Brokus v Eaton [2010] NTSC 20

PARTIES:	BROKUS, Fabian
	v
	EATON, Donald
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	21004294/21004299
DELIVERED:	4 May 2010
HEARING DATES:	4 May 2010
JUDGMENT OF:	MARTIN (BR) CJ
APPEAL FROM:	BORCHERS SM

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE
Manifestly excessive – whether Magistrate fell into error – young first offender – alternatives to actual imprisonment - appeal allowed.

Sentencing Act 1951 (NT) s 78B; *Young Offenders Act 1993* (SA), s 58; *Youth Justice Act 2005* (NT), s 81(6).

REPRESENTATION:

Counsel:

Appellant:	J Tapnelnelu
Respondent:	C Roberts

Solicitors:

Appellant:	CAALAS
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	Mar1007
Number of pages:	9

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

Brokus v Eaton [2010] NTSC 20
Nos. 21004294/21004299

BETWEEN:

FABIAN BROKUS
Appellant

AND:

DONALD EATON
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 4 May 2010)

Introduction

[1] This is an appeal against sentences of imprisonment imposed for crimes committed on 2 and 4 February 2010 when, in the company of others, the appellant broke into the Alice Springs Gillen Club and stole alcohol. Sentences of one and two months imprisonment were imposed, to be served cumulatively, making a total sentence of three months.

[2] In essence the appellant contends that the end result of imprisonment for three months, to be served immediately and without any suspension, resulted in a sentence that was manifestly excessive.

[3] For the reasons that follow, the appeal is allowed to the extent that the total sentence of imprisonment for three months is suspended after service of 24 days.

Facts

[4] The appellant turned 18 shortly before committing the offences. Normally resident with his family in Ernabella in the north of South Australia, the appellant came to Alice Springs before Christmas 2009 with the intention of holidaying during the Christmas/New Year period. He resided with his aunt and uncle in a house at the Little Sisters Camp where he was reliant upon their generosity because he was not receiving any Centrelink benefits.

[5] In the early hours of Tuesday 2 February 2010, the appellant and five other male persons decided to break into the Gillen Club and steal alcohol. At about 2.50am the group drove to the club and jumped the back fence into the rear beer garden where a co-offender, Christopher Coulthard, picked up a stool and used it to smash open the window to the outdoor serving area of the bar. The glass was smashed and the Crimsafe mesh popped away from the window frame. Approximately $500 damage was caused.

[6] The appellant and another offender entered the building via the damaged window. Counsel informed the learned Magistrate, Mr Borchers SM, that the appellant was told by Coulthard to enter the premises because the appellant did not have any warrants outstanding. The appellant was also smaller and could fit through the window. In addition it was put to the

Magistrate that the appellant was scared of Coulthard and did not want to refuse.

[7] Once inside the premises, the appellant and the other offender who entered the premises passed bottles of alcohol to co-offenders outside. The total value of property stolen was $700.

[8] Two days later on Thursday 4 February 2010, again in the early hours, the appellant and two other male persons decided to break into the Gillen Club and steal alcohol. The two co-offenders were not involved in the earlier offence. The appellant was the only offender common to both offences.

[9] At about 1.50am the appellant and his two co-offenders jumped the back fence where a co-offender picked up a stool and used it to smash the window. Again the Crimsafe mesh popped off the window frame. This was the same method of entry as had been used two days earlier. Approximately $500 damage was caused.

[10] The appellant entered the building via the damaged window and removed alcohol from the bar fridge which he passed to his co-offenders. The total value of property stolen was $100. The appellant was detained by security guards while attempting to leave the building.

[11] In a later record of interview, the appellant made full admissions with respect to both occasions. When asked why he entered the Gillen Club on the first occasion, the appellant said that Coulthard had told him to go in.

As to why he entered on the second occasion, the appellant replied "He told me to go in".

Manifestly excessive

[12] The appellant turned 18 on 28 January 2010, four days before he committed the first offence. He had never previously been convicted of a criminal offence. In these circumstances, although s 78B of the *Sentencing Act* required that a sentence of imprisonment be imposed unless there were "exceptional circumstances in relation to the offence or the offender", the principles governing the exercise of the sentencing discretion with respect to youthful offenders were of particular importance. The *Youth Justice Act* no longer applied to the appellant because he was 18 at the time of the offending, but the rationale underlying the principles enunciated in the *Youth Justice Act* for the sentencing of offenders under the age of 18 does not simply become irrelevant as if a tap was turned off on an offender's 18th birthday. For example, although the provision in the *Youth Justice Act* directing that the Court impose a sentence of detention or imprisonment on the youth only as a last result no longer applies,[1] this approach remains appropriate in respect of an offender who has only just turned 18 and has not previously been convicted of a criminal offence. Where the legislation requires that a sentence of imprisonment be imposed, this approach becomes particularly important in considering the length of the period of actual imprisonment that the offender should be required to serve.

[1] *Youth Justice Act 2005* (NT), s 81(6).

[13] The learned Magistrate took into account the appellant's young age, but it is unclear whether his Honour took into account that the appellant had never previously been convicted of a criminal offence. The prosecutor tendered a South Australian document headed "Offender History Report" which referred to charges of criminal trespass and dishonestly taking property and gave the date of the offences as 12 May 2009. However, it was noted on the Report that both charges had been adjourned and reference was made to the last hearing on 16 September 2009 as being a "family conference". The Magistrate clarified the meaning of the document with the prosecutor, but made no further mention of it and did not refer to the absence of any prior conviction.

[14] The appellant now complains that the Magistrate erred in admitting the Report. However, no objection was made to the admission of the Report and counsel for the appellant specifically stated that it was a matter for the Magistrate to determine what weight should be given to the document or the information contained in it.

[15] In South Australia, s 58 of the *Young Offenders Act 1993* (SA) specifically directs that offences for which a youth was dealt with by way of family conference must be disregarded when that person is later dealt with for offending as an adult. There is no identical provision in the Northern Territory *Youth Justice Act*. Section 136 provides that where a youth is found guilty of an offence, but no conviction is recorded, no mention may be made of that offence to a court other than a Youth Justice Court unless the

youth had turned 15 years of age at the time the offence was committed. Section 136 applies where a court finds a youth guilty of an offence, but in South Australia disposition by way of a family conference does not follow a finding of guilt. It can occur if a youth "admits the commission of a minor offence".

[16] In these circumstances, at the least it was appropriate to treat the appellant as a young offender who had never previously been convicted of a criminal offence.

[17] Notwithstanding the appellant's youth and absence of any prior conviction, bearing in mind s 78B of the *Sentencing Act*, I am not persuaded that the individual sentences were manifestly excessive. Nor am I persuaded that the decision to accumulate the sentences, making a total sentence of three months, resulted in a sentence that was manifestly excessive. There was no tariff and there was a range of sentence available to the Magistrate. It was open to his Honour to accumulate the sentences as they were separate occasions involving different co-offenders.

[18] The aspect of the sentencing that has given me cause for significant disquiet is the question of the period to be served. Again, this involves the exercise of a sentencing discretion and there is no rule that a young first offender shall never be required to serve all or a significant proportion of a total sentence such as three months imprisonment. Each case must be determined according to its circumstances and particular regard must be had to the

seriousness of the offending when weighed against matters personal to the offender. At times offending is so serious that matters personal to an offender, including youth and prior good character, must take second place to considerations of general deterrence and retribution. However, the appellant's offending was not in that category. No doubt general deterrence was important, particularly in the community of Alice Springs where breaking into commercial properties and stealing alcohol is far too prevalent, but the appellant's youth and lack of prior convictions required that very careful consideration be given to whether there was an appropriate alternative to requiring that the appellant serve the full period of three months. It is in this area that, with respect, in my view the Magistrate fell into error.

[19] The Magistrate was informed that the appellant wished to return to Ernabella and it was submitted that his Honour could suspend the sentence after service of a short period to enable that return to occur. However, the Magistrate rejected that submission because he reached the view that the appellant would not comply with conditions of suspension. The following passage from his Honour's reasons express this conclusion:

> "You have an incapacity for complying with the simplest of court orders. It is clear that you signed a bail form which directed you to attend court. You've acknowledged that you signed it. You now say you didn't understand it. A submission has been made on your behalf that you be released early from gaol on conditions. It is clear that you would not understand those and therefore would not comply with any conditions."

[20] The reference to bail arose because the appellant was bailed to appear in the Court of Summary Jurisdiction on 11 February 2010 and failed to attend. In response to a question by the Magistrate as to why the appellant did not attend Court, counsel informed his Honour that the appellant "just wasn't aware of the court date". Shown the bail form, counsel confirmed that the appellant acknowledged his signature, but said he did not see the date on the document. It was on the basis of the failure to appear and the explanation given by counsel that his Honour reached the conclusions in the passage I have cited.

[21] In my opinion, the failure to comply with a bail obligation did not justify a conclusion that the appellant had "an incapacity for complying with the simplest of court orders". Nor did it justify a conclusion that if the appellant was released on a suspended sentence with conditions, it was "clear" that he would not understand the conditions and, therefore, would not comply with them. Although the appellant signed the bail undertaking, there was no evidence as to whether any explanation was given to the appellant of his obligation to attend on the particular date. No attempt was made to explore the capacity of the appellant to understand conditions of suspension. The Magistrate was not given any information as to the appellant's education. When the question of the bail form was raised, counsel for the appellant informed the Magistrate that counsel did not know whether the appellant could read or write.

[22] In my opinion the Magistrate erred in drawing the conclusions to which I have referred. Inadequate consideration was given to alternatives to service of the full period of three months, particularly as the appellant had been in custody for three days. Sentencing occurred on 25 February 2010. The appellant had been in custody since 23 February 2010. These errors were of significance given the appellant's youth and absence of prior offending and resulted in a miscarriage of the sentencing discretion.

[23] The appeal is allowed to the extent that the commencement date of 24 February 2010 is set aside and the aggregate sentence of one month is to commence on 23 February 2010. Further, total sentence of three months is suspended after service of 24 days, which period the appellant has already served. The operative period of suspension is nine months commencing 25 February 2010. It is a condition of suspension that as soon as reasonably practicable the appellant return to Ernabella and not leave Ernabella for a period of three months from today except for the purposes of a medical emergency. Further, it is a condition that during the operative period the appellant is not to attend within 50 kilometres of Alice Springs except for the purposes of a medical emergency.
