ND v Heath [2016] NTSC 58

PARTIES:	ND v HEATH, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 28 of 2016 (21608885)
DELIVERED:	18 November 2016
HEARING DATES:	18 November 2016
JUDGMENT OF:	RILEY J
APPEAL FROM:	Local Court

REPRESENTATION:

Counsel:

Appellant:	T Collins
Respondent:	C Roberts

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Ril
Number of pages:	6

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

ND v Heath [2016] NTSC 58
No. LCA 28 of 2016 (21608885)

BETWEEN:

ND
Appellant

AND:

ANDREW HEATH
Respondent

CORAM: RILEY J

Ex Tempore
REASONS FOR JUDGMENT

(Delivered 18 November 2016)

[1] The appellant is aged 14 years. He has a regrettable criminal history for a person of his age. His earliest recorded offending was in 2014 and he has been before the courts on a regular basis since. At the time of his present offending he had 49 entries against his name. He had been dealt with in different ways by the Youth Justice Court including: by discharge without proceeding to conviction; good behaviour bonds without proceeding to conviction; conviction without penalty; and suspended sentences of detention. The record of offences included: eight of damaging property; six of stealing; five of unlawful entry; two of aggravated assault; one of unlawful possession of property; one of providing a false name; four of

trespass; nine of failure to comply with Youth Court orders; and 12 of breaching bail.

[2] On 11 March 2016 the appellant was dealt with in the Youth Justice Court for the offence of aggravated entry to a building, the car park of the Yeperenye Shopping Centre, and committing the offence of stealing. In relation to that offending he was convicted and sentenced to detention for a period of six weeks with the sentence wholly suspended on terms and conditions. In addition to the Court proceedings he was served with a trespass notice in relation to the Shopping Centre which notice, it seems, was defective.

[3] On 28 July 2016 the appellant was arrested for trespassing and, on 29 July 2016, was granted bail on various conditions including that he should not enter the Alice Springs CBD between the hours of 7 pm and 7 am. At about 9 pm that night he was again observed by police inside the Yeperenye Shopping Centre in breach of the terms of his bail. He was arrested after a short struggle and with the assistance of two security officers.

[4] The appellant was charged with breaching his bail and with trespass. The trespass charge was subsequently withdrawn as a consequence of the defect in the trespass notice. He pleaded guilty to the charge of breaching bail and was convicted and ordered to be detained for two days, being the period he had already served. In addition, the offending constituted a breach of the suspended sentence and he was resentenced by his Honour imposing the

same penalty as previously applied save that a condition was added that the appellant not enter the Yeperenye Shopping Centre or its car park for the term of the order.

Manifest Excess

[5] The first two grounds of appeal were that the learned Judge erred by imposing a sentence which was manifestly excessive and that he did not give sufficient regard to youth justice principles.

[6] It was noted that the appellant was 14 years old at the time of the offending and he suffered personal difficulties which were identified in a report by the Family Responsibility Centre. In summary form it was said he suffered from complex development trauma secondary to exposure to domestic violence, abuse and neglect. He also had learning difficulties and attachment insecurity. No responsible adult was identified who could take responsibility for him.

[7] It was submitted that his Honour failed to give adequate consideration to the requirements of the *Youth Justice Act* that detention should be the last resort in terms of sentencing dispositions and further that the imposition of two days detention was not proportionate with the gravamen of the conduct that occurred. In addition, it was submitted that the principal charge of trespass did not proceed and was ultimately withdrawn and that his Honour "erred in failing to see the clear disproportion that occurred in imposing a sentence of

detention in relation to a breach where the subject offence calls for a fine as the maximum possible outcome" and was, in any event, later withdrawn.

[8] This submission fails to recognise that the offence of a breach of bail is a separate matter from the offence in relation to which bail was granted. The offence of breaching bail has different elements and addresses different issues. The offence is concerned with the failure of a person to honour the terms and/or conditions of a grant of bail. Whilst the nature of the original offence and the nature of the term or condition which was breached will be matters relevant to consider in determining an appropriate response, it does not follow that a breach of bail for a matter which does not proceed is necessarily less serious than if the matter does proceed. In the present case, at the time of the breach, it was not known that the original matter would not be pursued. The reason it was not pursued was the subsequent discovery of a flaw in the document. The appellant's culpability in breaching the terms of his bail was not reduced because of the subsequently discovered flaw.

[9] Further, the fact that the original matter had a lesser maximum penalty than that provided for the offence of breach of bail does not mean that a penalty proportionate to the culpability attaching to the breach of bail should not be applied.

[10] The real issue is whether the imposition of detention for two days was manifestly excessive in all the circumstances. The principles applicable to such a ground of appeal are well known and well understood. It is

fundamental that the exercise of the sentencing discretion will not be disturbed unless error has been shown. The presumption is that there is no error. Interference will only occur if it be 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. The sentence itself may be so excessive as to manifest error. It is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so.

[11] In the present case, as the sentencing Judge observed, the appellant had 12 prior breaches of bail and nine breaches of Youth Court orders. He had demonstrated that he did not take bail obligations seriously and he also displayed an unwillingness or inability to comply with court orders. His Honour considered this was not a minor breach because the appellant was in breach of his curfew and was in breach of a condition which specifically excluded him, for good and identified reasons, from being within the CBD of Alice Springs. He went there in flagrant disregard of those obligations. The past offences of breaching bail had been dealt with on nine occasions by finding the offence proved without proceeding to conviction. On three occasions, being the more recent offences, convictions were recorded but no further penalty imposed.

[12] The penalty imposed by the sentencing Judge reflected the need for specific deterrence in relation to this young offender. Notwithstanding the previous opportunities provided to him he continued to exhibit a flagrant disregard of the orders of the Court by immediately doing that which he had promised he

would not do. Although other judicial officers may have taken a different approach, in my opinion, it has not been demonstrated that the sentence was manifestly excessive or in breach of the principles relevant to dealing with young offenders.

[13] The appellant also complained that the learned Judge erred in recording a conviction. In light of the matters I have discussed above including the fact that the appellant already had some nine convictions against his name for a range of offences and, therefore, this was not a first conviction, I see no error on the part of the sentencing Judge.

[14] The final complaint made by the appellant is that, in re-sentencing the appellant for the original trespass offence, his Honour added a more restrictive condition than existed in the original sentence by imposing a condition that he not enter the Yeperenye Shopping Centre or car park. It was argued that the appellant should have been forewarned and provided with the opportunity to make submissions. That did not occur. However submissions made in this Court did not demonstrate any reason why the order should not have been made and, in all the circumstances, it was obvious that such an order was appropriate. Although there may have been a failing in the Local Court, no injustice has occurred. Application of the proviso is appropriate.

[15] The appeal is dismissed.