dealt with, where appropriate, by means of admonition and counseling) …'. Having referred to that purpose of the Act Maurice J in *Simmonds v Hill* (1986) 38 NTR 31 went on (at 33) to observe that:
>
> > '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. Here there is a real risk that an incentive to good behavior has been removed, namely the desirability of a clean record in what for young people just leaving school is a very difficult labour market indeed.'"

[25] The remarks of Martin CJ were adopted by Kearney J in *M v Waldron* (1988) 90 FLR 355. His Honour also referred to *R v Homer* (1976) 13 SASR 377 at 382:

> "… 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 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 on an adult."

[26] I would also endorse the observation of Martin CJ in *Hill*, supra, at 67:

> "The punitive and deterrent aspects of the sentencing process should not be allowed to prevail so as to possibly destroy the results of (the) process of rehabilitation."

[27] I emphasis that in applying the above principles each case should be dealt with on its merits. In particular, even in the case of a juvenile, deterrence and punishment as sentencing objectives in the particular circumstances of an offender and an offence (or offences) may assume considerable significance. In *Forrester v Dredge*, unreported No. JA 78 of 1996, delivered 19 February 1997, Mildren J observed:

> "…general deterrence does have a role to play even in the sentencing of juveniles and the weight to be given to it must vary according to the circumstances of the case, including the nature of the charge."

[28] With respect, I agree with this remark of Mildren J, but also adopt the observation of Thomas J in *Grego v Setter* unreported No 9706926 of 1997, delivered 19 December 1997:

> "Overall, however, the consideration of general deterrence is not as important in the sentencing of juveniles as it is in the case of sentencing an adult. When sentencing a juvenile, considerations of rehabilitation should always be regarded as very important, *GDP* (1991) 53A Crim R112 at 116."

[29] In the present case, the learned Chief Magistrate, correctly in my view, referred to the notorious fact that unlawful use of motor vehicles at Port Keats by young offenders is a matter of community concern. In the appellant's case, having regard to his history of similar offences involving motor vehicles, I consider that the appellant was an appropriate vehicle for a sentence involving an element general deterrence. Similarly, on the basis of

the appellant's antecedents, an element of personal deterrence and punishment was warranted notwithstanding the appellant's status as a juvenile. It is clear, however, that in giving expression to these sentencing objectives, the learned Chief Magistrate did not lose sight of the need to structure a sentence which promoted the appellant's rehabilitation. He sought to do this by making available the educational and vocational training opportunities of a detention centre (notwithstanding his reference to "imprisonment") coupled with a partly suspended sentence subject to conditions of supervision.

[30] In the light of the appellant's criminal record and the very serious nature of his offences (in particular the offences of 'dangerous act' and 'driving at a speed and in a manner dangerous') I do not consider that the learned Chief Magistrate's approach was in any way contrary to the proper principles for the sentencing of juvenile offenders. On the material before His Worship, the appellant was a juvenile in urgent need of discipline, education, training and supervision. It may well be that greater consideration might have been given to the appellant's precise age to avoid him having to serve any period of incarceration in an adult prison. The effect of the learned Chief Magistrate's orders was such that the appellant would be likely (subject to s.53(6) of the *Juvenile Justice Act*) to spend some five months in a detention centre and one month in an adult prison. I do not consider that this latter period would assist the juvenile's rehabilitation. In the circumstances, as it is necessary for the reasons stated earlier to re-sentence the appellant, I will

take the opportunity to adjust the appellant's sentence to avoid him having to spend any further period in an adult prison. I will also adjust the appellant's sentence to run from 4 May 1999 (the date he was taken into custody) rather than 14 May 1999. Adoption of the latter date by the learned Chief Magistrate appears to be explicable only on the basis of oversight.

[31] For the above reasons, I allow the appellant's appeal against sentence and set aside the sentences imposed by the learned Chief Magistrate on 7 July 1999. The appellant is re-sentenced as follows:

(a) aggravated unlawful use of a motor vehicle and aggravated criminal damage – the appellant is convicted and is to be detained in a detention centre for a period of 6 months;

(b) driving a vehicle on a public street whilst not being the holder of a licence to do so – the appellant is convicted and is disqualified from holding a licence to drive a motor vehicle for a period of 12 months as from 4 May 1999 and discharged without further penalty;

(c) driving a motor vehicle at a speed and in a manner dangerous to the public – the appellant is convicted and is to be detained in a detention centre for a period of 3 months;

(d) being the driver of a motor vehicle, failed to stop the said vehicle when required to do so by a police officer – the appellant is convicted and is discharged without further penalty; and

(e) dangerous act – the appellant is convicted and is to be detained in a detention centre for a period of 6 months.

[32] The sentences with respect to (c) and (e) above are to be served concurrently to each other, but on a cumulative basis to the sentence referred to at (a) above. All sentences of the appellant are deemed to have commenced on 4 May 1999.

[33] With respect to the effective sentence of 12 months detention, the appellant is to be released from detention or imprisonment from the date of this order and the unserved balance of his sentence of detention is to be suspended for a period of 12 months from the date of this order, subject to the following conditions:

(a) the appellant is to be of good behavior; and

(b) the appellant is to report immediately to the Director of Correctional Services or his delegate and comply with any requirement of the Director or his delegate:-

(i) to reside with a particular person or at a particular place;

(ii) to refrain from specified activities or from associating with specified persons; and

(iii) to participate in specified educational programmes, vocational training or employment.