Pascoe v Davis [2010] NTSC 40

PARTIES:	GREGORY PASCOE
	v
	STUART AXTELL DAVIS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 18 OF 2010 (20920735)
DELIVERED:	30 JULY 2010
HEARING DATES:	20 JULY 2010
JUDGMENT OF:	MILDREN J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION, DR J LOWNDES SM

Criminal Code, s 239, s 240(b)
Justices Act, s 105A

R v Davies (2006) 164 A Crim R 353; *R v Kunia* (Sentencing Remarks, NTSC, Olsson AJ, 31 October 2007); distinguished

DF v The Queen [2006] NTCCA 13; followed

Ajax v The Queen (2006) 17 NTLR 80; (2006) 168 A Crim R 293; *Cameron v The Queen* (2002) 209 CLR 339; *R v Boko* (Sentencing Remarks, NTSC, Martin CJ, 30 August 2006); *R v Mills* [1998] 4 VR 224; referred to

REPRESENTATION:

Counsel:

Appellant:	J Brock
Respondent:	D Jones

Solicitors:

Appellant:	NAAJA
Respondent:	Director of Public Prosecutions

Judgment category classification:	C
Number of pages:	13

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

Pascoe v Davis [2010] NTSC 40
No. JA 18 of 2010 (20920735)

BETWEEN:

GREGORY PASCOE
Appellant

AND:

STUART AXTELL DAVIS
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 30 July 2010)

[1] This is an appeal against sentence brought pursuant to the provisions of the *Justices Act*.

Crown Facts

[2] On 20 June 2009, the appellant was living at Lot 502, Maningrida Community with his family and girlfriend who were residing in the kitchen area of the house, which was accessible only via a wooden exterior door. The house was a brick residence with a tin roof, timber roof trusses and wooden ceiling. It was owned by the West Arnhem Shire.

[3] On Saturday 20 June 2009 in the afternoon, the appellant and his girlfriend were at the house along with other family members when an argument

occurred between the appellant and his girlfriend. The girlfriend left the house and sat outside. The appellant remained in the kitchen area of the house and piled his clothes on top of a mattress. He placed a piece of cardboard between the mattress and the clothes. He then pushed an air conditioner from its position on the wall outwards so that it fell on the ground. He then returned to the mattress, cardboard and pile of clothes and moved these items in behind the exterior wooden door of the kitchen area. He then set light to the cardboard, clothes and the mattress. Once alight, the appellant left the kitchen area through the wooden exterior door, walked past his girlfriend without saying anything and then proceeded to a nearby residence. Seeing smoke and flames through the window of the house the appellant's girlfriend went into the house to alert relatives who were sleeping in another room. Upon being awoken, one of the relatives attempted to enter the kitchen area of the house to put out the fire but could not do so immediately because the door was locked. The relative then obtained a small axe to open the locked door and with the help of others, who had arrived, put the fire out. The appellant did not return to the house in order to help. Subsequently when police attended the house, the appellant returned and he made admissions to making a pile with his clothes and setting them alight. He was arrested, cautioned and taken to the Maningrida Police Station. He declined to participate in an electronically recorded record of interview. At the time of the fire, there were two adults inside the house in various rooms. The fire caused substantial damage to the house in

terms of building and electrical costs to an approximate value of $15,000.00. Additionally, the appellant's girlfriend lost several items of clothing and an MP3 player in the fire valued at a total of $250.00. Both the West Arnhem Shire and the girlfriend sought restitution for the damage caused.

[4] The appellant was originally charged with arson and recklessly endangering life. He was originally remanded in custody but on 23 June 2009, he was granted bail.

[5] Subsequently, an offer of a plea to the alternative charge, wrongly described as, attempted arson, contrary to s 240(b) of the *Criminal Code* was entered. That section provides as follows:

> "Any person who unlawfully sets fire to anything that is so situated that any such thing as is mentioned in s 239 is likely to catch fire from it is guilty of a crime and is liable to imprisonment for 14 years."

[6] The "thing" mentioned in s 239 in this case was the house in which the appellant and his girlfriend were living.

[7] At the sentencing hearing the prosecution tendered a victim impact statement from the West Arnhem Shire Council in which was noted:

> "Kitchen to be rebuilt and the electrical to be restored. Three other families needed to live for 2 days without power or hot water. Shire staff had to stop their current work programmes to make safe the damaged residence."

[8] A quote was attached to the victim impact statement for the cost of the repairs and the cost to reinstate the kitchen. This also included the work

already carried out to make the building safe for other household users. The total cost in the quote came to $20,780.00.

[9] The appellant was 21 years of age with no prior convictions. Two references as to his character were tendered. One reference was from an athlete whom the appellant trained for the NT School Sports 2008 and 2009 Championships. The writer of this reference indicates that the appellant helped him to win a number of medals and that he was subsequently able to participate in interstate and overseas championships. The second reference was from another young person whom he assisted to achieve literacy and numeracy in his capacity as the cultural truancy officer. This referee also refers to the appellant as kind, loving and caring and coming from a strict family. She refers to his work as a cultural truancy officer and the work that he had done in that capacity.

[10] After hearing submissions, the learned Magistrate indicated that the plea of guilty did not come at the earliest time but that the appellant was still entitled to a significant discount for his guilty plea, which he assessed at 15 per cent. He accepted also the appellant's actions on 20 June 2009 were spontaneous, although there was a degree of deliberation in that the appellant moved the items to which he had set fire behind the only door to the kitchen area, then, having set alight to those items, locked the door to the kitchen in order to make it more difficult for people to access the kitchen in order to put the fire out.

[11] After referring to various matters, the learned Magistrate came to the view that the seriousness of the offence was such that, notwithstanding that the appellant was a young man with no prior convictions, an actual sentence of imprisonment was required for the purposes of general deterrence. The appellant was sentenced to imprisonment for 18 months backdated to commence on 3 May 2010 to take into account time already spent in custody and ordered that the sentence be suspended after having served three months of that sentence on condition that the appellant not commit any offence punishable by imprisonment for 18 months from his date of release.

Ground 1 – The learned Magistrate erred in not allowing a full discount for an early plea of guilty

[12] The facts are that on 23 June 2009 the matter was listed for a hand up committal on 2 September 2009 and also as an oral committal for 29 September 2009 at Maningrida.

[13] However, the matter was not ready to proceed for some time, as counsel for the appellant had not been provided with the relevant written and recorded statements required under s 105A of the *Justices Act*. This was because the officer in charge had left the Northern Territory; and the matter was adjourned until 4 November 2009. On that date, the matter was adjourned again to 16 December 2009 because the relevant statements still had not been provided.

[14] On 16 December 2009, the prosecution was ready to proceed but the appellant did not appear and a warrant was issued. On the following day the

appellant appeared, the warrant was recalled and the matter was adjourned to 6 January 2010 for mention. On the following day, 17 December 2009, counsel for the appellant offered a plea to the present charge. That offer was accepted but, before the matter could proceed, a fresh Information was required and that was not attended to until 18 January 2010. On 3 February 2010, the appellant appeared and entered a plea of guilty to the fresh Information and the matter proceeded from then, albeit it required three further appearances before the matter was able to be resolved.

[15] The circumstances to be taken into account in deciding whether or not it is possible for a person to plead at an earlier time is not one that is answered by simply looking at the charge sheet. As was said in *DF v The Queen*,[1] the question is when it would have been reasonable for a plea to be entered. The Court of Criminal Appeal endorsed the observations of Kirby J in *Cameron v The Queen:*[2]

> "The test is not the time when theoretically or physically a person might have pleaded. The test is when it was reasonable, in all the circumstances and as a matter of practicality, to have expected a plea of guilty to be announced. That question is to be answered in a reasonable way, not mechanically or inflexibly."

[16] The circumstances of this plea have already been mentioned. Suffice it to say that upon close analysis the offer of a plea was made at the earliest opportunity having regard to the fact that the oral committal was not able to take place because the matter was not ready to proceed through no fault of

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1 [2006] NTCCA 13.
2 (2002) 209 CLR 339 at 363.

the appellant. The appellant admittedly did not attend Court on 16 December but he appeared the following day and on the day after that an offer of a plea to the present charge was made which was ultimately accepted. The plea itself could not be entered until such time as there was a fresh Information before the Court alleging the new offence. As soon as that Information was available, the appellant pleaded guilty at the first opportunity.

[17] It is also to be noted that these proceedings took place in the Maningrida Court of Summary Jurisdiction. The circumstances under which legal practitioners representing Aboriginal accused persons are required to work in, what are commonly referred to as bush courts, are well known to Magistrates and also to this Court. It is not unusual for the sittings to be held over one or two days or possibly even three days when a large number of matters have to be dealt with. Lawyers representing Aborigines have little time to take instructions, often have to take instructions without appropriate facilities where privacy and confidentiality are able to be protected properly, often have to use interpreters to obtain instructions and often have little time with the clients in order to take instructions. In cases involving serious charges, it is every lawyer's duty to ensure that he or she has obtained proper instructions and has properly considered the appropriateness of entering pleas to the charges which the Crown has laid.

Considerable latitude must be given to Aboriginal defendants in those circumstances.[3]

[18] In my opinion, the learned Magistrate erred in finding that the plea of guilty did not come at the earliest time. Nevertheless, a discount of 15 per cent was, in all the circumstances, still an appropriate discount. As was said in *DF v The Queen*,[4] factors that will determine the extent to which leniency may be accorded for those who plead guilty include whether the plea demonstrates remorse, the utilitarian benefits that flow from the plea, the strength of the Crown case and the extent to which the plea serves the self-interest of the accused.

[19] Undoubtedly, the plea assisted in the administration of justice, but I note that there was no evidence, apart from a submission from the bar table, that the appellant was remorseful or contrite. The learned Magistrate did not refer to this in his sentencing remarks. However, there was no evidence that the appellant was remorseful or contrite. For example, there was nothing by way of an apology. The appellant exercised his right of silence and so there is nothing available to the Magistrate in a record of interview in which the appellant expressed his remorse. The Crown case on the other hand was extremely strong. In all the circumstances, I do not think it can be said that the actual discount given should have been more than what was in fact given. Moreover, the learned Magistrate was required to take into account

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[3] For a first hand account of the problems involved see Donna Ward, *Visions of the Mocking Bird*, Balance 2/2010 page 22.

[4] [2006] NTCCA 13 at [16].

all of the factors relevant to the head sentence in deciding whether to suspend the sentence or not and deciding the extent to which any sentence for imprisonment might be partially served. Given that there was a very significant suspension of the sentence imposed, I would infer that the Magistrate properly considered the value of the plea for those purposes as well. I would therefore dismiss ground 1 of the appeal.

Ground 2 – The learned Magistrate erred in requiring three months to be served before the sentence was suspended

[20] There is no complaint that the learned Magistrate failed to take into account any relevant circumstance or took into account a circumstance which was irrelevant. The major argument is the learned Magistrate's conclusion did not take into account properly the fact that the appellant was a youthful first offender with extremely good prospects of rehabilitation. The learned Magistrate accepted that in those circumstances courts are very reluctant to send such persons to jail, accepted that the appellant had extremely good prospects of rehabilitation and that, in this particular case, there was no need for specific deterrence. The learned Magistrate said:

> "… this is an extremely difficult case where one has to finely balance the competing considerations of general deterrence and the rehabilitation of this young man. At the end of the day, this is a matter where I feel it is necessary to order the defendant to serve some time in prison. I think that that should be kept to the barest minimum consistent with the needs of general deterrence."

[21] The factors which the learned Magistrate plainly took into account are the limited planning involved, that the actions of the appellant were

spontaneous, the fact that the appellant locked the door to the kitchen to make it more difficult for people to access the kitchen to put out the fire, the fact that the house was occupied at the time by a relative who was asleep, the damage caused to the building, the lack of any ability by the appellant to make any restitution (although restitution was offered), the inconvenience to others whilst the premises were repaired and made safe, the weight to be given to the plea of guilty as well as the other matters to which I have referred already concerning the appellant's youth, prospects of rehabilitation, lack of prior convictions and the lack of need for specific deterrence. His Honour does not specifically refer to it, but the facts were that the appellant was not intoxicated or under the influence of any drugs at the time and there was evidence of the appellant's positive good character.

[22] Reference was made by counsel for the appellant to the judgment of the Court of Appeal of the Supreme Court of Victoria in *R v Mills*,[5] in which the Court accepted that the youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises. In such a case, rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. A youthful offender is not to be sent to an adult prison if such a disposition can be avoided especially if he is beginning to appreciate the effect of his past criminality. The benchmark for what is serious enough to justify adult imprisonment may be quite high in the case of a youthful

[5] [1998] 4 VR 224.

first offender. Where the offender has not previously been incarcerated, a shorter period of imprisonment may be justified. For the purpose of determining whether the person is to be treated as "youthful", a person of 21 years of age is to be so treated but as the age in question increases the force of these propositions diminish. Thus, the weight to be attributed to youthfulness is greater when an offender is 18 than what it would be at 21.

[23] I note that the learned Magistrate considered the possibility of a home detention order but unfortunately, that option was not available in the circumstances of this case. Plainly if that option had been available, his Honour may well have imposed such an order for a period, one might expect, longer than the three months of actual imprisonment which his Honour ultimately decided the appellant should serve.

[24] Both counsel made reference to the decision of the Court of Criminal Appeal in *Ajax v The Queen*,[6] where the Court noted that the current level of sentencing for the offence of arson was far too lenient and needed to be increased significantly. Some of the relevant factors to be considered by a sentencing court were referred to at para [34]. It is not in dispute that the factors referred to therein are relevant to the current offence, but it was put that in the circumstances of this case the learned Magistrate gave excessive weight to general deterrence. I accept the submission of counsel for the appellant that the offence of arson and the offence for which the appellant has been found guilty is a different offence in the sense that it carries a

[6] (2006) 17 NTLR 80; (2006) 168 A Crim R 293.

much lesser maximum penalty, it is capable of being dealt with summarily in some circumstances and the mental element is quite different. Obviously, the differences in these factors are also very relevant to sentencing. Nevertheless, as the Chief Justice has said in his sentencing remarks in *R v Boko* (Sentencing Remarks, NTSC, Martin CJ, 30 August 2006), this Court has given notice that the current level of sentences for this particular offence are too lenient and need to be significantly increased.

[25] Counsel for the respondent, Mr Jones, submitted that this is a prevalent offence in Aboriginal Communities and a deterrent sentence will generally be warranted. He further submitted that unless there are exceptional circumstances a sentence of actual imprisonment will be inevitable. The authority which he cites for that, *R v Davies*,[7] was a case where the charge was arson and therefore is to be distinguished from the current type of offence. The other authority referred to, *R v Kunia*,[8] does not support that proposition either. Moreover, the learned Magistrate did not, in my opinion, approach the case in that way.

[26] It is well accepted that on an appeal against sentence this Court will not interfere with the sentencing court's discretion unless error is shown. I agree with the submission of Mr Jones that offences involving the lighting of fires in Aboriginal Communities in circumstances similar to this are quite prevalent and general deterrence is a most important consideration. It is not

[7] (2006) 164 A Crim R 353.
[8] (Sentencing Remarks, NTSC, Olsson AJ, 31 October 2007).

sufficient that I myself may have imposed a lesser sentence. What must be shown is that the learned Magistrate erred. I am not satisfied that that has been demonstrated. This ground of appeal has not been established.

[27] As neither ground of appeal has been made out, the appeal is dismissed.
