Yunupingu v Sims [2009] NTSC 02

PARTIES:	YUNUPINGU, TERRANCE
	v
	SIMS, ERICA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA25/2008 (20723135)
DELIVERED:	30 January 2009
HEARING DATE:	2 October, 7 & 24 November, 8 December 2008 and 28 January 2009
JUDGMENT OF:	THOMAS J

CATCHWORDS:

CRIMINAL LAW -- APPEAL -- APPEAL AGAINST SENTENCE -- GROUNDS FOR INTERFERENCE -- SENTENCE MANIFESTLY EXCESSIVE

Whether sentence imposed was manifestly excessive – whether sentence imposed was onerous – whether sentence imposed was uncertain – whether insufficient weight was given to the nature and circumstances of the appellant – whether insufficient weight was given to the nature and circumstances of the offence – whether excessive weight was given by the sentencing magistrate to the requirement for general deterrence – whether the sentencing magistrate took into account irrelevant and prejudicial factors

CRIMINAL LAW -- APPEAL -- APPEAL AGAINST SENTENCE -- GROUNDS FOR INTERFERENCE -- PARITY BETWEEN CO-OFFENDERS

Co-offender older, more culpable and had a lengthier record of convictions – whether appellant would have a justifiable sense of grievance

CRIMINAL LAW -- APPEAL -- APPEAL AGAINST SENTENCE

Whether appeal duly instituted – requirement for appellant to enter into a signed recognisance (s 171 of the *Justices Act* (NT)) – whether appellant had done whatever was reasonable practicable to institute appeal (s 165 of the *Justices Act* (NT)) – whether requirement under s 171 of the *Justices Act* (NT) should be dispensed with

Criminal Code, ss 210, 213, 251(1), 251(2)(d)
Justices Act, ss 167, 171
Sentencing Act, ss 42, 43(6)

REPRESENTATION:

Counsel:

Appellant:	C Dolman
Respondent:	P Horvat

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	tho200901
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Yunupingu v Sims [2009] NTSC 02
No. JA25/2008 (20723135)

BETWEEN:

YUNUPINGU, Terrance
Appellant

AND:

SIMS, Erica
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 30 January 2009)

[1] This is an appeal from a sentence imposed on the appellant in the Court of Summary Jurisdiction on 18 April 2008.

[2] The appellant entered a plea of guilty to the following six charges committed on 26 August 2007:

1) Aggravated unlawful property damage contrary to ss 251(1) and 251(2)(d) of the Criminal Code. This offence carries a maximum 7 years imprisonment.

2) Unlawful entry contrary to s 213 of the Criminal Code. This offence carries a maximum of 14 years imprisonment.

3) Stealing contrary to s 210 of the Criminal Code. This offence carries a maximum of 7 years imprisonment.

4) Unlawful entry contrary to s 213 of the Criminal Code. This offence carries a maximum of 14 years imprisonment.

5) Stealing contrary to s 210 of the Criminal Code. This offence carries a maximum of 7 years imprisonment.

6) Unlawful property damage contrary to s 251(1) of the Criminal Code. This offence carries a maximum of 2 years imprisonment.

[3] The facts in support of the charge are as follows (tp 2-3):

> "… on the evening on Sunday, 26 August 2007, the defendant was at an Aboriginal itinerant bush camp located near The Narrows. During the evening, at about 9 pm, the defendant along with co-offenders formed the intent to attend the Liquorland Bottle Shop Winnellie to break in and steal some liquor. The defendant and co-offenders walked to the Liquorland Winnellie, where the defendant placed rocks in his shirt and then attempted to smash the side glass panel to the store with these rocks.
>
> ….
>
> He was unable to completely smash the glass panel and a co-offender, Andrew Gurrawiwi, finally smashed a hole into the glass panel. The defendant stood by as the co-offender put his arm through the hole, where he was able to reach the red wine stocks on the shelf. The defendant took about seven bottles of red wine, Yellow Tail Shiraz, and shared these bottles amongst co-offenders and then fled the area. They returned to the bush camp, where they drank the wine.
>
> On final consumption of the stolen liquor, the defendant and the same co-offenders again formed the intent to attend at the Liquorland Winnellie to steal liquor. At about 1 am that morning of Monday, 27 August 2007, the defendant and co-offenders attended at Liquorland Winnellie. Co-offender Gurrawiwi obtained a steel bar

and enlarged the hole made in the glass from the previous break-in, then bent back the thick wire mesh on the inside of the store to allow access for the defendant to enter the store.

When he entered the store, he caused 10 bottles of wine to break and damage to the shelf at the point of entry. Whilst inside the store, he made a number of trips with stolen items from the shop to the point of entry, where he passed them to co-offenders waiting outside. The stolen items are those listed in the charge. He then came out of the shop through the same hole in the glass and stood by as the stolen liquor was dispersed to be carried back to the bush camp. Whilst en route back to the bush camp, the defendant and co-offenders were located by police, who were attending the security alarm of the Liquorland Winnellie. The defendant was located with the stolen liquor and subsequently arrested.

On 27 August 2007 he participated in a record of interview, making full admissions. When asked his reason for the offences, he replied, 'They just told me to come.' The damage caused to the window is estimated at $1,500. The damage to the shelf was $300 and damage to the broken wine on entry of $174.95. The total value of the goods stolen is $109.60 [*amended to $809.60*]. At no time did he have permission to enter the Liquorland Winnellie or steal any of the items from Liquorland Winnellie or damage any property of Liquorland Winnellie. …"

[4] The appellant's counsel in the Court of Summary Jurisdiction made the following submissions (tp 4):

> "And what we're seeking today, your Honour, is that your Honour impose a suspended sentence so that he can go home to Millingimbi. He's happy with that, your Honour. This is the first time he's been before the court, the first time he's been in custody. He's been in custody 11 days already and, in my submission, in terms of personal deterrence for him, that's certainly been significant. He has not enjoyed that time at all, your Honour."

[5] An aggregate sentence was imposed, on Counts 1 to 5 inclusive, of six months imprisonment from 7 April 2008 suspended forthwith with an

operational period of two years from 18 April 2008 with conditions. The conditions were:

(1) Depart Darwin and fly to Milingimbi by 5.00pm on 18 April 2008.

(2) Not enter or remain in the Darwin or Palmerston areas for 12 months from 18 April 2008 except if seriously sick and cannot be treated in the community.

[6] On Count 6 he was convicted and sentenced to 10 days imprisonment from 7 April 2008 suspended forthwith on the same conditions as above.

[7] Mr Yunupingu was released. Later on the same date, that is 18 April 2008, the matter was brought back before the learned stipendiary magistrate as it had not been possible to organise a flight out of Darwin on that date for the appellant.

[8] The learned stipendiary magistrate then amended Condition 1 and added some further conditions to the defendant's suspended sentence which were as follows:

Condition 1: Amended with respect to the time and date of the flight to Milingimbi to read "on 23rd April, 2008".

Condition 2: Unchanged.

Condition 3: Between 18 April 2008 to noon 23 April 2008 the defendant reside at Fenton Flats, Flat 13/335 Stuart Highway and not be

absent from those premises any evening from 7.00pm until 7.00am and on the evening of 22 April 2008 from 7.00pm until 12.00 noon on 23 April 2008.

Condition 4: Not to consume any alcohol.

Condition 5: Present himself to Police or Correctional Services during the curfew hours if called upon to do so.

Condition 6: Submit to random alcohol testing as required by Police or Correctional Services.

The defendant consented to these conditions and was again released.

[9] On 21 April 2008, Mr Yunupingu was brought before the Court for a breach of the condition that he not consume alcohol. This was on the basis that at 1455 hours on 21 April 2008, a breath test was conducted and the defendant had a reading of 0.048 percent. The defendant admitted to "having a sip of wine". The reading of 0.048 percent put him in breach of Condition 4.

[10] Pursuant to s 42 of the Sentencing Act, the learned stipendiary magistrate varied the conditions of the suspended sentence as follows:

Condition 1: Amended so that the departure time to fly to Milingimbi read 2.15pm on 23 April 2008.

Condition 2: Remained unchanged.

Condition 3: Changed to delete the words "after 22 April 2008" and insert in lieu thereof "4.00pm until 1.00pm on 23 April 2008". The condition being the defendant was required to remain at his residence from 4.00pm on 22 April until 1.00pm on 23 April 2008.

Condition 4: Changed to add after the words "not consume any alcohol" the words "whilst in the Darwin Palmerston areas".

Condition 5: Amended to read "defendant present himself to police or Correctional Services during curfew hours referred to in condition 3 hereof if called up to do so".

Condition 6: Amended to read "the defendant submit to random alcohol testing as required by Police or Correctional Services any time he is located in the Darwin or Palmerston areas for 12 months and one day from 22 April 2008".

[11] The grounds of appeal are as follows:

"1. That the sentence was manifestly excessive."

[12] Leave was also sought to add the following grounds of appeal:

"2. That insufficient weight was given to the personal features of the Appellant and the Appellant's offence;

3. That excessive weight was given to general deterrence;

4. That the learned Magistrate erred by taking into account irrelevant and prejudicial factors;

5. That the condition of the suspended sentence requiring the Appellant to abstain from alcohol for 2 years is onerous, manifestly excessive and uncertain;

6. That the condition of the suspended sentence requiring the appellant to not enter or remain in the Darwin or Palmerston areas for 12 months except to attend for urgent and necessary medical treatment is onerous, manifestly excessive and uncertain."

[13] Ms Horvat, on behalf of the Crown, submitted that there was no properly instituted appeal before the Court. This was because the appellant had not entered into a recognisance to prosecute the appeal as required by s 167 of the Justices Act.

[14] In his affidavit sworn 15 August 2008, Callum Leigh Dolman, solicitor for the appellant, asserts that the failure to comply with s 167 of the Justices Act must lie with the appellant's counsel in not acting expeditiously to bring the requirement to enter into a recognisance to the appellant's attention and for not acting expeditiously to have the recognisance signed by the appellant.

[15] Mr Dolman also attests to the fact that various efforts have been made to locate the appellant in the intervening period without success.

[16] I note that the sentence being appealed from was imposed on 18 April and certain conditions subsequently amended.

[17] On 18 April 2008, the appellant instructed his solicitors to lodge a Notice of Appeal on the grounds that the sentence was manifestly excessive. This Notice of Appeal was filed on 2 May 2008 and served on the respondent on

the same date. The appeal was instituted within one month as required by s 171 of the Justices Act.

[18] The affidavits of Callum Dolman sworn 15 August 2008, Michelle Swift sworn 15 August 2008 and Marlene Dixon sworn 15 August 2008, make it clear that the appellant was never made aware he was to enter a recognisance. The appellant was not at the address where he had been residing in Darwin when his lawyers attended his place of residence on 23 April 2008 to have him sign the recognisance. I draw the inference that the appellant had already left to return to Millingimbi.

[19] The appellant did have his lawyers institute the appeal promptly. It was not brought to his attention that he was required to sign a recognisance. Lawyers for the appellant have not been able to contact him. The affidavit of Mr Dolman sworn 5 December 2008, details efforts made to contact the appellant. On 28 January 2009, Mr Dolman attended Court and made further submissions concerning extensive efforts made by his office to make contact with the appellant without success. There is no suggestion the respondent suffers a prejudice because of the failure by the appellant to enter a recognisance. In the circumstances I find that the appellant, through his lawyers, has done whatever is reasonably practical to comply with the Act. I dispense with the requirement to enter a recognisance.

[20] Mr Dolman, who appeared for the appellant on the appeal to this Court, stated he would not be submitting that a suspended sentence was not

appropriate. The essence of the appeal is that the period of the suspended sentence was too long and the conditions requiring abstinence from alcohol and not to enter the Darwin or Palmerston areas for 12 months, except for medical treatment that is urgent or necessary, were too onerous.

[21] Ms Horvat, who appeared to represent the respondent on this appeal, argued that the appellant had not demonstrated any error in the way the learned magistrate approached the sentencing process. The position on behalf of the respondent is that the sentence imposed on the appellant is not manifestly excessive having regard to the nature and gravity of the crimes and the appeal should be dismissed.

[22] At the close of the submissions, I asked for information as to the sentences that had been imposed on the co-offenders. I was advised that the Crown would check that and advise myself and counsel for the appellant by e-mail.

[23] I received an e-mail from Ms Horvat advising that the co-offender, Andrew Darkad Gurruwiwi, was dealt with by the Darwin Alcohol Court on 29 November 2007, (i.e. some months before this the appellant was dealt with in the Court of Summary Jurisdiction), in respect of the same charges faced by the appellant.

[24] Andrew Gurruwiwi pleaded guilty and was convicted and sentenced to an aggregate three months imprisonment, backdated to 1 November 2007, on charges of aggravated unlawful damage, unlawfully entering a building at night and two charges of stealing on 26 August and 27 August. The

sentence was suspended on entering an alcohol intervention order to be supervised for six months. On a further charge of stealing, he was sentenced to one week imprisonment concurrent with the first sentence, suspended on entering the alcohol intervention order to be supervised for six months. There was a further order he pay restitution in the sum of $900 to be paid to Liquorland Winnellie.

[25] I note from the record of convictions, that was included in the information provided by the Crown, that Andrew Gurruwiwi is considerably older than the appellant. Andrew Gurruwiwi was 37 years of age at the time of the commission of the offence. He has a lengthy record of prior convictions between 1987 and November 2007, including convictions for assault and drug offences that involve alcohol abuse. He served two months imprisonment following conviction on his fourth exceed .08 charge on 6 October 1998. On the same date he was sentenced to terms of actual imprisonment for drive disqualified and two breaches of suspended sentence.

[26] On 29 August 2002, he was convicted of "Assault Police Causing Bodily Harm" and sentenced to imprisonment for six months with a period of actual imprisonment for offences of drive a motor vehicle while disqualified.

[27] Andrew Gurruwiwi was, it would appear, the principal offender. He was the one ordered to pay restitution. The learned stipendiary magistrate accepted

that the appellant in this matter was not the leader because he stated in the course of his reasons for sentence (tp 6):

> "… You were clearly in the company of others who convinced you to get involved in this criminal activity."

[28] By comparison the appellant was, at the date of the offending, 19 years age. He was before the Court without prior conviction. He was entitled to the consideration extended to a youthful offender without prior conviction. He had been held in custody for 11 days. The learned stipendiary magistrate did take these matters into account. However, the sentencing magistrate did not have before him the details of the sentences imposed on the co-offender Andrew Gurruwiwi who had a lengthy record of offending and was the more culpable with respect to the offending.

[29] Upon receipt of the information concerning the sentences imposed upon Andrew Gurruwiwi, I requested this appeal be re-listed so that I could hear further submissions on the issue of parity of sentencing.

[30] I have now heard those submissions. I take into account Andrew Gurruwiwi had spent a longer period of time in custody, that is 28 days in custody. He received an order to pay restitution in the sum of $900 and had obligations under the alcohol intervention order for a period of six months.

[31] The appellant, in the matter before this Court, spent 11 days in custody. There was no evidence that he continually abuses alcohol to warrant an alcohol intervention order. He was not ordered to pay restitution.

[32] The appellant, unlike Andrew Gurruwiwi, has no prior convictions and is not regarded as the principal offender in these criminal offences.

[33] The appellant was given credit for his plea of guilty which, although not entered at the earliest reasonable opportunity, nevertheless entitled him to a discount. I granted leave to add parity of sentencing as an additional ground of appeal.

[34] On the basis of parity of sentencing, I consider this appeal should be allowed. The appellant would have a justifiable sense of grievance that the older, more culpable co-offender with a lengthy record of prior convictions should receive a sentence considerably shorter than this appellant (*Lowe v The Queen* (1984) 154 CLR 606).

[35] Because lawyers for the appellant have been unable to locate him since the appeal was instituted, another issue arises. This is the problem of imposing a suspended period of imprisonment when the appellant cannot be located to enter into the appropriate undertaking. The affidavit of Callum Leigh Dolman, sworn 5 December 2008, details the efforts Mr Dolman and members of the staff at North Australian Aboriginal Justice Agency have made to have the appellant contact his lawyer. By 28 January 2009 the appellant had not contacted his lawyers.

[36] The Court could further adjourn the matter for further efforts to be made to contact the appellant. However, there have already been a number of adjournments for this purpose. Lawyers for the appellant, have expended

considerable time and effort in an attempt to locate him. I have decided the matter should now be concluded.

[37] I accept there are considerable extenuating circumstances in this matter in particular the youth of the appellant, his lack of prior convictions and the lesser role he played in the commission of the offence.

[38] Mr Dolman submits that although he had not been able to argue that a suspended sentence of imprisonment was not appropriate there was no reason why the Court could not proceed to deal with the matter by finding that the 11 days the appellant had spent in custody was sufficient penalty for the offence.

[39] Ms Horvat, on behalf of the respondent, did not seek to argue against the appeal being allowed on the basis of parity of sentencing. I am informed the appellant has not come to the attention of the authorities since 23 April 2008. Neither Ms Horvat for the Crown nor Mr Dolman for the Defence, sought to argue that a sentence of 11 days imprisonment for the offences was not within the sentencing discretion of the Court.

[40] Accordingly, the order I make is that the appeal be allowed. I set aside the order made by the learned stipendiary magistrate. I order that the appellant be sentenced on:

Counts 1 – 5: 11 days imprisonment.

Count 6: 10 days imprisonment concurrent with sentence on Counts 1-5.

Total 11 days imprisonment.

[41] This sentence is backdated to 7 April 2008 to take account of time spent in custody.
