Campbell v The Queen [2016] NTSC 61

PARTIES:	CAMPBELL Graham v THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21557432, 21405549 and 21557423
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Sentencing Act 1995 (NT) s 103
Youth Justice Act 2005 (NT) s 5(1) s 6(1)-(2), s 82, s 83, s 121, s 141, s 142

R v DV [2015] NTSC 21406182, 21414403 and 21406171 (31 August 2015) Sentencing remarks, *R v Graham Campbell* [2015] NTSC 21405549, 21557423 and 21557432 (18 December 2015) Sentencing remarks, *Shannon v Cassidy* [2012] NTSC 27; (2012) 31 NTLR 188, referred to.

REPRESENTATION:

Counsel:

Applicant:	M Aust
Crown:	D Dalrymple

Solicitors:

Applicant:	Northern Australian Aboriginal Justice Agency
Crown:	Director of Public Prosecutions

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

Campbell v The Queen [2016] NTSC 61
No. 21557432, 21405549 and 21557423

BETWEEN:

GRAHAM CAMPBELL
Applicant

AND:

THE QUEEN

CORAM: HILEY J

REASONS FOR DECISION

Delivered 23 November 2016

Introduction

[1] On 20 September 2016 an application was made on behalf of Graham Campbell (**the applicant**) under s 141 of the *Youth Justice Act 2005* (NT) (the ***Youth Justice Act***) for the Court to reconsider sentences that were imposed on 18 December 2015, when the Court was sitting in Alice Springs (the **Application**).

[2] On that occasion I ordered the entry of convictions in relation to three offences relating to a break and enter on 9 April 2015 and another two similar offences on 4 October 2015. I also restored 16 months of a

sentence that had previously been imposed and suspended on 22 August 2014, for earlier offending. I sentenced the applicant to a total of three years imprisonment backdated to 18 November 2015 and fixed a non-parole period of 18 months, also backdated to 18 November 2015.

[3] I provided reasons as to why I thought that imprisonment was appropriate and that a non-parole period should be fixed rather than giving him the benefit of a suspended sentence. In light of his poor criminal record and other matters I considered his prospects of rehabilitation poor at that time and I was concerned that he might reoffend if he was again given the benefit of a suspended sentence.

[4] I heard submissions on the Application on 30 September 2016 and made orders under s 141 of the *Youth Justice Act* effectively replacing the imposition of the non-parole period with an order for a suspended sentence under supervision. In short, the applicant provided evidence indicating excellent conduct during his time in detention and strong prospects of rehabilitation. He was about to be transferred to the adult prison because he was soon to turn 18, and I considered that he and the community would be better off if he were given the benefit of a suspended sentence before that happened. The Application was not opposed.

[5] I provided ex tempore reasons which have been transcribed. Because there is very little authority concerning s 141 and its application I am reproducing some of those reasons here, and adding a few more observations about s 141.

Jurisdiction conferred by s 141 of the *Youth Justice Act*

[6] Sections 141 and 142 of the *Youth Justice Act* confer jurisdiction to reconsider or review a sentence imposed on a youth.

[7] Section 141 of the *Youth Justice Act* includes the following:

> (1) This section applies if the Court finds a youth guilty of a charge and an order is made in relation to the youth or a responsible adult in respect of the youth.
>
> (2) The Court may reconsider an order on application by:
>
> (a) the youth or a person on behalf of a youth; or
>
> (b) if the order is in relation to a responsible adult— the responsible adult.
>
> (3) An application for reconsideration may be made at any time.
>
> (4) If an application for reconsideration relates to a sentence of detention or imprisonment, the Court may, upon application by or on behalf of the youth, release the youth on bail before it hears the application for reconsideration.
>
> (5) The Court must notify the applicant, and all other parties, of the place, date and time for the hearing of the application.
>
> (6) After the hearing of the application, the Court may:
>
> (a) confirm or vary the order; or
>
> (b) revoke the order and deal with the youth under section 83 as if it had just found him or her guilty of the relevant offence or offences.

(7) An appeal lies to the Supreme Court from any order made by the Youth Justice Court under this section.

(8) The making of an application under this section does not prevent a person making another application under this section.

[8] Section 142 confers powers on the Court similar to those conferred under s 141(6) and also empowers the Court to discharge the earlier order.

[9] There are two differences between s 141 and s 142 that are relevant to note. Whereas an application under s 141 can only be made by or on behalf of the youth or a responsible adult, an application under s 142 can also be made by the Commissioner of Correctional Services or a prosecutor. Secondly, the jurisdiction under s 142 can only be invoked in certain circumstances, broadly where circumstances have changed as a result of which the youth is no longer able or willing to comply with an order or condition. There is no such constraint in relation to an application under s 141.

The Court

[10] In *R v DV*[1] this Court (Barr J) concluded that the reference to "the Court" in s 141 includes a reference to the Supreme Court and thus confers jurisdiction upon this Court (as well as the Youth Justice Court). His Honour said:

[1] *R v DV* [2015] NTSC 21406182, 21414403 and 21406171 (31 August 2015) Sentencing remarks at p 2.

> … I should indicate my view in relation to the reference to "the Court" in s 141 of the *Youth Justice Act*. In my view, that reference includes the Supreme Court, and the power of reconsideration under the section is given to both the Youth Justice Court and the Supreme Court.
>
> My view is not affected by the presence of s 141(7). The provision that "an appeal lies to the Supreme Court from any order made by the Youth Justice Court under this section" might be an indication that the reference in several previous subsections to "the Court" was intended to be to the Youth Justice Court only. However, there is no proper reason to interpret s 141 in such a way that the Supreme Court has no power, or lesser powers than the Youth Justice Court.

[11] I respectfully agree with his Honour's conclusion. I would add that Court is defined in s 5(1) of the *Youth Justice Act* to mean "the Youth Justice Court … and, if the context requires, includes the Supreme Court exercising its jurisdiction under this Act." The context in which the word "Court" appears in s 141 must include the Supreme Court not only where this Court has sentenced the youth under s 82 of the *Youth Justice Act* but also under the *Sentencing Act 1995* (NT). It would be an anomalous consequence if the right of a youth to have his or her sentence reconsidered only existed where the sentence was imposed by the Youth Justice Court and not where the sentence was imposed by the Supreme Court.

Age of applicant

[12] Another question about jurisdiction arose because the applicant is no longer a youth. He turned 18 on 20 or 22 September 2016, a week or so before I heard the Application.

[13] As Mr Aust submitted, s 141(3) states that an application for reconsideration under that section may be made "at any time". Also, although s 6(1) of the *Youth Justice Act* provides that a "youth" is a person under 18 years of age, s 6(2) provides that "if the context requires, a youth includes a person who committed an offence as a youth but has since turned 18 years of age."

[14] One obvious example of such a context is where a person sentenced as a youth breaches a condition of his suspended sentence after he has turned 18. Such a person is to be dealt with under (s 121 of) the *Youth Justice Act*, not under the *Sentencing Act*.[2]

[15] There is some uncertainty about the applicant's date of birth. Some documents, such as the Information for Courts dated 12 September 2016 and the Supervision Report under s 103 of the *Sentencing Act* dated 29 September 2016, state that his date of birth was 20 September 1998. However the applicant himself believes that his date of birth was 22 September 1998 and his records at Don Dale Youth Detention Centre have previously been amended to show this as his date of birth following the provision of information from the Department of Education.[3]

[2] *Shannon v Cassidy* [2012] NTSC 27; (2012) 31 NTLR 188.
[3] Affidavit of Paul James Morgan affirmed 21 September 2016 at [7] and [11]. See also, Institutional Report dated 7 September 2016.

[16] I consider it more likely than not that he was born on 22 September 1998. Accordingly this application, made on 20 September 2016, was made when he was still a youth. The Court has jurisdiction notwithstanding that he is now 18 years of age.

[17] Even if he turned 18 on 20 September 2016 I consider that the Court has jurisdiction to entertain his application. He was a youth at the time of his offending and also at the time when he was sentenced. I consider that the context of s 141(2) is such that the references therein to "youth" "include a person who committed an offence as a youth but has since turned 18 years of age."[4]

Court's powers

[18] Section 141(6) enables the Court to either (a) confirm or vary the order that had previously been made, or (b) revoke the order and deal with the youth under s 83 as if it had just found him or her guilty of the relevant offence. Subparagraph (b) could not be utilised here because the original order that I made included a sentence of imprisonment for three years. That sentence was imposed under the *Sentencing Act*. Such a sentence could not have been imposed under s 83 of the *Youth Justice Act* because s 83(2) prevents the imposition of detention of more than two years under s 83.

[4] *Youth Justice Act* s 6(2).

[19] Counsel accepted that the applicable provision would be s 141(6)(a). That provision enabled me to vary the order that I had made in December 2015.

Consideration

[20] I had regard to various materials provided to me and the submissions of counsel, particularly counsel for the applicant, Mr Aust. Those materials were contained in two affidavits of Paul James Morgan, one affirmed on 21 September 2016 and one on 25 September 2016. Included in those materials were my sentencing remarks on 18 December 2015.

[21] As Mr Aust pointed out, I indicated that I had difficulty assessing the applicant's prospects of rehabilitation at that stage and that his prior criminal history and previous breaches caused me to have some uncertainty as to his prospects of rehabilitation and his suitability for release under a suspended sentence. I said:[5]

> Unfortunately, because of your background, particularly your criminal history, I think your prospects of rehabilitation are poor at this stage. I am hoping that they will improve once you have spent some time in custody and will have had the benefits certainly of further education and attending courses, perhaps acquiring some new work skills both at Don Dale and in prison.

[22] The material that I was provided for the purpose of the Application answered most of those reservations that I had and expressed when I

[5] *R v Graham Campbell* [2015] NTSC 21405549, 21557423 and 21557432 (18 December 2015) Sentencing remarks at p 10.

sentenced the applicant in December last year. The s 103 report of 29 September 2016 also contained useful and encouraging information about the applicant and stated that he is now considered suitable for general supervision by the Department of Community Corrections.

[23] In particular, I was provided with a character reference addressed to the sentencing judge by Mr Victor Williams, Superintendent, Youth Detention, Department of Correctional Services. He has been employed with the Department of Correctional Services since 1998, and has had the role of Superintendent Youth Detention since May 2015. Mr Williams spoke very highly of the applicant.

[24] Mr Williams met with the applicant when he visited the Alice Springs Youth Detention Centre in January 2016 and discussed with him a brief sentence plan and the desirability of him being transferred to Don Dale for the period of his sentence. The applicant presented as an intelligent, motivated and confident young man. He spoke about his future plans and his willingness to seek employment and commence an apprenticeship. The applicant commented on his offending and said he would like to put that behind him and move forward.

[25] Mr Williams said that the applicant was transferred to Don Dale in January this year. He wrote:

> … since this time he has come along in leaps and bounds, he moved through the classification system and secured an open security rating and this has enabled him to engage in programs

> and activities in the community. Graham has embraced this opportunity and has been a role model for other youths in detention and his responsible and positive attitude has had a positive effect on others and this includes youth detention staff and service providers.

[26] He said that in all the time that he has spent in Corrections he "would consider Graham to be one of the best prospects to make a successful transition out of the criminal justice system and onto a brighter future."

[27] I was also provided with an Institutional Report. It also spoke well of the applicant but did raise some concerns about the applicant's occasional use or threat of physical violence as a coping mechanism.

[28] Attached to that report was a one-page document from Shannon Alexander, his class teacher at Tivendale School. It said:

> Graham is a very capable student and has the potential to be a strong leader. Graham's attitude and behaviour have been inconsistent of late. He can go from being respectful and mature, to argumentative, and defiant very quickly.

[29] I stressed to the applicant that he would need to address these issues and not react inappropriately when someone or something else upsets him.

[30] Apart from those reservations, everything else in the materials that I was given was very positive. The Institutional Report referred to a number of programs that he had participated in: the Love Bites program, Step Up Youth Violence program, Alcohol and Other Drugs for Youth (DAISY) program and the Equine Magic program. He had

also been actively involved in a number of activities including: basketball, Red Cross workshops and volunteering at the Youth Shack. The report also referred to his ongoing contact with his family, in particular, his grandmother. It also said that:

> Graham is a model detainee who follows instruction, block routines, participates in activities, and shows an acceptable level of hygiene. In addition to this, Graham has been described as a leader and role model for other detainees'.

[31] I was also provided with two documents prepared by Mr Terry Byrnes, a Senior Indigenous Youth Justice Worker with NAAJA. One of those documents discussed the applicant's unfortunate history and the fact that his mother was separated from him at an early stage because of particular problems that she had. The applicant told Mr Byrnes that he would like to show his aunties and uncles now that he is "not this little drug addict. I am not this little criminal." Mr Byrnes also talks about him studying cooking at Charles Darwin University.

[32] The other report from Mr Byrnes referred to the fact that the applicant has family living in Darwin and that he could live there with his aunt Ms Debra Seden who was present in court to support him. However, his initial preference was to be housed in the Sunrise Centre and the NAAJA Throughcare program would facilitate that.

[33] I was also provided with a letter from Antoinette Carroll. She is the Youth Justice Advocacy Project Coordinator at Central Australian

Aboriginal Legal Aid (CAALAS). She spoke about the applicant's aunt, Ms Debra Seden, and the fact that she has five children who are about his age. She said they will be a positive influence on him as they have come from a drug-free home and they are very committed to sport and schooling.

[34] She said that the applicant had demonstrated immense insight into his offending and that his rehabilitation has progressed as far as it can in the youth detention centre context. Ms Carroll quoted from a letter that the applicant wrote, where he said he enjoys learning, respects the teachers and is nervous about going to "the big house". The applicant told her that he wants to be a good role model to his brothers. She concluded by saying the applicant is "one of the most endearing, respectful and proactive young people I have had the pleasure of working with." She said that he has strong leadership potential.

[35] I was also provided with a letter written by the applicant. He said that he now realises that he used to get into bad company. He has learnt a lot since he has been in detention. He said that he now recognises that people whose houses are broken into would be afraid and that he now understands the feelings of the 71-year-old man whose house he broke into back in April last year.

Conclusions

[36] In light of all that material I concluded that the applicant had matured considerably during his 10 months or so in detention and that he should be released under supervision. His prospects of rehabilitation now appeared very good and would not be assisted by him serving further time in the adult prison environment.

[37] Accordingly I varied the order that I made on 18 December 2015 by revoking the order concerning the imposition of the non-parole period and replacing it with an order for a suspended sentence under supervision. I imposed the conditions set out in the s 103 Report subject to a variation in relation to the period of operation of two of them, namely the conditions relating to a curfew and the wearing of approved monitoring device. I suspended the sentence from 30 September 2016 and fixed an operational period of 2 years and 3 months.
