DD v Cahill [2009] NTSC 62

PARTIES:	DD
	v
	LEIGH CAHILL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 29, 30 & 31 of 2009 (20914960, 20914953 & 20912252)
DELIVERED:	26 November 2009
HEARING DATES:	25 November 2009
JUDGMENT OF:	RILEY J

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellant:	C Dolman
Respondent:	D Jones

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Ril0914
Number of pages:	9

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

DD v Cahill [2009] NTSC 62
Nos. JA 29, 30 & 31 of 2009 (20914960, 20914953, 20912252)

BETWEEN:

DD
Appellant

AND:

LEIGH CAHILL
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 26 November 2009)

[1] The appellant is a 12-year-old boy. On 9 June 2009 in the Youth Justice Court he pleaded guilty to three separate counts of unlawful use of a motor vehicle. He was found guilty and convicted on each charge. He was ordered to enter into a good behaviour bond with an operational period of 12 months with conditions that he not associate with certain identified people, that he obey the directions of his mother and that he attend school.

[2] The appellant appeals against the sentence on the basis that it is manifestly excessive. The focus of the appeal was whether the learned Magistrate failed to properly consider whether or not to record a conviction in the circumstances.

[3] The complaint of the appellant is that the sentence was manifestly excessive. The principles applicable to such an appeal are well known[1]. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing Judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing Judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive.

The circumstances of the offending

[4] The appellant was involved in the theft of three motor vehicles. During the afternoon of 5 November 2008 the appellant was in the company of his older brother and others when they were approached by two youths who offered them a ride in a motor vehicle that had previously been stolen. The vehicle had been started by forcing a pair of scissors into the ignition switch. At about midnight the vehicle was driven to the suburb of Leanyer where some rubbish bins were knocked over. Later, whilst the vehicle was being driven

[1] *House v The King* [1936] 55 CLR 499 at 503; *Cransen v The King* [1936] 55 CLR 509; *Liddy v The Queen* [2005] NTCCA 4.

in another area it mounted the kerb. The appellant and his co-offenders left the vehicle and ran away. When he was interviewed on 2 April 2009 the appellant made full admissions to the offending.

[5] On 5 April 2009 the appellant was at The Narrows when he was again approached by co-offenders who had stolen a motor vehicle. He travelled in the vehicle with his co-offenders to Alawa where it was abandoned. On 16 April 2009 the appellant and his mother attended at the Darwin police station where he made admissions as to the offence.

[6] The final offence occurred on 7 April 2009. On this occasion the appellant had a direct involvement in the stealing of the motor vehicle. He and his co-offenders were in Darwin city. A member of the group unlocked the driver's door of a motor vehicle using a pair of scissors. The group entered the vehicle which was then started with the assistance of the scissors. The stolen vehicle was seen by a police officer who pursued it in her vehicle with the emergency lights and beacons of the police vehicle activated. The stolen vehicle was abandoned in the car park at Vestey's Beach and the appellant and his co-offenders ran away. When he attended at the police station on 16 April 2009 with his mother he made admissions in relation to the offence.

[7] At the time of the offending the appellant was aged 12 years and he was the youngest of the group. In relation to the first two offences the appellant did not take part in stealing the motor vehicle but rather joined others who had

previously stolen the vehicle. In relation to the third offence he was present at the time the vehicle was stolen. He acknowledged that at all times he knew he was doing the wrong thing.

[8] At the time of the first offence in November 2008 the appellant, his mother and his siblings entered into a family agreement. Pursuant to that agreement the appellant attended a well-being counselling program conducted by Danila Dilba and he was continuing in that program at the time of sentencing. The offending in April 2009 occurred whilst he was in the program.

[9] The appellant is in year seven at a Darwin school and his attendance is good. His mother has imposed a curfew on him requiring him to be home at 6.00 pm. Notwithstanding that curfew these offences occurred late at night.

[10] In sentencing the appellant the learned Magistrate observed that he was mixing with "the wrong people". She noted that he had offended on three separate occasions in a similar way. Without more she went on to record a conviction on each count.

Recording a conviction

[11] Sentencing occurred under the *Youth Justice Act* which provides a wide range of options for a court when a charge has been found proven against a youth. Those options may be exercised whether or not the court proceeds to

conviction[2]. Section 4 of the Act sets out the general principles that must be taken into account in administering the Act. Those principles provide guidance to the court in determining an appropriate response to offending behaviour. A youth who commits an offence must be held accountable and encouraged to accept responsibility for his or her behaviour. The youth must be dealt with in a manner consistent with his or her age and maturity and in a way that allows him or her to be re-integrated into the community. There must be a balance between the needs of the youth and the rights of any victim and the interests of the community. Further, any decision affecting a youth should, so far as practicable, be made and implemented within the time frame appropriate to the youth's sense of time. The punishment imposed must be designed to give the youth an opportunity to develop in socially acceptable ways.

[12] The duration of the impact of the recording of a conviction against a young person is governed by the *Criminal Records (Spent Convictions) Act*. That Act does not apply to all convictions but, generally speaking, a conviction in the Youth Justice Court will become a spent conviction for the purposes of the Act after five years provided the offender has not, during that period, been convicted of an offence punishable by imprisonment or served any part of a sentence of imprisonment[3]. Where the court does not record a conviction the criminal record is a spent conviction immediately upon the

[2] s 83 *Youth Justice Act*.
[3] s 6 *Criminal Records (Spent Convictions) Act*.

person being discharged[4]. Where a record is a spent record the person to whom it relates is not required to disclose to another person that spent record. A question concerning the person's convictions does not include a spent record. It is an offence for a person with access to public records to disclose a spent record or information relating to a spent record to a person without the consent of the person to whom the record relates[5].

Dealing with very young offenders

[13] In relation to very young offenders, of whom the appellant is one, the interests of the community are best served by placing emphasis upon rehabilitation and the development of the young person as a law-abiding citizen. It has been held[6] that:

> "In relation to first offenders committing minor offences, the interests of the community are seldom met with a disposition which emphasises the deterrent aspects of sentencing and much greater emphasis is given to reform, particularly when the offender is very young or immature."

[14] The decision whether or not to impose a conviction on a young person requires careful consideration by a court. In relation to adult offenders there is some guidance to be found in the *Sentencing Act*. Section 8 of that Act requires a court, in deciding whether or not to record a conviction, to have regard to the circumstances of the case including the character, antecedents, age, health or mental condition of the offender; the extent to which the

[4] s 7 *Criminal Records (Spent Convictions) Act.*
[5] s 11 and s 12 *Criminal Records (Spent Convictions) Act.*
[6] *LA v Kennedy* [2007] NTSC 56 at [16] per Mildren J.

offence is of a trivial nature; and the extent to which the offence was committed under extenuating circumstances. Section 8 does not apply to the Youth Justice Court[7]. The *Youth Justice Act* itself does not provide any guidance as to the matters to be taken into account in determining whether or not to record a conviction. The decision involves an exercise of discretion. However the discretion must be exercised judicially and, in that process, all of the relevant surrounding circumstances must be considered including factors of the kind identified in s 8 of the *Sentencing Act*.

[15] In addition, it is appropriate to consider the consequences of the imposition of a conviction upon the person concerned. The recording of a conviction has been described as "a formal and solemn act marking the court's and society's disapproval of the defendant's wrongdoing"[8]. The recording of a conviction is in itself an element of punishment. In some cases, notably with adult offenders, it may encourage an offender to refrain from further offending and may act as a deterrent to others[9]. That is less likely to be a consideration in the case of a very young offender who may be expected to be less mature, less aware of the consequences of acts, subject to peer pressure and less responsible than an adult[10].

[16] It is readily apparent that a conviction may impact upon the ability of a person to obtain employment. Many employers require applicants to

---

[7] See s 4 *Sentencing Act*
[8] *McInerney* (1986) 42 SASR 111 at 124
[9] *R v Brown, ex parte Attorney-General*[1994] 2 Qd R 182 at 194
[10] South Australia, Children's Court Advisory Committee, Annual Report 1983 referred to in Fox and Freiberg, Sentencing (second edition) at page 827

complete a declaration regarding convictions as part of the employment process. Others who have an interest in convictions may include various licensing authorities, government departments and insurers[11]. A conviction may impact upon the ability of the person to travel to some countries. When sentencing an adult it is possible for there to be direct evidence of the consequences of recording a conviction. However, when dealing with a child as young as 12 it is difficult to identify whether, and if so in what manner, the recording of a conviction may impact upon the child. Nevertheless, the prospect of adverse consequences is real and the recording of a conviction remains for the child "a significant act of legal and social censure"[12].

[17] Further, the deterrent aspect of imposing a conviction is likely to be of little weight for an offender who is so young and not readily able to appreciate the significance of such a punishment. Whilst it may be argued that the recording of a conviction may be necessary in cases where a very young offender has committed quite serious offences or a crime of a particular character, it is difficult to see any public interest in so doing in the circumstances of the matter under consideration. Viewed from the perspective of the rehabilitation of the child there would seem to be no reason to record a conviction, indeed it would seem to be likely to be counterproductive.

[11] *R v Briese, ex parteAttorney-General* [1998] 1 Qd R 487 at 491
[12] Fox and Freiberg, Sentencing: State and Federal Law in Victoria (second edition) at [1.504]

Conclusions

[18] The learned sentencing Magistrate provided no explanation as to why she chose to impose a conviction on any of the counts. Having reviewed the sentencing remarks it is not clear to me why her Honour felt it necessary to impose a conviction on a 12-year-old boy with no prior record at the time of his offending. Whilst these were not minor offences, his involvement was to some extent peripheral to the commission of the offences and occurred in circumstances where he was the youngest person present and was led into the offending by others. He had cooperated with the authorities and he had pleaded guilty to the offending. He had been of good behaviour in the period from the offending to the date of sentencing. He expressed remorse and his family was on a path designed to assist them in overcoming some of the problems they had experienced. In my opinion, in all the circumstances, the imposition of convictions in relation to each of the counts resulted in a sentence which was manifestly excessive. The appeal is allowed. I set aside each of the convictions but otherwise confirm the terms of the sentence imposed.
