JA v Nicholas & Ors [2014] NTSC 10

PARTIES:	**JA** v **NICHOLAS, Sally** and **MARSHALL, Wade Gordon** and **WOOD, Paul Jason**
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 50 of 2013 (21320515), JA 51 of 2013 (21330922) and JA 52 of 2013 (21345781)
DELIVERED:	26 MARCH 2014
HEARING DATES:	18 MARCH 2014
JUDGMENT OF:	KELLY J
APPEAL FROM:	S OLIVER SM

REPRESENTATION:

Counsel:

Appellant:	J Hunyor
Respondent:	D Jones

Solicitors:

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

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

JA v Nicholas & Ors [2014] NTSC 10
Nos. JA 50, 51 & 52 of 2013 (21320515, 21330922, 21345781)

BETWEEN:

JA
Appellant

AND:

SALLY NICHOLAS,
WADE GORDON MARSHALL
PAUL JASON WOOD
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 26 March 2012)

[1] The appellant is a 14 year old boy. From the age of 5, he grew up in and around the community of Daly River until the age of 12, when his family moved to Darwin. Before coming to Darwin, his family was living at the Woodygupildiyerr Outstation, where he was attending school with another 8 – 10 children.

[2] In 2013, the appellant was enrolled at Rosebery Middle School, but was not attending school.

[3] On the night of 7 May 2013 (between 11.00 pm and 3.00 am the next morning) the appellant and some co-offenders unlawfully entered a unit at 410 Vanderlin Drive, Wagaman and stole property including some alcohol and a set of car keys. (One of the co-offenders had jimmied open the front door.) They used the stolen car keys to take a car. They drove off in the car and abandoned it after driving it up onto a gutter and puncturing a tyre.

[4] On the night of 8 May 2013 (between 11.00 pm and 1.00 am the next morning) the appellant and a number of co-offenders decided to unlawfully enter a unit in 28 Bradshaw Terrace and steal property. They saw the occupants turn off the lights and waited until they thought the occupants were asleep. The co-offenders cut the fly wire on the door, then they entered and stole some property including a wallet and two sets of car keys. The appellant and other co-offenders kept look out.

[5] They used one set of keys to take one of the cars, and about two hours later returned and took the other car.

[6] On the following evening (9 May 2013) the appellant and some co-offenders went to Mindil Beach Markets where they stole a woman's handbag from one of the stalls. The appellant picked up some car keys that had fallen from the bag and got the others to help him look for the car to steal. When they found the car, one of the co-offenders drove it away with the others, including the appellant, as passengers. They went to a service station, the

appellant filled the car with $50.30 worth of fuel and they drove away without attempting to pay – as had been their intention.

[7] On Sunday 12 May 2013, the appellant and his co-offenders went to another dwelling at 19 Stedcombe Street, Alawa, intending to unlawfully enter and steal property. They walked around Alawa until the occupants of the house had gone to bed, then they unlawfully entered the house by an unlocked front door. They stole property from the house including a hand bag, an iPhone and car keys. They used the stolen car keys to take a red Mini Cooper S which they drove away. All the co-offenders except the appellant took turns at driving; the appellant could not drive.

[8] The appellant was arrested on 15 May 2013, and admitted his part in these offences to police. He was given bail to appear on 21 May 2013. On that date, his bail was extended to 11 June. His bail conditions included a curfew and not associating with the co-offenders.

[9] On 24 May 2013, the appellant breached his bail conditions by breaching the curfew condition.

[10] At about 2.30 am on 5 June 2013, the appellant and co-offenders went back to 19 Stedcombe St Alawa intending to again unlawfully enter the house and steal property. The appellant kept look out while co-offenders entered the house using keys that had been left in the front door lock. They stole property from the house including a mobile phone, car keys and some

alcohol. One of the co-offenders woke one of the sleeping occupants by shining a torch in her eyes.

[11] The appellant and the others went from there to Alawa Primary School to have a cigarette. While they were there, the appellant and one of the others vandalised the pre-school sign with a permanent marker.

[12] At about 12.00 mid-day on 5 June 2013, the appellant was arrested for being in breach of his bail by being at Casuarina in the company of two co-offenders. He spent three days in custody, coming before the Youth Justice Court on 7 June 2013. Ms Oliver SM ordered a pre-sentence report and adjourned the matter 12 July 2013. JA did not apply for bail and was remanded in detention until that date.

[13] On 12 July 2013, her Honour did not record a conviction on any of the charges and gave the appellant a 12 month good behaviour bond in relation to the substantive offences and a total of 100 hours community work to be performed within six months for the breaches of bail.

[14] On 16 July 2013 (ie four days later) the appellant committed criminal damage by smashing a windscreen. He also unlawfully entered another dwelling at night with co-offenders and stole further property including alcohol and car keys which he and his co-offenders used to take a car.

[15] On 23 August 2013, the appellant was dealt with by Ms Morris SM for that further offending. It was described by her Honour as “a serious offence”

which was committed less than a week after he was sentenced for the previous offences. This was, of course, a breach of the good behaviour bond imposed on 12 July. Nevertheless, her Honour did not impose convictions, found the breach proved and re-sentenced the appellant for the earlier offences and the fresh offences by again imposing a 12 month good behaviour bond from that date. She noted that the appellant had spent some time in detention on remand and, in the meantime, had begun attending school, had participated in a victim conference at the Community Justice Centre and had performed some of the community work he had been ordered to perform.

[16] Just after 4.00 am on 14 October 2013, less than two months into the 12 month period of the good behaviour bond, the appellant and some co-offenders went to 78 Moil Crescent, Moil in order to steal a motor vehicle. (His co-offenders had unlawfully entered the house and stolen the keys the night before.) They used the keys to open the car door and tried to push the car out of the driveway but they were disturbed and ran away.

[17] The appellant and his co-offenders then went back to 19 Stedcombe Crescent, Alawa which had already twice been the subject of their larcenous attentions. They stole a bottle of Jim Beam from the front seat of an unlocked car.

[18] At about 8.00 am on the morning of 14 October, a co-offender picked the appellant up in another car which had been stolen the night before. The co-

offender drove to Casuarina Square shopping centre with the appellant as a passenger. They parked the car, went shopping and then went back to the car. At about 10.00 am they drove out of the car park. They stopped behind the KFC takeaway to give way to traffic and noticed that they were being watched by police. The appellant said, "Put it in reverse," and, as police came towards them on foot, the co-offender reversed at speed against the flow of the traffic for about 100 metres only stopping when the car hit a fixed object near the main entrance to the shopping centre. The co-offender then drove off at speed, and ran a red light, the car becoming briefly airborne as it travelled through the intersection. The co-offender drove at speed along Vanderlin Drive and they abandoned the car in Moulden. Police found the appellant at his home, hiding in a cupboard. They arrested him and took him to Darwin police station where he took part in an interview with police and admitted to the offending.

[19] On 22 October 2013 the appellant came back before Ms Oliver SM to be sentenced for fresh offending on file 21345781 and re-sentenced on those matters for which he was previously on a good behaviour bond (files 21324635, 21320515 and 21330922). Her Honour imposed a total effective sentence of seven months detention, backdated to 22 September to take into account time spent in custody, and suspended from 24 January 2014 (ie after approximately four months detention).

Grounds of appeal

[20] The appellant appeals against that sentence on the following grounds:

1. That the learned magistrate failed to consider that detention should be an option of last resort.

2. That the learned magistrate erred in her characterisation of the nature of the seriousness of offending.

3. That the learned magistrate failed to give sufficient weight to the appellant's subjective features and prospects of rehabilitation.

4. That the learned magistrate failed to consider the principle of totality in imposing a significant term of detention and community work.

5. The learned magistrate was unduly influenced by the appellant's school commencement in determining the release date from detention.

[21] The appellant was granted leave to argue an additional ground of appeal, namely:

6. The learned magistrate failed to give weight to the appellant's cooperation with police, admissions and pleas of guilty at the earliest reasonable opportunity.

[22] The principles governing appeals are well known. A 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 or magistrate was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The sentence is presumed to be correct.

Ground 1

[23] The appellant contended that the learned magistrate failed to apply the principle that detention should be an option of last resort; that there was another option available, specifically a community work order; that her Honour failed to consider whether a community work order was appropriate in the circumstances; and that she ought to have concluded that it was an appropriate disposition.

[24] At the sentencing hearing on 22 October, the appellant's then counsel submitted that an appropriate disposition would be a suspended sentence taking into account the time already served in Don Dale (said to have been seven days) and keeping the existing community work order in place. His counsel said that JA was willing to engage in the community work order more frequently over the Christmas holidays, but that was in relation to the existing community work order. It was not submitted that an appropriate disposition for the matters then before the court was a further community work order.

[25] Before standing the matter down to consider the appropriate sentences for the various offences, her Honour said:

> "JA's offending seems to be largely unrestrained since he started getting into trouble earlier this year. It's hardly like there's been gaps in the offending, numerous, numerous (inaudible) motor vehicles and this is just a repetition of the same sort of behaviour. I propose to revoke the good behaviour bonds.

> I propose to re-sentence him in relation to those matters. He was given an opportunity to show that he could stay out of trouble and he has given no indication of changing his behaviour whatsoever. I think even though he's quite young I'm going to have to consider a far different option to a further good behaviour bond and frankly a few days in detention is not going to cut it for all of this offending. It would be sending, I think, the wrong message to JA altogether."

[26] While acknowledging the force of her Honour's remarks about sending the wrong message, and acknowledging that it was necessary, in the interests of sending the right message to the appellant, that there be a consequence to him for breaching his good behaviour bond a second time by further offending, counsel for the appellant submitted that a community work order would have provided a sufficient and appropriate consequence for a 14 year old boy entailing, as it would have, having to give up his weekends and being seen to work in the community.

[27] I am not prepared to conclude, as counsel for the appellant submitted I should, that her Honour failed to take into account the principle that detention should be an option of last resort or to consider whether a community work order was an appropriate disposition. It is not to be assumed that the failure to mention a sentencing principle means that it has been overlooked. In particular, magistrates are working under pressures which mean that they are simply unable to give the kind of detailed reasons which might be expected of a court delivering a reserved judgment, and sentencing remarks delivered in such circumstances should not be subjected to the same degree of critical analysis as the words in a considered reserved judgment. An appellate court is entitled to assume that a magistrate has

considered all matters which are necessarily implicit in any conclusions which she has reached.

[28] As counsel for the respondent pointed out, her Honour is an experienced youth justice magistrate, well aware of the applicable principles and of the available sentencing options. The question then is whether, having considered it, her Honour was in error in not imposing a further community work order in the circumstances, given the nature of the offending, the appellant's persistence in offending and re-offending in breach of good behaviour bonds, the fact that he was only 14 years old, and the principle that detention is an option of last resort.

[29] The appellant relied on a number of authorities including *P (a minor) v Hill*[1] in which 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: see *R v Williams* (1992) 109 FLR at 7. 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 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 area 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."

1 (1992) 110 FLR 42

[30] In *M v Waldron*[2] Kearney J said:

> "It is clear, I think, that only in a bad case could a court properly conclude that a 15 year old juvenile has 'come to the end of the road' as far as non-custodial penalties are concerned."

[31] Counsel for the respondent contended that the sentence of seven months detention was within the range of sentencing options and demonstrated no error of principle. I agree.

[32] In *WO (a child) v Western Australia* (2005)[3] the court said in a joint judgment (at 354 [7]):

> "Every Court sentencing an offender is required to give reasons for that sentence. The reasons need not be elaborate, but, must in every case, be sufficient to enable the offender, and the public, to understand why that sentencing disposition was chosen and to preserve to the offender the right of appeal. In a context where a sentence of imprisonment is a last resort (as it is both for children and for adults, although the principle has greater weight in respect of the former), those sentencing remarks will always be deficient if it is not possible to discern from them why a sentence of detention or imprisonment, as opposed to some other disposition, was selected."

[33] In this case, it is possible to discern from her Honour's sentencing remarks why she imposed a sentence of detention.

(a) In the passage quoted in paragraph [25] above, her Honour emphasised the repeat nature of the offending and the need not to send the wrong message to the appellant.

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2 (1988) 56 NTR 1

3 (2005) 153 A Crim R 352 (EA CA).

(b) Her Honour emphasised the "bold faced" nature of the fresh offending. (They parked the stolen car at Casuarina, went shopping and then drove it away again.)

(c) Her Honour referred to the dangerous and destructive way the stolen car had been driven in the fresh offending.

(d) Her Honour placed emphasis on the fact that the more recent offences were committed in breach of previously imposed good behaviour bonds – in one case four days after receiving the good behaviour bond.

(e) Her Honour rejected a submission that the appellant just "went along" with others and gave examples of his taking the initiative in relation to a number of offences.

(f) Her Honour referred to the fact that a number of the offences involved planning and gave examples.

(g) Her Honour noted that the previous re-sentencing to a further good behaviour bond had presumably been largely reliant on the fact that the appellant had attended a victim offender conference where he had apologised and said he would try not to commit any more offences in future. Her Honour noted that the victim (and the appellant's mother) had both said they wanted him to have a better life, a good education, a job in the future and a family without trouble with the law. In that context she said:

> "Clearly that was what the court was aiming at when the further good behaviour bond was given to JA in the hope that JA, having met with a victim of your crimes, that you would understand the sort of impact that what you do has on other people. But that turned out not to be the case. You haven't learned anything at all, it seems to me from meeting the victim of your crimes, having victim impact statements read to you in the past, being placed under supervision."

(h) Unsurprisingly, in those circumstances, her Honour assessed the appellant's prospects of rehabilitation as poor. She said:

> "Frankly I have some difficulty at this point in time in saying that JA has any prospects of rehabilitation at all, however he is still only 14."

(i) Her Honour characterised the offending as "appalling".

(j) Her Honour placed weight on community protection, saying:

> "Nothing seems to have changed your view that you can go out, take other people's vehicles and use them as you will. Until you make a personal decision to stop doing this sort of thing, people in the community are going to continue to suffer from your offending."

(k) Her Honour referred to the fact that the appellant had good and supportive parents but said that he was not listening to them, finally referred to "the totality of the offending and JA's total disregard for other people's property and his disregard of court orders, before proceeding to sentence him.

[34] It seems to me that these matters, in combination, justified the imposition of a sentence of detention, despite the appellant's young age. The appeal on this ground is dismissed.

Ground 2

[35] The appellant contended that the learned magistrate erred in her characterisation of the seriousness of the fresh offending by placing significant weight on the manner in which the car which was unlawfully used on 14 October had been driven by the co-offender when the appellant had not been charged with dangerous driving and, in any event was not the driver. Counsel for the appellant pointed out that the sentence of three months detention for the final unlawful use of a motor vehicle charge was the longest of all the sentences imposed for the charges of unlawful use of a motor vehicle and submitted that this showed that the sentence imposed was unduly influenced by the nature of the driving. It was submitted that her Honour described the circumstances of the offence as "extremely alarming" and "an appalling set of offences".

[36] In *The Queen v De Simoni*[4] the High Court stated the relevant principle in the following terms (389):

> "At first sight it may seem unlikely that the framers of the Code intended that an offender should be sentenced on the fictitious basis that no circumstance of aggravation existed when it is found by the trial judge that such a circumstance did exist, particularly when such a finding is based upon an unchallenged statement of facts made by the prosecutor after the offender has pleaded guilty. However, the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted. Section 582 reflects this principle. The combined effect of the two principles, so far as it is relevant for present purposes, is that a judge, in imposing sentence, is entitled to consider all the conduct of

4 [1981] HCA 31; (1981) 147 CLR 383

the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence."

[37] The application of that principle was considered by the Court of Criminal Appeal in *R v Syrch.*[5] The Court applied the approach set out in *R v Austin:*[6]

> "It is true that in imposing sentence for a crime, a judge should take into account not only the conduct which actually constitutes the crime, but also such of the surrounding circumstances as are directly related to that crime and are properly to be regarded as circumstances of aggravation or circumstances of mitigation.
>
> Just what surrounding circumstances are properly to be taken into account in a particular case is a matter of degree. The courts have to be particularly cautious when the circumstances relied upon themselves may constitute crimes. Often the circumstances amount to crimes of a similar character to that charged and can more readily be taken into account as circumstances of aggravation. Likewise where the criminality of the aggravating circumstances is clearly subsidiary to as well as related to the criminality involved in the conduct constituting the crime charged. Special care, however, is required when the circumstances relied upon as circumstances of aggravation themselves constitute crimes or may constitute crimes of a different character or crimes against different victims.
>
> If a person is to be punished for conduct which is said to be criminal, generally speaking justice requires that he be charged with it and have the opportunity of defending himself. If he is not charged with it, generally speaking it should not be relied upon as a circumstance of aggravation of some other crime. This, of course, is not a hard and fast rule; everything must depend upon the particular circumstances and, as I have said, it is very much a matter of degree."

[38] The Court also referred to the approach taken by the Queensland Court of Appeal in *R v D*[7] in which, among other things, the court held that although

5 (2006) 165 A Crim R 129

6 (1985) 121 LSJS 181 at 183

7 [1995] QCA 329; [1996] 1 Qd R 363

an act or circumstance which might itself technically constitute a separate offence is not, for that reason, necessarily excluded from consideration in sentencing, an act or circumstance may not be taken into account if the circumstances would then establish a separate offence which consisted of, or included, conduct which did not form part of the offence of which the person to be sentenced has been convicted. However the CCA did not adopt that approach. Martin (BR) CJ said (at [20]):

> "On that approach, the difficult question to be determined is whether the conduct formed "part of the offence". In addition, this approach has the potential to undermine the flexibility which is inherent in the observations of King CJ in *Austin* to which I have referred."

[39] I do not think this ground of appeal has been made out. First, it seems to me that on a fair reading of the sentencing magistrate's remarks, she did not place great emphasis on the method of driving. She did say it was "extremely alarming", which it clearly would have been. However her reference to "an appalling set of offences" (emphasis added) was a reference to the whole of the offending behaviour – and not specifically to the manner of driving.

[40] Second, it seems to me that the method of driving by the co-offender was a relevant matter for the sentencing magistrate to take into account. It was, as her Honour pointed out, initially instigated by the appellant saying to the co-offender, "Put it in reverse." Even if one were to adopt the somewhat more restricted approach in *R v D*, it seems to me that the manner of driving is

conduct which forms "part of the offence" of unlawful use of a motor vehicle.

[41] Counsel for the appellant pointed out that the appellant's counsel at the sentencing hearing submitted that JA did not expect it would turn out to be such a wild ride and said he was quite scared of that kind of driving. It was contended that the learned magistrate did not put counsel on notice that she rejected that submission and that that was itself an error.[8] However, there is no indication from her Honour's sentencing remarks that she did not accept that submission. What she rejected was the contention that the appellant simply "went along" easily led by other people, and one example she gave was that it was the appellant's idea to put the car in reverse to escape from police.

Ground 3

[42] The appellant contended that her Honour was in error in the lack of weight given to the appellant's prospects of rehabilitation and should have formed a "more liberal view" of his prospects given:

(a) the ongoing support of his parents and the pro-social influence of his family;

(b) his success in complying with the terms of his community work order over a two month period; and

8 M v Waldron (1988) 56 NTR 1 at p 5; Mununguri v R (1994) 4 NTLR 63 at p 74

(c) the report that he had complied with his reporting requirements and made "good engagement" during interviews.

[43] Counsel for the appellant submitted that while the ongoing nature of his offending was a matter of legitimate concern, it should be seen as indicative of immaturity and not of settled criminal habits given that he had not been in trouble before May 2013 and had taken up with anti-social peers in Darwin after growing up on a remote outstation.

[44] In my view, her Honour was perfectly entitled to take the view she did about the appellant's prospects of rehabilitation given his continual re-offending in breach of two good behaviour bonds imposed to give him a chance to keep out of trouble. Her Honour specifically mentioned that the appellant had good and supportive parents – but that he would not listen to them. In any event her Honour's negative characterisation of his prospects was not reflected in the sentencing disposition. Because he was only 14 her Honour did not record convictions and partially suspended the sentences she imposed in order to give him yet another chance and to encourage rehabilitation.

[45] This ground of appeal has not been made out.

Ground 4

[46] The appellant contended that the learned magistrate failed to consider the principle of totality in imposing a significant term of detention and community work. I do not think this ground of appeal is made out.

[47] Her Honour specifically referred to “the totality of the offending” immediately before sentencing him on each of the offences and clearly had regard to that principle in making the various sentences partly concurrent.

[48] Her Honour did not specifically mention the community work orders until after she had sentenced the appellant, but she was not resentencing him for the offences (breach of bail) for which he had received those community work orders. There is no reason to suppose that she was not aware of them and did not take their existence into account when determining the appropriate length of the sentences for the offences she was dealing with.

Ground 5

[49] It was contended that the learned sentencing magistrate was unduly influenced by the appellant’s school commencement in determining the appellant’s release date from detention, to the extent that the unsuspended part of the sentence effectively amounted to preventive detention. I do not agree. This submission assumes that the portion of the sentence to be actually served was longer than was warranted by the objective seriousness of the offending. I do not agree that that assumption is correct. The fact that it would be desirable for the appellant to be able to attend school at the beginning of the school year was a relevant consideration for her Honour to take into account in fixing the date of his release.

Ground 6

[50] It was submitted that the learned magistrate failed to take into account the appellant's guilty pleas and co-operation with police when imposing these sentences. Counsel for the appellant pointed out that her Honour had not mentioned these matters in her sentencing remarks. He contended that a reduction in the order of 25% was warranted, so that, had the learned magistrate taken these matters into account, her Honour must have taken as a starting point an effective total sentence of nine months which would have been manifestly excessive.

[51] It is highly desirable that sentencers specifically refer to the fact that a plea has been entered at an early opportunity and to co-operation with authorities and specify that these matters are being taken into account in sentencing. However, it cannot be assumed that the failure to do so means that these matters were not taken into account. They formed part of the Crown facts that were read out in Court so her Honour was clearly aware of them.

[52] As to the submission that it can be inferred from the length of the sentence and the size of the reduction that would have been warranted that her Honour neglected to apply such a reduction, I do not agree that a reduction of around 25% would have been warranted. In *JKL v The Queen*[9] the Court of Criminal Appeal held that although the value of the reduction to be given for any plea of guilty is a matter of discretion dependent on the

9 [2011] NTCCA 7

circumstances of the particular case, a reduction of 25 per cent will normally be given in circumstances where there has been an early guilty plea which is indicative of true remorse and resipiscence.[10] In this case, there is no indication at all that the appellant was genuinely remorseful and I would have thought that a reduction of around 20% would have been appropriate in relation to the fresh offences. In the case of the offences for which the appellant was being resentenced, the utilitarian value of his early pleas might be thought to have been somewhat reduced by the fact that he had to be resentenced twice. However, accepting that a reduction of around 20% would have been appropriate across the board, that would lead to a starting point of a little over eight months. Given the number and nature of the offences and the circumstances of the offending, I do not think that would have been an unreasonable starting point. Hence I do not think one can infer that her Honour could not have adopted that as the starting point and so must have neglected to take into account the early plea and co-operation with police.

[53] The appeals are dismissed.

10 per Martin (BR) CJ at para [28]