TS v Teague [2013] NTSC 71

PARTIES:	**TS**
	v
	TEAGUE, Allan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 18 (21304954) and JA 19 (21308015)
DELIVERED:	5 November 2013
HEARING DATE:	4 June, 1 November 2013
JUDGMENT OF:	BARR J
APPEAL FROM:	Youth Justice Court

CATCHWORDS:

APPEAL-Appeal against sentence-appeal allowed-appellant to be resentenced

CRIMINAL LAW-Appeal against sentence -Magistrate erred in not applying s 81(6) of the *Youth Justice Act*-the principle of imprisonment as a last resort-alternatives to imprisonment were available-appeal against sentence allowed.

CRIMINAL LAW-Appeal against convictions-Magistrate erred in imposing convictions-sentencing objectives obtainable without imposing convictions-appeal against conviction upheld-appellant to be re-sentenced.

SENTENCING-Young offender-principle of imprisonment as last resort

STATUTE-*Youth Justice Act*-s 81(6)-Principle of imprisonment as a last resort to be applied in matters involving youths.

Youth Justice Act ss *6, 83, 9, 941 121,*

Justices Act s *177*

P (a minor) v Hill (1992) 110 FLR 42

Verity v SB (2011) NTSC 26

REPRESENTATION:

Counsel:

Appellant:	A Hancock
Respondent:	M Lester

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	Bar1313
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

TS v Teague [2013] NTSC 71
No. JA 18 of 2013 (21304954) and JA 19 of 2013 (21308015)

BETWEEN:

TS
Appellant

AND:

ALLAN TEAGUE
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 5 November 2013)

[1] The appellant, who was born on 31 October 1995, was sentenced by the Youth Justice Court on 9 April 2013, aged 17 years and 5 months. He had earlier entered pleas of guilty to stealing $800 and unlawfully using a motor vehicle ("the fresh offending"). The fresh offending constituted a breach of a good behaviour order[1] imposed by the Court on 5 February 2013. He was sentenced to two months detention in respect of the fresh offending. The magistrate also revoked the earlier good behaviour order,[2] convicted the appellant on six counts and sentenced him to three

1 S 83(1)(f) and s 91 *Youth Justice Act*.
2 S 121(6)(a)(ii) *Youth Justice Act*.

months' detention cumulative on the two months imposed for the fresh offending.

[2] The appellant now appeals the several convictions and the effective sentence of five months imposed on 9 April 2013.

[3] It is necessary to state the facts in relation to the offending for which the appellant was sentenced on 5 February 2013. The offending took place between 22 January and 1 February 2013. The appellant at that stage was 17 years and 3 months old and knew the victims of his offending.

[4] On 22 January 2013, the appellant unlawfully entered the flat of one of the victims and located a Nintendo DS-XL valued at $250, which he then stole.

[5] Subsequently, the appellant and a male co-offender formed a common intention to unlawfully enter a property in Humpty Doo in order to steal property. They located the key to a firearm safe, opened the safe and found a 12-gauge under and over shotgun, a 30/30 rifle, a bolt action rifle, a Winchester 44 rifle and ammunition for those firearms. The appellant and the co-offender then stole the firearms and ammunition. They concealed three of the firearms underneath a damaged burnt out car body in Girraween Road, in the Darwin rural area.

[6] The appellant and his co-offender also stole property from another residence in a suburb of Palmerston: a laptop computer valued at $1,000

and a large money box containing approximately $4,000. They drove away in a vehicle belonging to the co-offender. The appellant returned later that afternoon, unlawfully entered the same residence and stole the keys for a Holden Commodore which he then drove away. After causing the vehicle to become bogged in a location on Girraween Road, he returned to the residence of the victim and informed the victim what had happened.

[7] On 1 February 2013 the appellant was arrested and assisted police to recover three of the four stolen firearms. He made full admissions to the offending. When asked by police why he had unlawfully entered premises, he stated, "No reason". When asked about stealing property he again replied, "No reason". When asked about the firearms, he said, "Because I wanted to go hunting".

[8] The total value of stolen firearms was $6,000.

[9] On 5 February 2013, the appellant pleaded guilty in the Youth Justice Court to a total of 15 counts. On counts 2 (stealing a Nintendo DS XL), 12 (unlawful entry of dwelling house with intent to steal), 13 (stealing laptop computer and money box), 14 (unlawful entry of dwelling house with intent to steal), 15 (stealing car keys) and 16 (unlawful use of a motor vehicle), the appellant was ordered to be released on a 12-month good behaviour bond, without conviction.[3] The Court ordered, inter alia,

[3] S 83(1)(f) *Youth Justice Act*.

that the appellant be under supervision by a Probation Officer; that he submit to any curfew as directed by a Probation Officer; that he not purchase or consume alcohol; and that he have no contact directly or indirectly with certain named persons.[4]

[10] The Youth Justice Court made a further order on 5 February 2013, without recording a conviction, that within two months the appellant perform a total of 110 hours community work under a community work order[5] in respect of counts 3 (unlawful entry with intent to steal), 4 (stealing firearms), 5 (possessing a firearm without licence), 6 (possessing a firearm without licence), 7 (possessing a firearm without licence), 8 (possessing a firearm without licence), 9 (possessing ammunition without licence), 10 (failing to comply with the storage and safe keeping of firearm) and 11 (stealing alcohol).

[11] The appellant re-offended on 21 February 2013. The facts in relation to the fresh offending were that he was at the home of his father. The appellant stole $800 in bank notes from the purse of his stepmother and also took the car keys to his father's car, a Toyota Hilux, which was parked in the driveway. He opened the gates and stealthily pushed the vehicle out of the driveway onto the road. He then jumped in the driver's seat and started the vehicle. At that point his father yelled out to him, but the appellant drove away at speed. However, some 12 hours later, at

[4] The appellant had some difficulties resisting the peer pressure exerted by those persons.
[5] S 83(1)(h) *Youth Justice Act.*

about 8.30 am on 22 February, police found the appellant standing in the driveway of his father's residence leaning against the vehicle. The appellant was arrested and interviewed by police. He confirmed that he was aware of the conditions of his good behaviour bond. When asked why he had breached that bond he replied, "I don't want to talk about it here". When asked if he had permission to use his father's vehicle, he replied, "No". When asked if he had permission to take the $800 cash, he replied, "No".

[12] The appellant was refused bail by police and remanded in custody.

[13] On 26 February, the magistrate ordered a pre-sentence report. Proceedings for the fresh offending and for breach of the earlier good behaviour bond were adjourned to 9 April 2013. The appellant was remanded in custody.

[14] By 9 April 2013, the appellant had been in custody since 22 February 2013, that is, some six or seven weeks.[6]

[15] As can be seen from the summary in [1], the magistrate imposed a total effective sentence of 5 months' detention on 9 April 2013: two months' detention in respect of the fresh offending, and three months' detention for the offending in January and February 2013 in respect of which the good behaviour bond referred to in [9] had been revoked.

[6] Transcript 09/04/2013, page 5.9: "one month and nineteen days".

[16] Notwithstanding the appellant's fresh offending, the appellant had completed 49 of a total of 110 hours of the community work ordered to be performed by him on 5 February in respect of those charges referred to in [10] which were not the subject of the good behaviour bond. Therefore, as at 9 April, there remained 61 hours of community work to be completed.

[17] In relation to the fresh offending, Counsel for the appellant informed the magistrate on 9 April that the appellant had realised the stupidity of his actions and had contacted his corrections officer the following morning. He then made the decision to return home. He returned his father's vehicle in an undamaged condition, and returned $130 which remained of the stolen $800.

[18] The appellant's counsel submitted that the magistrate should note and take into account the completion by the appellant of a substantial amount of the community work previously ordered. Counsel informed the magistrate of the appellant's engagement in an apprenticeship as a glazier and constant employment since leaving school. Counsel submitted that her Honour should sentence the appellant to time served: "a straight period of detention backdated appropriately." As mentioned above, the appellant had by this time been in detention on remand for some 6 to 7 weeks. Counsel submitted, in the alternative, that the magistrate should make an order for further community work to allow

the appellant to continue making "reparation and amends to the community".

[19] The prosecutor drew to her Honour's attention the contents of the pre-sentence report which suggested that the appellant was not remorseful and was not willing to attend alcohol and other drug counselling to help him overcome bad habits in relation to the use of those substances. I note, however, that in his discussions with the report writer, the appellant had acknowledged making wrong decisions and also that alcohol, illicit substances and peer pressure were significant factors in his offending behaviour. He had gained some insight. Moreover, he had shown motivation for changing his ways; the issue was as to how that change could be achieved. The appellant believed that he could bring about the required change himself:

> "He has stated he is averse to attending any alcohol or other drug counselling to help him overcome his alcohol and other drug habits. The youth feels that (by) changing friends, involving himself in sport and gaining a job, he will be able to keep away from the substances that have been involved in (his) offending."

[20] Notwithstanding the appellant's differing view as to how best the required changes could be achieved, the writer of the presentence report acknowledged that the appellant had shown "enthusiasm and motivation to better his life by making changes with the peers he associates with, alcohol and illicit substance use and looking for work."

The magistrate's sentencing remarks

[21] The magistrate made the following remarks when she passed sentence on the appellant:

> I find you guilty of an offence of stealing $800 from your stepmother's purse, and taking a vehicle belonging to your father, the offence of unlawfully using a motor vehicle.
>
> Your father and stepmother, in my view, did exactly the right thing in reporting the matter to the police. You might think that they were being tough on you, but in being tough they were doing exactly the right thing.
>
> … This happened on 21 February. You had been in court and orders made for your good behaviour and community work on 5 February. So, not even three weeks later, you were back disregarding things again.
>
> I was very concerned and I remain concerned about your level of use of alcohol and use of drugs. I think that they do play a part in your behaviour. And certainly the psychological assessment suggests that. … The psychologist is very clear that you are in a high risk group for using alcohol:
>
> > "Master S appears to have no physical dependency for alcohol, but if his current consumption behaviour continues he is at high risk of developing such a dependency".
>
> In other words, if you keep going with alcohol the way you are going, you will become dependent on alcohol, there's a very high risk of that happening. …
>
> You seem to be trying to accept responsibility for what you have done, in the sense that you don't want to get into that sort of trouble again. …
>
> You don't want to be under an order that says you are not to drink. Because you say, "well, I won't be able to stick to that". Well I cannot in all conscience give you an order that doesn't put that

limitation on your behaviour because it's been identified to me as being a high risk. And I would not be prepared to do it.

In any event, you are 17; it is not legal for you to be drinking. There is a big difference between dealing with someone who's 13 or 14 or even 15 who's committing these sorts of offences and dealing with someone who is 17 years old, who has been in employment and who, in many ways, is wanting to behave as an adult, doing his own thing.

You have to accept responsibility for your behaviour and that has to include not drinking and not using drugs.

… I cannot have any confidence that you would stick to that form of order if I were to give it you because you have said quite clearly that you won't, you won't be able to do it. That being the case, I really have no alternative but to invoke the good behaviour bonds for which you were given the leniency of a good behaviour order for serious offending, for which you were given the leniency of not having a conviction recorded. You just threw those opportunities away by getting into trouble so quickly afterwards.

So I really have no option but to re-sentence you with respect to the offences for which the good behaviour bond was placed.

So I revoke the good behaviour bond, having been satisfied it's been breached by the further offending. I re-sentence on counts 2, 12, 13, 14, 15 and 16 by recording a conviction and sentencing (the appellant) to three months' detention.

That sentence will be cumulative, in other words it will be added on to the sentence that I'm going to impose for the current offences of stealing and unlawful use of a motor vehicle.

On those sentences you are sentenced to two months' detention. So that gives five months' detention in total which I have backdated to start on 27 February. Once you've served that you will indeed not be subject to restrictions.

But you need to do a lot of thinking between now and then about where this is leading you to. You need to think about what the

> psychologist said in the report about the high risks, for you, associated with ongoing alcohol use.
>
> The community work order, I think you should actually complete your community work, so I have allowed until 30 September to complete the outstanding hours. He can complete that when he is released.

[22] The appellant contends on appeal that the magistrate failed to apply the principle that imprisonment is a last resort. Other grounds include that the magistrate failed to apply the principle of totality, and that the sentences imposed were manifestly excessive.

[23] I have decided that, in dealing with the appellant for his breach of the good behaviour order and for the fresh offending, the learned magistrate erred in failing to apply the sentencing principle clearly expressed in s 81(6) *Youth Justice Act* that a sentence of detention or imprisonment is to be imposed only as a last resort. I find that her Honour imposed sentences of detention without giving the necessary consideration to making a community work order; alternatively, to imposing a term of detention which was wholly or partly suspended.

[24] In dealing with the appellant for his breach of the good behaviour order, the magistrate could have confirmed or varied the order, or revoked the order and dealt with the appellant under s 83 of the Act as if she had just found him guilty of the relevant offences, nonetheless taking into

account "the extent to which the youth had complied with the order before the application was made."[7]

[25] Even if the magistrate considered that it was inappropriate to vary the good behaviour order (for example, by imposing further conditions), her Honour nonetheless had power to make a community work order; to order a term of detention which was wholly or partly suspended; to order a term of detention that would be suspended on the appellant entering into an alternative detention order (home detention); to order that he serve a term of periodic detention; or to sentence the appellant to actual detention, that being the next most serious penalty available to her under s 83.

[26] The purpose of a community work order is to reflect the public interest in ensuring that a youth who commits an offence makes amends to the community by performing work that is of benefit to the community.[8] The magistrate could have ordered the appellant to carry out up to 480 hours of community work and so could have required him to participate in an approved project working eight hours per day for up to 60 days.

[27] In circumstances where a 17-year-old male youth was willing to do community work under a community work order and already had "runs on the board" in terms of having successfully completed some 49 hours of community work within a three-week period, the sentencing option of

[7] S 121(6)(a)(ii) and s 121(7) *Youth Justice Act.*

a community work order required careful consideration, particularly when regard was had to s 4 *Youth Justice Act*, and in particular the need to hold the youth accountable for his offending and encourage him to accept responsibility for his behaviour; the need to provide him with the opportunity to develop in socially responsible ways; the desirability not to withdraw a youth unnecessarily from his family environment (or from employment); and the need for punishment to be designed to give the youth an opportunity to develop a sense of social responsibility.

[28] The correct approach required the magistrate to be satisfied that no sentence other than a term of detention was appropriate in the circumstances of the case.

[29] In *P (a minor) v Hill*[9] Mildren J said:

> The approach of the courts when dealing with juveniles must be cautious, patient and caring, with the interests of the juvenile foremost in mind. Of course, there are some offences which warrant an immediate custodial sentence, notwithstanding that the offender is a juvenile and notwithstanding, even, that the juvenile has no prior convictions. But these are for extremely serious crimes, usually, but not always, crimes of violence where it is right that the need to punish and deter is given particular emphasis. … I do not say, of course, that in the case of a persistent offender, where the crimes are not in the extremely serious category, that it is not appropriate to order detention or imprisonment. But even in such cases, detention or imprisonment should only be used as a last resort, where all other options are inappropriate and the need for deterrence and to protect the community must be given special prominence: see, eg, *Yovanovic v Pryce* (1985) 33 NTR 24.

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[8] S 93(2) *Youth Justice Act*.
[9] (1992) 110 FLR 42 at 48.5.

[30] Caution and patience were required for a proper consideration of the fresh offending. True, the fresh offending came only three weeks after the appellant had been dealt with by the Youth Justice Court for the offending summarized in [3] to [8], and that was rightly a concern for the magistrate. However, the fresh offending had all the hallmarks of juvenile angst: wanting to escape from the home environment, stealing money from his stepmother's purse, making off in his father's car, realising the stupidity of his actions and then returning the car undamaged the following morning. He was unable or unwilling to explain to police why he had acted as he did.

Conclusion

[31] I uphold the appeal on the ground that the magistrate erred in failing to apply the principle that detention was a last resort. For reasons explained above, I consider that the magistrate erred in imposing terms of detention.

[32] I do not consider that her Honour erred in her decision to revoke the good behaviour order imposed by her in respect of the offending summarised in [9] above. However, I consider that her Honour erred in imposing convictions, both for those offences and for the fresh offending, essentially for the reasons explained by me in *Verity v SB*.[10] In my assessment, the magistrate could have achieved all of the

[10] (2011) NTSC 26 at [31] - [37].

sentencing objectives she sought to achieve without imposing a conviction or convictions. A no-conviction disposition was particularly relevant in the case of this appellant, a youthful offender who had demonstrated a good work ethic and good prospects for future employment.

[33] At the conclusion of the first part of the appeal hearing on 4 June, I determined that I should grant bail to the appellant, on strict conditions as to residence, non-association with named persons, non-consumption of alcohol and dangerous drugs (in both cases subject to testing) and with a night time curfew. I made it clear to the appellant that I was not granting bail because I had decided the appeal in his favour but rather because if I were to decide the appeal in his favour, the decision might come after he had served both sentences. The appellant was cautioned that if he were not successful with the appeal, he would have to be returned to detention. It was a condition of appeal bail that he surrender himself to custody within seven days of the determination of his appeal in the event that he was required to serve further time in detention under the sentences imposed on him.

[34] This Court now has the task re-sentencing the appellant. In that respect, I propose to consider making a community work order; in the alternative, imposing a partly suspended sentence. Each of those sentencing dispositions would require the Court to take into account the period of detention already served by the appellant prior to his being granted bail

in the circumstances explained in [33]. Moreover, the appellant has now turned 18, so that a sentence of detention for offending committed as a youth[11] would become a sentence to imprisonment in an adult prison. This will also have to be taken into account. Further, before the Court is able to make a community work order, it must be satisfied that there is an approved project suitable for participation in by the youth, and must receive advice from a probation officer that arrangements will be made for the youth to participate in the approved project. The Court must also be satisfied that the youth is a suitable person to participate in the approved project. In relation to those matters, the Court will require further evidence and must receive a report in relation to the youth's present circumstances.[12]

Orders

[35] I make the following orders:

1. In file 21308015, pursuant to s 177(2)(c) *Justices Act* read with s 144(3) *Youth Justice Act*, I quash the convictions recorded against the appellant by the Youth Justice Court on 9 April 2013. Further, I quash the sentence of 2 months' detention imposed.

[11] The *Youth Justice Act*, s 6(1), provides that a "youth" includes a person who committed an offence as a youth but has since turned 18 years of age.
[12] S 94(1)(d) read with s 94(2) *Youth Justice Act*.

2. In file 21304954, pursuant to s 177(2)(c) *Justices Act* read with s 144(3) *Youth Justice Act*, I quash the convictions recorded against the appellant by the Youth Justice Court on 9 April 2013 in respect of counts 2, 12, 13, 14, 15 and 16. Further, I quash the sentence of 3 months' detention imposed.

3. In respect of both files 21308015 and 21304954, pursuant to s 177(2)(a) *Justices Act* read with s 144(3) and s 147 *Youth Justice Act*, I adjourn further consideration of the appeal to a date to be fixed, to hear submissions on the re-sentencing of the appellant.

4. In respect of both files 21308015 and 21304954, pursuant to s 147 *Youth Justice Act*, I direct that a probation officer provide a report to this Court as to whether there is an approved project of community work which is suitable for the appellant's participation; further as to the appellant's present circumstances, to enable assessment of his suitability to participate in such project.
