Cook v Nash & Anor [2007] NTSC 14

PARTIES:	SASHA MARY KATHLEEN COOK v MARK STEPHEN NASH RENAE MOANA McGARVIE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 4 of 2006 and JA 5 of 2006 (20512155, 20512790)
DELIVERED:	22 February 2007
HEARING DATES:	12 May 2006
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

JUSTICES APPEAL – Justices Act – juvenile offender – sentencing – appeal against conviction and sentence – schoolgirl with no record – influence of older offender – (NT) Juvenile Justice Act 1983 s 53 – appeal allowed – convictions quashed – appellant re-sentenced

Girrabul v The Queen [2003] NTSC 101; *R v Hearne* (2001) 124 A Crim R 451; *Simmonds v Hill* (1986) 38 NTR 31; *Wood v Samuels* (1974) 8 SASR 465, applied

R v Bell (1999) 30 MVR 115; *M v Waldron* (1988) 56 NTR 1; 90 FLR 355; *Nelson v Chute* (1994) 72 A Crim R 85; *P (a minor) v Hill* (1992) 110 FLR 42; *R v GDP* (1991) 53 A Crim R 112; *R v Sherpa* (2001) 34 MVR 345;

Smith [1964] Crim LR 70; *R v Toombs* (2001) 34 MVR 509; *R v Tran* (2002) 4 VR 457; *Yovanovic v Pryce* (1985) 33 NTR 24, referred to

REPRESENTATION:

Counsel:

Appellant:	G Bryant
Respondents:	J Down

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondents:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Cook v Nash & Anor [2007] NTSC 14
Nos JA 4 of 2006 and JA 5 of 2006 (20512155 and 20512790)

IN THE MATTER OF the *Justices Act*

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

BETWEEN:

SASHA MARY KATHLEEN COOK
Appellant

AND:

MARK STEPHEN NASH

AND:

RENAE MOANA McGARVIE
Respondents

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 22 February 2007)

Introduction

[1] These are appeals against sentence under s 58 of the Juvenile Justice Act.

[2] On 23 December 2005 the appellant pleaded guilty to three offences with which she was charged in the Juvenile Court. She received the following sentences. First, for the offence of unlawfully damaging a Holden utility being the property of Mr Stefan Magoulas on 22 May 2005 at Darwin

contrary to s 251(1) of the Criminal Code the appellant was convicted and ordered to do 56 hours of unpaid community work within two months of being convicted. Secondly, for the offence of stealing the front left exterior rear view mirror of a Holden utility being the property of Mr Magoulas on 22 May at Darwin contrary to s 210 of the Criminal Code the appellant was convicted and ordered to do 24 hours unpaid community work within two months of being convicted. Thirdly, for the offence of doing a dangerous act on 27 May 2005 at Darwin contrary to s 154(1) of the Criminal Code the appellant was convicted and sentenced to detention for one month. The sentence of one month detention was suspended forthwith upon the appellant entering into a bond in the sum of $500 on her own recognisance to be of good behaviour for 18 months. The conditions of the bond were that the appellant was to be supervised by the Department of Correctional Services for the first nine months of the bond and she was to obey all reasonable directions of the Director of Correctional Services or his delegate as to residence, reporting, associates, alcohol counselling, anger management counselling and general counselling; and the appellant was not to contact Jennifer Alanna Cooper for a period of 12 months. In addition, the appellant was also ordered to pay a $20 victims assistance levy in relation to the first two offences and restitution in the sum of $1772.30 to Mr Magoulas.

[3] The appellant appeals against each of the above sentences. She has filed two notices of appeal, one in relation to the sentences for the offences committed on 22 May 2005, and the other in relation to the sentence for the

offence committed on 27 May 2005. Both notices of appeal are dated 19 January 2006. The two appeals were heard together on 12 May 2006.

Grounds of appeal

[4] The grounds of appeal are that: the presiding magistrate erred in recording convictions against the appellant; each of the sentences is manifestly excessive; and the presiding magistrate failed to give any weight or adequate weight to the appellant's prospects of rehabilitation.

The Facts

[5] The facts are as follows. The appellant was born on 3 May 1989. She was 16 years of age at the time that she committed the offences which are the subject of these appeals. The appellant was previously of good character. She had never previously been to court for any offence. She had a dysfunctional upbringing. Her mother and father separated when she was four years of age. When she was five years of age her father left the Northern Territory and went to live in South Australia. The appellant does not get on with her mother. She left home when she was about 13 years of age and started living independently with older men. The appellant is an intelligent young person who deliberately conceals her scholastic ability. The author of the pre-sentence report that was before the Juvenile Court opined that the appellant was not a criminally minded person and that the chance of her committing similar offences was remote. It was further considered that the appellant's prospects of rehabilitation were excellent.

However, concerns were expressed about her emotional and psychological welfare.

[6] Prior to the offending which is the subject of these appeals, the appellant had become friendly with Jennifer Alanna Cooper who is four years older than her. Ms Cooper was not a good influence on the appellant. She had been in a relationship with Mr Magoulas. The relationship lasted for about two years. The relationship ended when Ms Cooper became pregnant. Mr Magoulas did not want to keep the baby. He felt that they were too young. He persuaded Ms Cooper to have an abortion. He gave her money for an abortion. Ms Cooper ended up having a spontaneous miscarriage. When the relationship came to an end there was considerable animosity between them. Ms Cooper involved the appellant in her animosity towards Mr Magoulas. She got the appellant onside and the appellant took a disliking to Mr Magoulas.

[7] After Mr Magoulas separated from Ms Cooper he began a relationship with another woman. Unbeknown to her, Mr Magoulas and Ms Cooper continued a secret sexual relationship. The appellant became friends with Ms Cooper shortly after the secret relationship ended.

[8] On the evening of Saturday 21 May 2005 the appellant and Ms Cooper travelled into Darwin City in Ms Cooper's motor car. They visited the Victoria Hotel and a nightclub, the Lost Arc, where they socialised. Mr Magoulas worked as a bouncer at the Lost Arc. At about 2.00 am on

Sunday 22 May 2005 the appellant and Ms Cooper left the Lost Arc and drove off along Mitchell Street.

[9] As they were driving down Mitchell Street, Mr Magoulas called out the word "slut" in the direction of their motor car. The appellant thought that the remark was directed at her. She felt very insulted by this remark and she became extremely angry. She decided to retaliate by damaging his Holden utility. The appellant and Ms Cooper knew where the staff of the Lost Arc parked their motor vehicles. Ms Cooper parked her motor car in front of the Darwin Entertainment Centre. They then walked down to the car park of the Holiday Inn with the intention of finding and damaging the Holden utility that was owned by Mr Magoulas.

[10] The appellant and Ms Cooper located his Holden utility in the car park. The appellant then proceeded to damage the Holden utility by using a key to cause numerous deep scratches to the paint work on the panels and doors on the left hand side of the Holden utility. The appellant then rocked the front left exterior rear vision mirror backwards and forwards until it snapped off. It was left dangling by the electrical wiring. She used her skirt to try and wipe her finger prints off the front left exterior rear vision mirror. The appellant then raised the radio aerial of the Holden utility and snapped it off at its base. The appellant then used the key to scratch further marks into the paint on the passenger side of the Holden utility. The appellant and Ms Cooper then left the area.

[11] About 10 minutes later Ms Cooper and the appellant drove back to Mitchell Street and parked outside the Holiday Inn. The appellant got out of the motor car and walked back into the car park where she cut the loose wires that were holding the front left exterior rear view mirror with a pair of secateurs. She then took the mirror back to Ms Cooper's motor car and placed it under the front passenger seat. The mirror was valued at $130. The appellant and Ms Cooper then left the area.

[12] At about 5.05 am on Sunday 22 May 2005 police stopped the appellant and Ms Cooper while they were driving along Progress Drive, Nightcliff. They were arrested and conveyed to the Darwin Watch House. The appellant was later interviewed by police in the presence of her mother. During the interview the appellant made full admissions to damaging the Holden utility although she stated that she acted alone and without the knowledge of Ms Cooper. As a result of the appellant's admissions the mirror was recovered from Ms Cooper's motor car. The cost of the damage done to the Holden utility was $1772.30.

[13] At about 7.00 pm on Friday 27 May 2005 Mr Magoulas picked up his girlfriend from her residence at Sunset Cove. As they were leaving Sunset Cove they were seen by the appellant and Ms Cooper who drove past them. Mr Magoulas drove to the Shell Service Station on Progress Drive to refuel his Holden utility. Ms Cooper followed Mr Magoulas and she parked at a petrol bowser in the Shell Service Station near Mr Magoulas. The appellant got out of Ms Cooper's motor car and refuelled it. She then entered the

shop to pay for the fuel, as did Mr Magoulas. As Mr Magoulas was leaving the shop the appellant said to him, "Hey sexy." Mr Magoulas replied, "How do you like gaol?" The appellant said, "It was good. Nice paint job!" Mr Magoulas said, "Fuck off, you fat slut!"

[14] The appellant then left the shop and as she did she yelled out, "Fuck off, slut!" The appellant told Ms Cooper what Mr Magoulas had said to her. Mr Magoulas returned to his Holden utility. When he got into his utility his girlfriend told him what the appellant had yelled out at her. She believed that the words were directed at her. This angered Mr Magoulas. He then drove his Holden utility in front of Ms Cooper's motor car and there was a verbal altercation between him and the appellant. He then threw a small plastic object at the appellant but it hit Ms Cooper. Mr Magoulas then drove off.

[15] Ms Cooper then followed Mr Magoulas in her motor car as he drove onto Bagot Road. Ms Cooper accelerated her motor car to catch up to Mr Magoulas's Holden utility. Mr Magoulas was driving in the middle lane. Ms Cooper drove up next to him in the right hand lane and then levelled her car so it was next to Mr Magoulas's Holden utility. The appellant shouted abuse at Mr Magoulas who was provoked and responded in a like manner. The appellant said, "I'm going to throw this", and she held up an opened near full can of alcoholic drink. She threw the can of drink through the open driver's side window of Mr Magoulas's utility. In an attempt to avoid the can of drink he moved his body to the left keeping one hand on the

steering wheel. The can hit Mr Magoulas's right shoulder and alcohol spilt on his shirt. He picked the can up and threw it back at Ms Cooper's motor car hitting it on the rear. Ms Cooper then drove off at speed. When the appellant threw the can of drink at Mr Magoulas both motor vehicles were travelling at about 80 kilometres an hour and the traffic was light.

[16] The appellant was later arrested and interviewed by police. She admitted to throwing the can of drink at Mr Magoulas. When asked why she threw the can of drink the appellant said, "He was calling me every name under the sun, English and non-English. I got angry and pegged an alcohol beverage at him. I don't know where it hit him because I was not paying attention." When asked if she knew the can of drink hit Mr Magoulas the appellant replied, "I just threw it. That was it."

[17] After the offending the appellant went to live in Harvey Bay in Queensland with her grandparents, Mary and Jim Cook. There she attended the Harvey Bay Christian Academy. At first the appellant behaved responsibly, obeyed her grandparents' rules and did well at school. She even got a regular two hour stint on a radio station as part of a work experience program that she undertook. However, things fell apart when Ms Cooper travelled to Harvey Bay. After Ms Cooper arrived the appellant started playing up again. She stopped going to school, stopped obeying house rules and started staying up all night and going to Brisbane. The appellant was suspended from school on 25 November 2005. She returned to Darwin with her grandmother to answer the charges that are the subject of these appeals.

The sentencing remarks of the presiding magistrate

[18] Having considered all of the above matters, the presiding magistrate made his sentencing remarks and imposed the above sentences on the appellant. His Honour's sentencing remarks included the following statements:

> When I turned to the objective facts, my starting point was imprisonment in relation to both lots of offending. The wanton and deliberate damage of someone's car for such a petty reason is in my view very serious and calls for a period of detention. The dangerous act also in my view called for detention and given that it only occurred five days after you were arrested on the other matter against the same victim that was an aggravated matter.
>
> I take into account your age. I take into account that you do have prospects of rehabilitation. I am not sure that I agree with the author of the presentence report that your prospects are excellent. I think your life is still in flux at the moment. Your situation with your grandparents has not worked out because of Ms Cooper's presence. Now you are going to try the situation with your father.
>
> ....
>
> I certainly have concerns about your prospects for the future. I do not think that you are necessarily out of trouble. I think that there is the possibility of ongoing trouble with you. Hopefully that is not the case, but I think that there is a possibility.
>
> What to do with you? You are 16 years old. You have no priors, although you did have a diversion for shop stealing in 2003. But your offending is quite serious offending. I have considered the question of, conviction or no conviction? I have considered the question of bonds. I have considered community work. I have considered detention. I have considered that your rehabilitation is a major concern. It is not the only concern, but it is a major concern. My concern is also to deter you from similar offending.
>
> ....

> Taking all of those matters into account, I have moved away from detention in relation to the first file, but I have not moved away from it in relation to the second file. I consider that it was a sufficiently dangerous act that there needs to be a sentence of detention, but I will keep it to a minimum and I will also fully suspend it. Given this offending only happened over a five day period, hopefully it will not recur and hopefully you will not re-offend.

The arguments on behalf of the appellant

[19] As to ground one of the appeals, counsel for the appellant argued that the appellant was 16 years of age with no prior convictions and that there were extenuating circumstances. The appellant was emotionally vulnerable. She had formed a relationship with an older woman who had a controlling influence upon the appellant's behaviour. The convictions will stigmatise the appellant for life. They will impede her future prospects and they do not assist in her rehabilitation.

[20] As to ground 2 of the appeals, counsel for the appellant argued as follows. The presiding magistrate's opinion that detention was the starting point was an erroneous approach to the sentencing of juveniles. A sentence of imprisonment is only to be imposed when all other sentencing options have been eliminated. A term of actual imprisonment is to be the disposition of last resort.

[21] The offences of unlawful damage to property and theft of the front left exterior rear vision mirror of the Holden utility could not, viewed objectively, warrant detention for a first time juvenile offender. It is irrelevant that the presiding magistrate ultimately departed from that

disposition. His approach erroneously affected the outcome. The presiding magistrate failed to appreciate that prima facie detention for such an offence was wholly disproportionate to the gravity of the offending in all of the circumstances.

[22] Counsel for the appellant further submitted that the presiding magistrate's approach to sentencing the appellant for committing the dangerous act disclosed that he erroneously gave disproportionate weight to the risk of much greater harm occurring. In the circumstances of this case there was no relevant harm.

[23] As to the third ground of appeal, counsel for the appellant submitted the following. It is a well established principle in the sentencing of juvenile offenders that rehabilitation is to be given considerable weight and the punitive and deterrent aspects of the sentencing process should not prevail so as to possibly destroy the rehabilitation process. The appellant was a first offender with excellent prospects of rehabilitation and specific deterrence could have been achieved by undertakings to be of good behaviour of the type contemplated by s 53 of the Juvenile Justice Act which was in force at the time that the appellant was sentenced by the Juvenile Court.

The arguments on behalf of the respondent

[24] Counsel for the respondent argued as follows. The presiding magistrate's discretion was not improperly exercised nor did he fall into error. Neither

the appellant's age nor her relationship with Ms Cooper was such as to sufficiently diminish the appellant's culpability or excuse the commission of the offences with which the appellant was charged so as to give rise to a decision not to record a conviction. The nature of the offending engaged in by the appellant required that a conviction be imposed.

[25] The offending was objectively serious and the presiding magistrate gave appropriate weight to all relevant subjective matters including rehabilitation of the appellant. The sentences that were imposed on the appellant were not such as to destroy the rehabilitation process.

Conclusion

[26] I accept the appellant's submissions in both appeals. The presiding magistrate failed to apply the sentencing principles appropriate to juveniles. His Honour gave undue weight to punishment and the objective facts. It was an error to take a period of detention as the starting point for all of the offences that the appellant faced. His Honour failed to adequately recognise the diminished culpability of the appellant and to give due weight to individualised treatment of the appellant directed towards her rehabilitation. As a result, each of the sentences imposed on the appellant were manifestly excessive. In cases involving this level of offending the primacy of rehabilitation in sentencing juveniles should not be diminished by reference to the seriousness of the offence: *R v Hearne* (2001) 124 A Crim R 451 at 458 [24].

[27] The appellant was sentenced under the provisions of the Juvenile Justices Act. The Act is no longer in force. However, it was in force at the time that the appellant was sentenced by the Juvenile Court. Section 53 of the Juvenile Justice Act empowered the Juvenile Court when it found a charge proven against a juvenile, to dispose of the case in a number of ways, with or without proceeding to a conviction. Guidance as to the exercise of the sentencing discretion in the case of juveniles may be found from the following statements of principle which were enunciated by this court in *Simmonds v Hill* (1986) 38 NTR 31 at 33 by Maurice J and applied in *Nelson v Chute* (1994) 72 A Crim R 85; *P (a minor) v Hill* (1992) 110 FLR 42; *M v Waldron* (1988) 56 NTR 1; 90 FLR 355; and *Yovanovic v Pryce* (1985) 33 NTR 24. First, the overwhelming concern of a court when sentencing juveniles 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 young offenders. This is particularly so in the case of a first offender. Before imposing a particular sentence on a juvenile a court must ask itself if it is necessary to go beyond the lesser options.

[28] It is also important to have regard to the needs of the juvenile to ultimately obtain employment and to take into account the need to minimise the stigma to a juvenile resulting from a court determination and to avoid amplifying the juvenile offender's deviance.

[29] None of the above principles exclude consideration being given to the objective facts of the offending; to protection of the community; to holding

juveniles properly accountable; and to deterrence in the appropriate case. Those factors must still be considered. However, those factors are to be considered in accordance with the principles enunciated in *Simmonds v Hill* (supra). In *Girrabul v The Queen* [2003] NTSC 101 Martin (BF) CJ (as he then was) stated:

> The sentencing remarks in those cases derive from particular circumstances of the offence and the juvenile offender there under consideration. However, there is a theme which recognises that in the case of juveniles the sentencer is required to consider sentencing options by firstly taking into account the psychological and social needs of the individual wrongdoer and applying that which can be best directed towards meeting his or her needs and aiding rehabilitation. The appropriate resources of the state available to support that welfare objective are often to be engaged both before the sentencing and after. Accountability, personal responsibility for the offending, and deterrence both personal and general, may be brought to bear within that framework by the imposition of restraints which can work together with the rehabilitative measures. The two models are not mutually exclusive. Striking the desirable balance between divergent objectives may often be a difficult task but the nature of the offending must not be allowed to overshadow its cause. The offender's background, including age and criminal history, will always be relevant factors as will the family and state resources available.

[30] In the case of a juvenile offender there can rarely be any conflict between his or her interest and the community's. The community has no greater interest than that he or she should become a good citizen: *R v Smith* [1964] Crim LR 70; *R v GDP* (1991) 53 A Crim R 112 at 116 per Mathews J.

[31] As to the appellant's offending on 22 May 2005 the following factors are important. She was only 16 years of age and there were extenuating circumstances. The appellant was at an age where most young girls are

vulnerable and are less capable of controlling their impulses. "Slut" is an extremely derogatory term. The word is only applied to women and it is used to disempower them. The great majority of women find the word particularly offensive. The appellant had been provoked by Mr Magoulas's conduct in circumstances where she was already caught up in the animosity that existed between Ms Cooper and Mr Magoulas and she was under Ms Cooper's influence. Ms Cooper was four years older than the appellant. The offending was spontaneous and impulsive. In the circumstances the appellant's culpability was significantly diminished. The appellant had no prior convictions. She had successfully completed an earlier diversionary program. The pre-sentence report which had been obtained by the Juvenile Court expressed the opinion that the appellant was not criminally minded and that her prospects of rehabilitation were excellent. In effect, the offending was an aberration. It is well known that a conviction for an offence of dishonesty is detrimental to a person's prospects of employment. The appellant is an intelligent child and her potential should not be undermined.

[32] In the particular circumstances referred to above, lesser sentencing options than a conviction and hours of unpaid community work are not eliminated. For the offences committed by the appellant on 22 May 2005 it was not necessary for the Juvenile Court to go beyond making an order for restitution and imposing a non-conviction bond with conditions that the appellant is to be of good behaviour; the appellant shall not associate with

Ms Cooper; the appellant shall not approach Mr Magoulas or his property either directly or indirectly; and, the appellant shall undertake anger management counselling.

[33] While it is possible for other sentencing objectives including deterrence to prevail when a court sentences a young person for committing a dangerous act on a main road: *R v Tran* (2002) 4 VR 457; *R v Sherpa* (2001) 34 MVR 345; *R v Toombs* (2001) 34 MVR 509; and *R v Bell* (1999) 30 MVR 115; there is always scope for youth and concomitant prospects of rehabilitation even in very serious cases involving culpable driving and death of the victim. The circumstances of each case can vary greatly. Importantly, so far as the appellant's offending on 27 May 2005 is concerned, no one was injured. Traffic was light and Mr Magoulas was warned by the appellant that she was going to throw the can. The force with which the can of drink was thrown was not sufficient to cause Mr Magoulas to lose control of his Holden utility. The appellant's immaturity was a significant contributing factor towards the commission of the offence and she obviously did not consider the potential consequences of her act. She acted impulsively. The offending occurred in the context of an ongoing argument. The appellant was in the company of Ms Cooper. Once again the appellant's culpability was diminished and a sentence of imprisonment is only imposed when all other sentencing options have been eliminated: *Wood v Samuels* (1974) 8 SASR 465 at 468. The presiding magistrate wrongly allowed the potential for much greater harm to overshadow the requirement to impose a sentence

which was, in all the circumstances, proportional to the actual offending of the appellant on 27 May 2005.

Orders

[34] Both appeals must succeed. I make the following orders:

1. Appeal number JA 4 of 2006 from the Juvenile Court in matter number 20512155 is allowed.

2. Appeal number JA 5 of 2006 from the Juvenile Court in matter number 29512790 is allowed.

3. The appellant's conviction for the offence of unlawfully damaging a Holden utility being the property of Mr Stefan Magoulas on 22 May 2005 at Darwin contrary to s 251(1) of the Criminal Code is set aside.

4. The appellant's sentence to do 56 hours of unpaid community work within two months for the offence of unlawfully damaging a Holden utility being the property of Mr Stefan Magoulas on 22 May 2005 at Darwin contrary to s 251(1) of the Criminal Code is set aside.

5. The appellant's conviction for the offence of stealing the front left exterior rear view mirror of a Holden utility being the property of Mr Magoulas on 22 May at Darwin contrary to s 210 of the Criminal Code is set aside.

6. The appellant's sentence to do 24 hours unpaid community work within two months for the offence of stealing the front left exterior rear view mirror of a Holden utility being the property of Mr Magoulas on 22 May 2005 at Darwin contrary to s 210 of the Criminal Code is set aside.

7. The appellant's conviction for the offence of doing a dangerous act on 27 May 2005 at Darwin contrary to s 154(1) of the Criminal Code is set aside.

8. The appellant's sentence of detention for one month to be suspended forthwith upon the appellant entering into a bond in the sum of $500 own recognisance to be of good behaviour for 18 months on conditions that: the appellant was to be supervised by the Department of Correctional Services for the first 9 months of the bond and was to obey all reasonable directions of the Director of Correctional Services or his delegate as to residence, reporting, associates, alcohol counselling, anger counselling and general counselling; and the appellant was not to contact Jennifer Alanna Cooper for a period of 12 months; for the offence of doing a dangerous act on 27 May 2005 at Darwin contrary to s 154(1) of the Criminal Code is set aside.

[35] I confirm that the appellant stands found guilty of each of the above offences. The appellant is to be re-sentenced. Before re-sentencing the appellant I will hear the parties further. I will also hear the parties as to costs.