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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

SC No. 30 of 1992
SC No. 31 of 1992

IN THE MATTER of the
JUSTICES ACT

AND IN THE MATTER of appeals
from sentences imposed by the
Court of Summary Jurisdiction
at Alice Springs

BETWEEN:

KEITH SYDNEY LEANEY
Appellant

AND:

TREVOR HOWARD BELL
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 21 August 1992)

The appeals

On 15 May 1992 the appellant pleaded guilty before the Court of Summary Jurisdiction at Alice Springs to the

following charges for which sentences were imposed as indicated.

	Charge	Sentence
1.	Unlawfully entering a building, Pat Holden Fashions, on 6 May 1992 with intent to commit a crime, namely, stealing:	3 months imprisonment
2.	Stealing 8 pairs of jeans, valued at $800, the property of Pat Holden Fashions:	3 months imprisonment, to be served concurrently with sentence no. 1.
3.	Unlawfully entering a building, Tennant Creek Apothecary, on 7 May 1992 with intent to commit a crime, namely, stealing:	3 months imprisonment, to be served cumulatively upon sentence no.1.
4.	Stealing Rohypnol, Serapax and Valium valued at $64.95, the property of Tennant Creek Apothecary:	3 months imprisonment, to be served concurrently with sentence no.3.

5.	Unlawfully entering a building, namely St.Johns Ambulance Centre, with intent to commit a crime, namely, stealing:	3 months imprisonment, to be served concurrently with sentence no.3.

It can be seen that the effective sentence which the appellant was to serve for these 5 charges was 6 months imprisonment. There was some initial confusion on the hearing of the appeals as to whether sentence no.5 was to be served concurrently with or cumulatively upon sentence no.3, but it later became clear that it was a concurrent sentence. On 18 May the appellant appealed to this Court against the severity of the 5 sentences, contending that individually and in totality they were manifestly excessive. The appeals were argued together before me on 19 August; I rule on them today.

The submissions before the Magistrate

Counsel for the defendant/appellant, Mr Allen, pleaded in mitigation of punishment as follows. The appellant had pleaded guilty, co-operated with the Police and voluntarily expressed his intention to make full restitution at the rate of $100 per month for the property and drugs taken from the chemist's shop and the damage occasioned thereto ($650). The level of criminality

displayed in these offences was not great, as indicated by the following facts. As to charges nos. 1 and 2, at 11.30 pm the appellant had found the shop window smashed and, being affected by alcohol and Rohypnol, without any premeditation, he had reached in and seized the 8 pair of jeans. As to charge no. 3, he was at the time suffering withdrawal symptoms; he was formerly a heroin addict and had become addicted to Rohypnol and Serapax. He had earlier that evening unsuccessfully sought assistance from the Tennant Creek Hospital and the Aboriginal Congress Centre. He had kicked in the back door of the chemist shop and had taken only Rohypnol, Serapax and Valium (charge no.4). As to charge no.5, he had raised the door to the ambulance station at about 1.45 am and had unsuccessfully tried to find Serapax in the ambulance, taking nothing else.

Mr Allen took his Worship briefly through the appellant's background in New South Wales and explained that he had started to use heroin at age 20 and had become addicted to it. This had resulted in the usual drug addict's extensive criminal record, as he sought money to support his habit. He had contracted hepatitis C, from using unclean needles. He had commenced, voluntarily, a Methadone program about 5 years ago, but found that remaining within the Sydney drug culture made life difficult for him. Last year he entered Odyssey House for 4 months

and was able to free himself from his addiction to Methadone. He had a sleeping disorder for which he uses Rohypnol. He takes Serapax for an anxiety condition from which he suffers, associated with his hepatitis C.

Mr Allen informed his Worship on 15 May that the appellant had come to Tennant Creek "a few months ago" to "try to put the past behind him", after he had left Odyssey House. He had an uncle at Tennant Creek, Mr Bill Williams, and believed that Tennant Creek was relatively free of the drug culture. Mr Allen stressed the defendant's continuing attempt to rehabilitate himself, but did not go into specifics. He asked that the defendant's present criminal conduct be treated as a "slip", and that leniency be extended to him to the extent that any sentences of imprisonment imposed be fully suspended. There were facilities for drug counselling in Tennant Creek.

The sentencing process

Before his Worship was the appellant's criminal record. This showed that over a 9 year period between August 1980 and December 1989 he had appeared before various courts of summary jurisdiction in New South Wales, on 13 occasions. He had been convicted of 38 offences, including break enter and steal (7 convictions), stealing (4 convictions), and drug offences (4 convictions) and traffic

offences. His first sentence of actual imprisonment was in August 1984, a sentence of 12 months periodic detention. In March 1987 he received an effective sentence of 2 years imprisonment with a non-parole period of 12 months. In February 1988 he was sentenced to 2 years imprisonment with a non-parole period of 9 months; this must have involved a breach of the parole built in to the sentence of March 1987. He received a further effective sentence of 6 months imprisonment in April that year and in June a further 6 months for escaping. As a result of an appeal to the Court of Criminal Appeal in September 1988 against the sentence for escaping, his total effective sentence at that time was 3 years 6 months imprisonment with a non-parole period of 12 months computed from 12 June 1988. In October 1989 he received an effective sentence of 6 months imprisonment. In December 1989, when convicted on 2 charges of break enter and steal, and one of break and enter with intent to steal, he was released on a bond to be of good behaviour for 5 years, expiring in 1994.

It is clear that a record of this type would be a ground for refusing to extend leniency, on the basis that the appellant had showed himself unresponsive to leniency in the past (particularly to the bond of December 1989) and had persisted in a life of crime. A record may be legitimately treated as showing the offender's true character and the

extent and nature of his criminal inclination. This record showed that the offences in Tennant Creek were committed during the currency of the good behaviour bond of December 1989. His Worship was entitled to treat that fact as suggesting that the appellant had no great regard for the law, of for his obligations under the bond, and as casting doubt on the likelihood of his being of good behaviour in the future or of taking advantage of any leniency his Worship might extend to him; see *R v Gray* [1977] V.R. 225 at 228-9.

The maximum sentence for each of the 5 charges which the appellant faced was 2 years imprisonment, upon summary conviction. His Worship expressed his opinion tersely:-

> "Well I take into account what has been put to me, Mr Leaney. I'm not impressed. The first act was done under the influence. The second act and your third act were because of self imposed drug use and suffering withdrawal symptoms. - - -"

His Worship then imposed the sentences under appeal and ordered that the appellant pay $600 restitution to the chemist by instalments of $100 per month, with 15 months to pay.

The submissions on appeal

(a) The appellant's submissions

Mr Allen acknowledged that no evidence had been placed before the learned Magistrate to support the submission that the appellant was rehabilitating himself in Tennant Creek. He submitted that his Worship's sentencing observations were "perhaps simplistic", in that the word "self-imposed" suggested that his Worship may have assumed that a drug addict has a choice as to whether or not he takes the drugs to which he is addicted. He referred to observations by Burt CJ in *Jenkins* (1980) 20 A Crim R 56 at 57-8, on the effects of heroin addiction. However, I consider that his Worship was simply stating the facts which lay at the root of the commission of the offences.

Mr Allen submitted that in a case such as this "rehabilitation - - is an extremely strong consideration", in considering whether a custodial sentence should be imposed. He submitted that after the appellant was sentenced in May, his attempt to rehabilitate himself had continued. In support of this submission, Mr Allen was permitted to tender in evidence, by consent, a medical report by Dr. Kiss of 11 August, a report by a Departmental social worker of 10 August, and a report of 4 August from the Julalikari Council Aboriginal Corporation for which the appellant had been working. Briefly, these reports disclosed its following position. The appellant first

sought the assistance of Dr. Kiss on 19 May, 4 days after he was sentenced; Dr. Kiss had placed him under a detoxification regime, considered he had since maintained a non-drug abuse status, and that he was genuine in his attempts to deal with his drug problem. The social worker noted that the appellant had worked as a respite worker for 19 days from 29 June to 17 July, and considered that during that time he had shown himself to be "dedicated, caring, reliable and responsible". He had had to be discharged from that employment simply because he had a criminal record. The liaison officer at the Julalikari Council, for which the appellant had been working for the past 2 months as a respite worker, spoke well of him. Mr Allen submitted that these reports showed that there was "great hope" for the appellant; I think that "very cautious optimism" would be a more accurate conclusion.

Mr Allen also submitted that the appellant, now aged 31, was at a "watershed in his life", having reached an age at which courts sometimes extend leniency despite the existence of a bad criminal record. He referred to observations by Street CJ in *R v Caridi* (unreported, Court of Criminal Appeal (NSW), 3 December 1987); his Honour said at pp2-3:-

> "The further consideration is that his Honour took the view that, at the respondent's present age, thirty-two, and with an earlier life which included quite serious criminal offences, a stage had been reached where a grant of leniency might be just sufficient to turn the respondent away from continued involvement in crime. That recognition by the criminal courts of a critical time, usually in the order of about thirty years of age, when otherwise hardened criminals may prove responsive to some degree of leniency - not a total absence of punishment but some degree of leniency - has been recognised both in this country and elsewhere and his Honour so regarded the present respondent.
>
> In the context of the provision of assistance by the respondent to the prosecuting officers, this view of what could be called this critical rehabilitative age can be seen to have been a view which was open to his Honour."

See also to the same effect *Micallef* (1990) 50 A Crim R 465

at 467 per Woods J:-

> "It is true that sentencing judges should be astute in detecting those cases where, after a poor record, a turning point appears in the life of a repetitive offender: *Cardi* (unreported, Court of Criminal Appeal, NSW, 3 December 1987). Commonly, offenders in their early 30s reach that criticals (sic) stage, but before extending leniency sentencing judges should be satisfied that there is a real glimmer of hope, and even then should impose a sentence which adequately balances the interest of general deterrence against the interest of rehabilitation. In appropriate cases that may justify reducing the minimum term and extending the additional term in the manner discussed in *Moffitt* (1990) 20 NSWLR 114; 49 A Crim R 20." (emphasis mine)

In terms of Wood J's observations Mr Allen conceded that when the appellant was sentenced in May there was "perhaps only a glimmer of hope", but submitted, relying on the three reports now tendered, that since then the glimmer had "become far greater". As indicated earlier, I think that overstates the candlepower; there was really nothing in May to found a "glimmer of hope", but now a glimmer appears.

Mr Allen informed me that to date the appellant had made restitution to the chemist of nearly $120. He submitted that the courts considered that restitution should be encouraged and so mitigated punishment where restitution was voluntarily offered, as here. I accept that submission; see *R v Hutchins* (1957) 75 WN (NSW) 75 and *Mickelberg v The Queen* (1984) 13 A Crim R 365. Voluntary restitution involves reparation to the victim of crime, a redress for the wrong inflicted on him; it also indicates remorse on the part of the offender and a probability of his rehabilitation. However, the offer of restitution in this case was before his Worship and the fact that he did not refer to it as a specific mitigating factor when imposing sentence does not mean that he is to be treated as not having taken it into account. To the contrary, it is to be assumed that the learned Magistrate knew the elementary rules of sentencing, and the courses open to him.

Successfully to contend that his Worship erred in some way, error must be shown clearly to appear from his sentencing remarks, or in some other reliable way. See generally *R v Reiner* (1974) 8 SASR 102 at 106 per Bray CJ, and especially at 114-5 per Wells J.

Mr Allen submitted that a suspended sentence should be imposed.

(b) The respondent's submissions

Mr O'Loughlin, counsel for the respondent, informed me that the appellant had been arrested and charged with offences nos. 1-4 on 9 May. During his interview by the Police, in which he fully admitted those offences, there is recorded:-

> "Leaney: - - I'm sorry, I want to pay compensation.
>
> Marsh: Anything else you want to say?
>
> Leaney: That I'm sorry and it'll never happen again."

Mr O'Loughlin observed that less than 12 hours later the appellant was arrested for offence no.5. He submitted that this showed a "degree of persistence" by the appellant in his criminal activity. I agree; it is behaviour typical of drug addicts.

Mr O'Loughlin informed me that on 26 April, 15 August and 25 October 1991 the appellant was committed for trial in New South Wales, on charges of break and enter with intent to steal, break enter and steal, and malicious wounding respectively. He had failed to appear for trial at the Parramatta District Court on 8 April 1992; as a result, 2 warrants for his arrest had issued in New South Wales. Mr O'Loughlin noted that the appellant had shortly afterwards arrived in Tennant Creek and within some 4 weeks had committed the present offences. He submitted that these facts showed that the appellant probably had several reasons for being "anxious to leave the New South Wales jurisdiction". This seems crystal clear, and it weakens Mr Allen's argument, unsupported by specifics, that the appellant's purpose in coming to Tennant Creek was to rehabilitate himself.

Mr O'Loughlin sought to tender a presentence report on the appellant prepared in New South Wales on 7 April 1992, and a psychologist's report of 11 May 1990. Mr Allen objected to the admission into evidence of these reports, on the basis that they contained hearsay and he had had no opportunity to cross-examine the makers. I consider that the reports should not be received into evidence on the appeals, and dismiss their contents from consideration.

Mr O'Loughlin submitted that the appellant had already received the benefit of the opportunity referred to in *Caridi* (supra), when he was given the 5 year bond in December 1989 against a background of a long history of offences and terms of imprisonment. Mr O'Loughlin submitted that the appellant should not be given that opportunity again, in light of his recent offences.

(c) The appellant's submissions in reply

Mr Allen freely conceded that the appellant had been "in a great deal of trouble in New South Wales", but pressed his submission that the appellant had come to Tennant Creek "to rehabilitate himself". The difficulty with that submission, as noted earlier, is that there is no evidence of the rehabilitative steps he had taken, if any, between arriving in Tennant Creek and committing these offences.

Mr Allen stressed that the suspended sentence which he sought is a serious punishment, citing *Elliott v Harris (No.2)* (1976) 13 SASR 516 at 527, where Bray CJ said:-

> "So far from being no punishment at all, a suspended sentence is a sentence to imprisonment with all the consequence such a sentence involves

> on the defendant's record and his future, and it is one which can be called automatically into effect on the slightest breach of the terms of the bond during its currency. A liability over a period of years to serve an automatic term of imprisonment as a consequence of any proved misbehaviour in the legal sense, no matter how slight, can hardly be described as no punishment. This Court has frequently expounded the merits of the suspended sentence in appropriate cases - - - ".

It should be noted that under the relevant legislation in South Australia - s4(2a) of the Offenders Probation Act 1913, as amended - breach of the terms of the bond automatically resulted in service of the full term of the sentence suspended; see *R v Locke* (1973) 6 SASR 298 at 301-2. However, under the corresponding legislation in the Northern Territory - ss5(1)(b) and 6(3)(e) of the Criminal Law (Conditional Release of Offenders) Act - that is not the case. The sword of Damocles, in this respect, is not as sharp in the Territory; the suspended sentence has not the same "teeth" as in South Australia, as disposition upon breach is discretionary. I note also and respectfully agree with the following observations in *R v Percy* [1975] Tas S.R. 62. At p73 Neasey J said:-

> "- - - I subscribe entirely to the view that a suspended sentence should not be imposed as a "soft option" when "the court is not quite certain what to do", or "when, but for the power to give a suspended sentence, a probation order was the proper order to make" - *O'Keefe v The Queen* (1969)

53 Cr. App. R. 91, at p.94. In that case the court also said [at pp94-5]:-

> "After all, a suspended sentence is a sentence of imprisonment. Further, whether the sentence comes into effect or not, it ranks as a conviction, unlike the case where a probation order is made, or a conditional discharge is given.
>
> Therefore, it seems to the Court that before one gets to a suspended sentence at all, a court must go through the process of eliminating other possible courses such as absolute discharge, conditional discharge, probation order, fine, and then say to itself: this is a case for imprisonment, and the final question, it being a case for imprisonment: is immediate imprisonment required, or can I give a suspended sentence?"

With the general effect of that, I respectfully agree. It follows, in addition, that the length of a sentence should not in any way depend upon the question whether it is to be suspended or not. As to the suspended sentence generally, see "The Use of Suspended Sentences", by R.R. Sparks [1971] Cr. Law Rev. 384; "Suspended Imprisonment", by Stephen White [1972] Cr. Law Rev. 7.

However, it is almost self-evident that a sentence of imprisonment should not be suspended unless there is some reasonable prospect, from the circumstances of the case or of the offender, that remission from actual imprisonment combined with the expectation that the sentence will have to be served if the conditions of suspension are breached will have sufficient deterrent effect; or will sufficiently move the offender towards reform of his conduct as to achieve that reformation." (emphasis mine)

At p82 Chambers J said:-

> "In my opinion the aspect of deterrence, both to the offender himself and generally, was the most important aspect of the case. I agree with what

> Gibson J. said in *Paynter v The Queen* (unreported, C.C.A., Tas., 4th November, 1964) that imprisonment as a deterrent is easily comprehended by the ordinary man, but a suspended sentence is unlikely to produce the same effect. An effective sentence of imprisonment cannot be shrugged off but, certainly in the case of a person who has consistently been in trouble with the law on previous occasions - - - a suspended sentence might be regarded as something in the nature of a "paper tiger"." (emphasis mine)

Further, I note that the decision whether or not to suspend a sentence involves an exercise of the discretion of the sentencing Magistrate; the review of such a discretion involves the application of the same principles as the review of the sentence actually imposed. See *R v Shueard* (1972) 4 SASR 36 at p44, where the Court identified matters relevant to the decision as follows:-

> "Facts bearing upon the person of the prisoner, his age and history, his medical and psychiatric condition, his future prospects, and his circumstances generally may be taken into account, and often are more appropriately taken into account, as subjective matters which will help a court to decide whether to suspend a sentence, rather than as matters bearing directly upon the appropriate term of imprisonment; though the two aspects are related, and often cannot properly be considered separately and in isolation."

As to the relevance of the appellant's absconding from New South Wales, Mr Allen referred to *Halewyn* (1984) 12 A Crim R 202. In that case the learned sentencing judge in Victoria was informed that there were 9 extradition warrants

waiting to be executed as soon as the prisoner left the court, if he left pursuant to a non-custodial disposition. This appeared to affect the disposition he made. Young CJ said at p205:-

> "The task of a sentencing judge is, of course, to impose the proper sentence for the offence, having regard to all the relevant circumstances, including circumstances personal to the individual offender before him. It would be going too far perhaps to say that the existence of the extradition warrants of which the learned judge was told was totally irrelevant to the task before the judge, but I think that his Honour too readily assumed that if released the application would immediately be extradited and taken to New South Wales."

Applying these views, I set aside the existence of the New South Wales warrants as a relevant factor in determining these appeals. The undisputed fact that the appellant is a recent bail absconder is however a significant matter.

Observations

Section 163 of the Justices Act provides for an appeal to this court from a sentence imposed by a Court of Summary Jurisdiction. As to the general nature of that appeal I adhere to the views I expressed in *Mason v Pryce* (1988) 53 NTR 1 at 7:-

> "I consider that the correct approach to an appeal against sentence under the Justices Act is that

> since the determination of a sentence is a discretionary judgment, this court should not interfere by substituting its own judgment in a case where fresh evidence is not admitted on appeal, unless it is first satisfied that the magistrate fell into error and improperly exercised his sentencing discretion." (emphasis mine)

In this case, however, fresh evidence was admitted on appeal.

Section 172(1)(b) of the Justices Act requires that the nature and grounds of the appeal be stated in the Notice of Appeal. In the Notices of Appeal filed herein the grounds are stated as follows:-

> "The learned Magistrate failed to give sufficient weight to the submissions put in mitigation and as a result the sentence is manifestly excessive."

The ground is that the sentence is manifestly excessive, and the basis for that ground is stated. It appears to escape the critical observations of Martin J in *Flanigan v Barrett* (1988) 7 MVR 31 at p39. The respondent was fairly warned of the basis upon which the appeals were to be argued, though more particularity could have been given.

Sections 176 and 176A of the Act provide, as far as is presently material:-

> "176. Subject to section 176A, no evidence shall be received on the hearing of the appeal other than - - -, except by consent of the parties.
>
> 176A. (1) Where evidence is tendered to the Supreme Court, that Court shall, unless it is satisfied that the evidence, if received, would not afford a ground for allowing the appeal, admit that evidence if -
>
> (a) it appears to it that that evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal;
>
> (b) it is satisfied that that evidence was not adduced in those proceedings and there is a reasonable explanation for the failure to adduce it; and
>
> _ _ _"

The three reports upon which Mr Allen relied met the "consent" requirement of s176. However, I consider that evidence which qualifies under s176 to be received must then meet the requirements of s176A before it is admitted, since s176 is expressed to be subject to s176A. It is somewhat difficult to see how evidence of matters occurring after sentence had been imposed by the Court of Summary Jurisdiction could meet the requirements of s176A(1)(a) or (b); see *R v Prideaux* (1988) 36 A Crim R 114 at 116, and *R v Munday* [1981] 2 NSWLR 177 at 178. Those provisions are consonant with the nature of the appeal as an appeal stricto sensu. The type of evidence which would normally be

admitted on appeal would be, for example, evidence required to explain some ambiguity in the evidence before the Court of Summary Jurisdiction, or some error in the transcript of proceedings. However, it seems that evidence relating to post-sentence matters is sometimes received; see for example *Arnold v Samuels* (1972) 3 SASR 585, *Paynter v Huffa* (1977) 17 SASR 120, *R v Smith* (1987) 27 A Crim R 315, *Giles v Barnes* [1967] SASR 174, *Edwards v Wylie* (1976) 14 SASR 268, and *R v Amuso* (1987) 32 A Crim R 308. In this case, I proceed on the basis that the appeals are to be determined in the light of the three reports received, and also in the light of the new material which shows that the appellant came to Tennant Creek as a bail absconder.

As this is a case where fresh evidence was received on appeal, the function of this Court is as described by O'Leary CJ in *Seears v McNulty* (1987) 28 A Crim R 121 at 127:-

> "- - to form its own independent opinion of the evidence on the material put before it, and give judgment as if it were sitting as a court of first instance."

This is subject to the rider that what is involved is an appeal, and consideration must be given to the advantages of the learned Magistrate, and to his exercise of a sentencing

discretion. As to the fresh evidence, it must have the quality described in principle no.3 in *In the matter of a Petition by Van Beelen* (1974) 9 SASR 163 at 183-4.

Conclusions

I consider that in all the circumstances as they were presented before the learned Magistrate, including the appellant's prior record, the effective sentence of 6 months imprisonment which he imposed was well within the proper exercise of his sentencing discretion. It cannot be said to be manifestly excessive. I do not consider that the appellant has established that his Worship failed to give sufficient weight to the submissions made to him in mitigation, when sentencing. I do not consider that the 3 reports relating to the appellant's changed lifestyle in the last 3 months give cause for more than a cautious optimism that a glimmer of hope for a future drug-free life may now be appearing. Those reports constitute an insufficient basis, in the light of his established history to date, particularly his breach of the bond of 1989 and his recent absconding from bail in April 1992, to conclude that a sentence of imprisonment, otherwise fully merited in my opinion, should be suspended in whole or in part. There is no substance in the other arguments relied on by the appellant.

The appeals are dismissed and the sentences of 15 May 1992 as set out on p2, are affirmed.

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