Mitchell v Gibson [2014] NTSC 59

PARTIES:	MITCHELL, Leslie
	v
	GIBSON, Stephen
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 41 of 2014 (21410254)
DELIVERED:	5 December 2014
HEARING DATES:	14 November 2014
JUDGMENT OF:	KELLY J
APPEAL FROM:	P MALEY SM

REPRESENTATION:

Counsel:

Appellant:	J Brock
Respondent:	G McMaster

Solicitors:

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

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

Mitchell v Gibson [2014] NTSC 59
No. JA 41 of 2014 (21410254)

BETWEEN:

LESLIE MITCHELL
Appellant

AND:

STEPHEN GIBSON
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT
(Delivered 5 December 2014)

Background

[1] This is an appeal against a sentence imposed by the Court of Summary Jurisdiction on 17 April 2014 following the appellant's guilty plea to six charges – all committed in breach of suspended sentences the appellant had received for previous offences.

[2] In late 2011 the appellant was convicted of two unlawful entries. Initially he was sentenced to community work orders, but he did not comply with those orders. His non-compliance was explained by his unstable living arrangements and medical issues and, on re-sentencing, the Court of Summary Jurisdiction imposed a three month term of imprisonment, fully

suspended, with an operational period of 18 months. The operational period for that offence was due to expire in just over seven months when the appellant committed the offences that are the subject of this appeal.

[3] In July 2012 the appellant was convicted of unlawful use of a motor vehicle for which he was sentenced to one month imprisonment fully suspended. The operational period for that offence was due to expire in one week when the appellant committed the subject offences.

[4] On 25 February 2014 the appellant entered a property in Anula and stole a significant amount of property (valued at $18,170). He caused approximately $100 of damage gaining access.

[5] On 26 February 2014 the appellant entered a property in Jingili and stole property valued at $910. He caused approximately $500 of damage gaining entry to that property.

[6] The appellant was arrested on 27 February 2014 and remanded in custody. All of the stolen property, except for a play station valued at approximately $680, was recovered on that day.

[7] The offences breached the two suspended sentences he had received for the offences committed in 2011 and 2012. It should be noted that the offences committed in February 2014 were precisely the same kind of offences as the one committed in 2011.

[8] On 17 April 2014 the appellant pleaded guilty in the Court of Summary Jurisdiction to six charges (unlawful entry, stealing and property damage) relating to those two unlawful entries. He was sentenced to imprisonment for 13 months, suspended after eight months for the six property offences and the two breaches of suspended sentence. No additional conditions were attached to the suspended sentence.

[9] At the time of entering the pleas on 17 April 2014, the appellant had spent 50 days on remand.

Grounds of Appeal

[10] The appellant filed a notice of appeal dated 14 May 2014. He then sought and was granted leave to file amended grounds of appeal as follows:

(1) Ground 1: The learned magistrate did not apply the sentencing principles relating to youthful offenders.

(2) Ground 2: The sentence is manifestly excessive.

Principles on appeal against sentence

[11] It is not enough that the court of appeal would have imposed a less or different sentence or considers the sentence overly severe. An appellate 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 magistrate was in error in acting on a wrong

principle or in misunderstanding or in wrongly assessing some salient feature of the evidence.[1]

[12] Unless there is demonstrable error, then the presumption is that there is no error.[2] It is not to be assumed that the failure to mention a sentencing principle means that it has been overlooked.[3] 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.[4] An appellate court is entitled to assume that a magistrate has considered all matters which are necessarily implicit in any conclusions which he has reached.[5]

Appeal Ground 1: The learned magistrate did not apply the sentencing principles relating to youthful offenders

[13] It was contended by the appellant (*inter alia*) that the learned sentencing magistrate had made an error of principle in failing to turn his mind to a relevant question, namely whether supervision should be ordered as a condition of any partly suspended sentence. Counsel for the appellant

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1 *Burrenjuck v Garner* [1999] NTSC 66 at [7]

2 *Tait v Bartley* (1979) 46 FLR 386; *Salmon v Chute & Anor* (1994) 94 NTR 1 at 24-25

3 *Van Toorenburg v Westphal* at [23].

4 *Jambajimba v Dredge* (1985) 33 NTR 19, at 22 per Muirhead ACJ.

5 *Bartusevics v Fisher* (1973) 8 SASR 601.

pointed out that the appellant is a youthful adult (only 20 at the time of sentencing) who would clearly have benefitted from supervision and access to rehabilitation services. Moreover, he had been assessed as suitable for the FORWAARD residential rehabilitation programme and a report to that effect was tendered.

[14] The learned sentencing magistrate made no reference in his sentencing remarks to having considered whether it would be appropriate to order supervision as a condition of a suspended sentence. No reference was made in the sentencing remarks to the report from FORWAARD despite the fact that there was evidence before his Honour to suggest that substance abuse was a factor in the appellant's offending.

[15] In those circumstances, given the well recognised principles applicable to the sentencing of young offenders,[6] one would have expected some form of supervision to have been included as a condition of the suspended sentence in order to facilitate the appellant's rehabilitation, yet his Honour made no mention of having considered it, and did not order a supervision report which would have been a pre-requisite to such an order.

[16] Counsel for the respondent pointed out that the appellant had had the benefit of some supervision in the past in the form of a community work order, but had failed to comply with the conditions of that order. She suggested that perhaps, in those circumstances, his Honour did consider supervision, but

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[6] See *R v Mills* (1998) 4 VR 235

rejected it in favour of a "short sharp sentence". However, as counsel properly conceded, if that were the case, one would have expected some explanation of that in the sentencing remarks and also a differently structured sentence – either a non-parole period instead of a partially suspended sentence, or a straight eight month term (rather than a longer term suspended after eight months with no additional conditions). She also conceded (again, properly in my view) that, given these matters, the failure to order a supervision report appeared to be an oversight on the learned magistrate's part.

[17] Although, for the reasons set out above, an appeal court should be slow to infer from the absence of comment in a sentence imposed by a busy magistrate, that relevant matters have not been considered, I consider that the above matters lead inevitably to the conclusion that in this case the sentencing magistrate did fail to turn his mind to the question of whether supervision (and residential rehabilitation) should form a condition of the partly suspended sentence. I also consider that, in the circumstances, this would have been a highly relevant matter for his Honour to have considered, and thus, that the failure to consider it amounted to an error of principle.

[18] The appeal on this ground is allowed.

Appeal Ground 2: The sentence is manifestly excessive

[19] In support of this ground of appeal, the appellant relied on the principles applicable to sentencing youthful offenders as summarised in *R v Mills*:[7]

> (i) Youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises.
>
> (ii) In the case of a youth offender rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualised treatment focusing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender.)
>
> (iii) 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 as justifying adult imprisonment may be quite high in the case of a youthful offender, and, where the offender has not previously been incarcerated, a shorter period of imprisonment may be justified.[8]

[20] Counsel for the appellant submitted that there were a number of features of this case that supported a realistic submission that rehabilitation of the appellant was achievable:

(1) The appellant had entered a plea of guilty and accepted responsibility.

(2) The appellant was aware that his substance abuse was a significant risk factor. That insight had been acted upon through seeking assessments

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7 Supra

8 at 241

for rehabilitation. A favourable assessment from FORWAARD had been provided to the court.

(3) The appellant has made efforts to improve his employability which showed an awareness of steps that could be taken to minimise risk factors in his life. (He was in the process of completing a certificate in business).

(4) It was submitted that there had been a break in offending behaviour, the last significant offending having occurred in July 2012, as well as "a significant period of compliance" with the operational periods of the two existing suspended sentences.

[21] Counsel for the appellant pointed out that the appellant had entered an early plea and that, allowing for a notional discount of 20%, that means the starting point for this sentence was just over 15.5 months. He submitted that such a term was excessive in light of the objective seriousness of the offence and the subjective circumstances of the offender referred to in [20] above.

[22] Apart from the fact that his Honour overlooked the option of including supervision as a condition of the suspended sentence, I do not agree that the sentencing magistrate failed to take into account the principles applicable to the sentencing of youthful offenders. Nor do I agree that the sentence was manifestly excessive.

[23] Counsel for the respondent pointed out that his Honour had to take into account the maximum terms of imprisonment, as well as all of the other relevant factors specific to the offender and the offences. That included the prevalence of these kinds of offences (making general deterrence difficult to discount completely), the appellant's previous offending, the fact that this offending was in breach of two previous suspended sentences, and the lack of suitable available alternative dispositions (such as community work orders) given the appellant's demonstrated unwillingness (or inability) to comply with such orders.

[24] I agree. The appellant had been dealt with leniently in the past and had failed to learn any lesson as a result. In addition to the two fully suspended sentences he breached by the commission of the subject offences, in 2010 the appellant was dealt with by way of bonds for assault and property offences committed in 2009 and early 2010. To foster the rehabilitation of the appellant, the court did not record a conviction for the assault. He faced the Youth Justice Court again in November 2010 for another property offence and for failing to comply with a Youth Justice Court order. He was sentenced to complete a Community Work Order ('CWO'), but no action was taken on the breach of his earlier bond. Upon facing the court again in September 2011 for breaching the CWO, the appellant was shown further leniency: he was simply fined $200. He had also breached bail for which he was fined $100.

[25] By the time of his fourth court appearance in 24 May 2012 the appellant was an adult. He pleaded guilty to nine property offences committed between 6 September 2011 and 9 February 2012. Again the court extended leniency in the form of CWOs and fines.

[26] In 2013, he was dealt with for committing the offences in 2012 referred to above. Once again he was not given any actual term of imprisonment.

[27] In summary, the appellant has repeatedly breached CWOs, good behaviour bonds, bail conditions and suspended sentences over a period of three years or so. The sentencing magistrate was entitled to take the view that enough is enough. The sentence imposed by his Honour reflected the need for personal accountability, general and personal deterrence, and in all the circumstances was not manifestly excessive.

[28] This ground of appeal is dismissed.

[29] However, the appeal having been allowed on Ground 1, the sentence is set aside. I will hear the parties as to the appropriate alternative sentence.