Jinjair v Verity [2014] NTSC 35

PARTIES:	PAUL JINJAIR v BRETT VERITY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	21328434
DELIVERED:	8 August 2014
HEARING DATES:	13 June 2014
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Court of Summary Jurisdiction (Darwin)

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – Offence of receiving stolen property – Alcohol – Manifestly excessive sentence – Submission requesting "short, sharp term of imprisonment" – Sentence of imprisonment manifestly excessive – Appeal allowed – *Criminal Code* (NT), s 229(1), (4).

Criminal Code (NT), s 229(1), (4); *Justices Act* (NT), s 177(2)(f).

Cranssen v The King (1936) 55 CLR 509; *Gassy v R* (2008) 236 CLR 29; *Latu v McPherson* [2014] NTSC 14; *Pittman v The Queen* [2013] NTCCA 16; *R v Morse* (1979) 23 SASR 98 at 99; *Raggett, Douglas and Miller v R* (1990) 50 A Crim R 41, *Salmon v Chute* (1994) 94 NTR 1, applied.

Munkara v St Leger Moss JA 1 of 2014, (no. 21356827), 17 April 2014, Hiley J, unreported, referred to.

REPRESENTATION:

Counsel:

Appellant:	T Moses
Respondent:	S Ozolins

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	BLO 1407
Number of pages:	10

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

Jinjair v Verity [2014] NTSC 35
No. 21328434

BETWEEN:

PAUL JINJAIR
Appellant

AND:

BRETT VERITY
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 8 August 2014)

Introduction

[1] This is an appeal against the length of a sentence imposed by a Magistrate sitting in the Court of Summary Jurisdiction on 21 January 2014. The appellant was convicted and sentenced to six weeks imprisonment for one count of receiving stolen property, namely, alcohol valued at $70, contrary to s 229 of the *Criminal Code*. During the same proceedings, the appellant pleaded guilty to and was convicted and fined $288 for the offence of giving a false name to police. The fine is not the subject of any appeal.

[2] The first ground of appeal is that the sentence of six weeks imprisonment was manifestly excessive. The second ground is that the learned Magistrate erred by placing too much weight on the appellant's prior convictions.

Proceedings Before the Court of Summary Jurisdiction

(i) Background

[3] The appellant was originally charged with four counts that did not include the receiving charge, the subject of the appeal, but did include the charge of providing a false name to police. The charges were all alleged to have been committed on 22 July 2013. The history of the progress of the original charges was complicated.

[4] I will not set out the full history here, save that the appellant indicated pleas of not guilty to all charges on or about 9 October 2013 in Wadeye. As the events leading to the charges arose in Darwin, the case was adjourned to the Darwin Court of Summary Jurisdiction for contest mention on 22 September 2013.

[5] On 9 November 2013 representations were made on the appellant's behalf to the prosecution, offering to resolve the charges by way of plea of guilty to the false name charge, a plea of guilty to a new, substituted count five (the receiving charge) and the withdrawal of the remainder of the counts.

[6] There was no response to those representations. The representations were submitted again to the prosecution on 15 January 2014. They were accepted

on 16 January 2014 which enabled the hearing date for the contested charges of 28 January 2014 to be vacated on 21 January 2014.

[7] On 21 January 2014 the receiving stolen alcohol charge (value $70) was laid on information, the plea of guilty entered and the appellant sentenced. Between the representations being made and various court dates in early January 2014, the appellant was arrested for further alleged offending, refused bail and remanded in custody. On 28 March 2014 he was found not guilty of the further alleged offending and discharged.

(ii) The Facts

[8] The facts in support of the receiving charge were that on 1 July 2013 the appellant and another person were walking in Mitchell Street. The appellant met two other persons who offered him alcohol. The appellant accepted the alcohol and asked where it came from. The other person replied, “We stole it”. The appellant continued to drink the alcohol, the value of which was $70. The appellant was arrested at 4:10 on the same morning and held in custody due to his level of intoxication. At the time of the arrest he stated his name was Luke Jinjair. He made full admissions to receiving the stolen alcohol in a formal record of interview with police.

(iii) Previous Convictions

[9] The 'Information for Courts'[1] revealed the appellant had significant previous convictions for aggravated assault (2011, 2009 (x2), 2005, 1998, 1993 (x2)). In relation to dishonesty offences the most recent convictions were in 2001, for unlawful use of a motor vehicle and stealing. He received a two month prison sentence. He also had two previous convictions for unlawful use of a motor vehicle in 1991. Further, there were convictions for traffic matters, for offences related to alcohol and several breaches of court orders.

(iv) Submissions

[10] Counsel for the appellant outlined his personal circumstances: that he was 40 years of age, from Wadeye and that he had been "long-grassing" in Darwin. This was said to be the context of the offending. Just prior to committing the receiving offence, he had been released from protective custody, was walking with a friend, was offered a drink by another person, refused at first, then accepted and learnt it was stolen alcohol. Counsel set out the history of the matter, submitting that in relation to the later unrelated contested charge he was not a good prospect for bail "anytime soon". Counsel told the court "so that certainly limits the dispositions that may be available to you in this matter. I would be asking that you consider a short, sharp term of imprisonment of this matter". The prosecutor confirmed the

[1] Exhibit P 2, File 21328434, Court of Summary Jurisdiction.

earlier offer to resolve the matter and acknowledged the representation made by the appellant was not answered at an earlier time. The prosecutor advised the court that they had come to the view that the charges could then be settled consistently with the original offer made.

(v) Sentencing Remarks

[11] The learned Magistrate took into account the earlier offer to plead and noted he would allow the maximum discount for the plea. He said of the previous dishonesty offences that there was "not a lot and what there is, is quite old – 12 years or so". His Honour also observed the appellant did not come before the court as a man of good character in a general sense. He considered the offending to be at the lower end of seriousness and took into account the discount for the plea in arriving at a six week term of imprisonment.

Ground One: The Sentence is Manifestly Excessive

[12] The principles governing the question of a ground such as this are well known. The sentence is presumed to be correct.[2] An appellate court interferes only if it is shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence.[3] The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so

[2] *Raggett, Douglas and Miller v R* (1990) 50 A Crim R 41 at 42; *Salmon v Chute* (1994) 94 NTR 1 at 24.
[3] *Cranssen v The King* (1936) 55 CLR 509.

excessive as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. An appellant "must show that the sentence was clearly and obviously and not just arguably excessive".[4]

[13] The maximum penalty for an offence of receiving against s 229(1), (4) of the *Criminal Code* is seven years imprisonment. The maximum penalty provides the overall sentencing context. The particular criminal conduct must be viewed in that context to determine where in the scale of seriousness the offending should be placed. This assessment also includes a consideration of the personal circumstances of the offender and the sentences customarily imposed for offending of this kind.[5]

[14] Given the wide variety of conceivable offending of this generic type, it is unsurprising there is no established tariff. A number of relevant general factors, summarised above, concerning the overall objective seriousness of the offending were considered by the learned Magistrate. A sentence of six weeks imprisonment does, however, strike as harsh given the value of the property received; the circumstances under which the appellant received the alcohol; the extent of the appellant's knowledge of the theft and the purpose for receiving the stolen property. The value of the goods was $70. The appellant had just be released from protective custody and was offered alcohol to drink in the street that he was told was stolen; he continued to

[4] *Pittman v The Queen* [2013] NTCCA 16 at [25].
[5] *R v Morse* (1979) 23 SASR 98 at 99; *Latu v McPherson* [2014] NTSC 14.

drink the alcohol. This was obviously not a case involving any planning, prior knowledge of the theft or intention to dispose of the property for financial gain. Obvious inferences may be drawn in respect of addiction. The plea of guilty and the earlier proposals to resolve the case had significant value. The appellant was not of good character, however, his previous matters of dishonesty, given their nature and the passing of time were not of such significance to elevate the ultimate sentence passed in any significant way. The learned Magistrate did not in any event treat them as a significant factor.

[15] A factor that appears to have skewed the sentence to a level that in my opinion is disproportionate to the offending is a response to the submission by the appellant's counsel that "a short, sharp term of imprisonment;" (without further elaboration by counsel), was an appropriate disposition. This submission was made in the context of the appellant being on remand.

[16] On appeal it was argued that the court below was being invited to conclude the appellant would not have the capacity to meet a fine, or be suitable for a community disposition. It is fair to say those factors would have been obvious at the time of sentencing in the Court of Summary Jurisdiction. Counsel for the appellant also submitted the court was being invited to conclude that given the time served on remand, any victim levies that would be required to be imposed for any community disposition would be an unjust additional penalty. This further elaboration of counsel's submission in my

opinion cannot readily be inferred from the basic submission made to the Court of Summary Jurisdiction.

[17] Clearly the learned sentencing Magistrate was constrained by the appellant's circumstances at that time, however, the magnitude of the sentence imposed is significantly out of proportion to the offending and the circumstances of the appellant. A similar set of circumstances arose in *Munkara v St Leger Moss*,[6] when Hiley J dealt with an appeal against a total sentence of six weeks imprisonment, imposed for two counts of stealing rum. The total value of the property was $135. There the appellant had no previous convictions for dishonesty. He had limited convictions for other matters,[7] although not as significant as this appellant's previous convictions. Nevertheless the offending itself in *Munkara v St Leger Moss* was more objectively serious than in this case. Justice Hiley found the six week sentence to be manifestly excessive and re-sentenced the appellant to four days imprisonment, representing time in custody already served. Had the appellant not spent time in custody, his Honour was of the view that a non-custodial sentence would have been appropriate.

[18] In my opinion the submission to the Court of Summary Jurisdiction, that effectively acknowledged the reality of the appellant's custodial status did not consequently justify a sentence of the magnitude imposed. The length of

[6] JA 1 of 2014, (no. 21356827), 17 April 2014, Hiley J, unreported.
[7] *Munkara v St Leger Moss*, JA 1 of 2014, (no. 21356827), 17 April 2014, transcript at 4.

the sentence indicates the discretion miscarried. In all of the circumstances the sentence was manifestly excessive.

Ground two: Improper Weight Given to Prior Convictions

[19] In my opinion this ground of appeal is not made out. The learned Magistrate appropriately dealt with the appellant as a person who was not of good character; little regard was had for previous convictions that were for somewhat older offences of dishonesty. On a fair reading of the transcript, prior convictions were not a factor of significance leading to the final term imposed.

The Question of Miscarriage of Justice

[20] Counsel for the respondent submitted that even if error were found to have occurred, the appeal should be dismissed as it was contended that no substantial miscarriage of justice had occurred. It is relevant here that the appellant had served the six week term of imprisonment, well before the appeal was heard. Section 177(2)(f) of the *Justices Act* provides that notwithstanding the court "is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred".

[21] In relation to the operation of the proviso, it is the "nature of error"[8] that must be considered. Although I have given significant consideration to the respondent's argument, I have come to the conclusion that this is not an appropriate occasion to resort to the proviso. The imposition of a sentence that is manifestly excessive by its nature represents a substantial miscarriage of justice. In my opinion the appellant is entitled to have a sentence that is manifestly excessive corrected.

[22] Even though the appellant has served the sentence, should there need to be any future assessment of his prior offending, a prison sentence of six weeks implies conduct of a significantly more serious type than is represented by the actual offending. It may be noted the appellant in *Munkara v St Leger Moss* (summarised above) was re-sentenced to the time he had already served, although unlike here, he had not served the balance of the full term.

Orders

[23] The appeal is allowed. The sentence of six weeks imprisonment imposed by the Court of Summary Jurisdiction on 21 January 2014 is quashed. The appellant is resentenced to a term of one week imprisonment commencing on 7 January 2014.

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[8] *Gassy v R* (2008) 236 CLR 29; Gummow and Hayne JJ at [34].