CITATION: *Police v HT* [2009] NTMC 020

PARTIES:	JAMIE THOMAS O'BRIEN
	v
	HT
TITLE OF COURT:	Youth Justice Court
JURISDICTION:	Youth Justice
FILE NO(s):	20833892
DELIVERED ON:	20 May 2009
DELIVERED AT:	Darwin
HEARING DATE(s):	16 March 2009; 1, 14, 15 May 2009
JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

YOUTH SENTENCE – ENGAGE IN RECKLESS CONDUCT

Criminal Code (NT) s 174c
Youth Justice Act (NT) ss 4, 81

R v Mills (1998) 4 VR235
R v The Queen [2008] NTCCA 8

REPRESENTATION:

Counsel:

Prosecutor:	Mr Nathan
Defendant:	Ms Musk

Solicitors:

Prosecutor:	ODPP
Defendant:	NAAJA

Judgment category classification:	C
Judgment ID number:	[2009] NTMC 020
Number of paragraphs:	15

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20833892

[2009] NTMC 020

BETWEEN:

JAMIE THOMAS O'BRIEN
Informant/Complainant

AND:

HT
Defendant

REASONS FOR SENTENCE

(Delivered 20 May 2009)

Jenny Blokland CM:

1. HT pleaded guilty in the Youth Justice Court to three counts. First, that he engaged in conduct that gave rise to a danger of death to Valerie Thardim and Timothy Tucker and was reckless as to that danger, contrary to *s* 174C *Criminal Code* (NT); second, that he possessed a Remington .222 bolt action rifle category B that he was not licensed to possess, contrary to *s* 58 *Firearms Act* (NT) and third that he possessed the same firearm while under the influence of alcohol or a drug, contrary to *s* 86 *Firearms Act* (NT). Other more serious counts have been stood aside. These reasons concern primarily considerations relevant to count 1, reckless endangerment.

2. The offences were committed on 4 December 2008. The agreed facts state that for four months prior to the commission of the offences the Defendant and victims, Valerie Thardim and Timothy Tucker had been residing in a three bedroom house at 4 Mile Hole Camp-Kakadu. During part of November and early December 2008 Valerie Thardim had been visiting an

ill family member in Port Keats. Ms Thardim returned to Darwin on 4 December 2008 and it was arranged Timmy Tucker and the Defendant would pick her up from the airport. During travel to and from the airport the Defendant consumed an unknown quantity of alcohol and cannabis.

3. The three arrived back at the 4 Mile Hole Camp-Kakadu at about 5.00pm. Ms Thardim and Mr Tucker showered together, had sex and slept together on their bed. Throughout this time the Defendant remained outside of the house, continued to consume alcohol and cannabis and became increasingly intoxicated. At about 7.00pm the Defendant obtained a loaded Remington .222 bolt action rifle from Mr Tucker's vehicle, approached the house and entered the room where Mr Tucker and Ms Thardim were sleeping. He stood two metres away from them while they were still sleeping and took aim at them.

4. At that moment Mr Tucker woke up, saw the Defendant standing with the rifle pointed in his direction and shouted "what the fuck do you think you're doing?". The Defendant said "fuck you mob". He then discharged the firearm in the direction of Valerie Thardim. The projectile narrowly missed Mr Tucker's head but creased the top of Ms Thardim's head causing a 6 cm laceration. The Defendant immediately ran out of the bedroom and the house carrying the firearm with Mr Tucker in pursuit. The Defendant ran through bushland and lost the firearm. Mr Tucker assisted Ms Thardim and drove her to the Royal Darwin Hospital for treatment.

5. The Defendant was apprehended by police on 5 December 2008, 15 km from 4 Mile Hole Camp. He declined to participate in a recorded conversation with police and has been remanded in detention since 5 December 2008, primarily in the Don Dale detention facility. Both Ms Thardim and Mr Tucker feared for their lives and Ms Thardim endured about 10 stitches to her scalp as a result of the 6 cm laceration. The photos of the injury illustrate just how close this episode came to a devastating tragedy.

6. It is acknowledged and I accept, there was no incident that led to any animosity between HT and the victims. His counsel has submitted his actions are inexplicable in terms of reference to any motivation to behave in such an extreme manner. None of the reports before the Court shed any further light on HT's motivation. Counsel has explained the Defendant is very close to both victims – Valerie Thardim is his sister-in-law and Timmy Tucker and he regard each other as family. Through counsel he has said he was not jealous of their relationship and no previous incident explains his conduct. It is all put down to being so highly intoxicated by alcohol and cannabis he made an extreme decision while in this distorted state of mind, to behave in this way. It is submitted and accepted he simply would not have indulged in this behaviour if he had been sober. He has no previous record for violence of any sort. On his single previous court appearance in July 2008 he was dealt with for one count of trespass and one count of stealing in the Youth Justice Court at Wadeye.

7. The reckless endangerment offence on any view is extremely serious. It carries a theoretical maximum penalty of 10 years imprisonment. The jurisdictional limit in the Youth Justice Court is two years detention or imprisonment. Of the possible degrees of recklessness that may be imagined, this is at the very high end. Ms Thardim and Mr Tucker were placed at an extremely high risk of being killed or seriously injured. It is acknowledged Ms Thardim suffered a significant injury. Aside her physical injury, both were placed in dreadful fear for their lives. Aside the strong principles favouring rehabilitation and reintegration into the community for young offenders, the confronting facts of this case do require the application of broader sentencing principles to ensure a balanced approach between the needs of the Defendant, the rights of the victim and the interest of the community: (*s* 4 (g) *Youth Justice Act* (NT)).

8. HT was 17 years of age at the time of the commission of the offences. He will turn 18 years on 24 July of this year. During the course of these

proceedings he was assessed by Top End Mental Health Services. The author of that report, Ms Smyth, interviewed the Defendant with the assistance of a Murrinh-Patha interpreter. From her report, the pre-sentence report and the submissions of counsel I can readily find the Defendant is a young indigenous man who usually resides at Wadeye where he shared a home with immediate and extended family. His father is very ill with dementia and no longer resides at Wadeye. Although it does not appear the Defendant has suffered from any significant physical or mental health problems, it is obvious from all of the sources of material before the Court that he has been drinking significant amounts of alcohol from about 16 years of age and has apparently not been able to cease drinking when he has tried. He has used significant amounts of cannabis since he was 15 years of age. The Defendant told Ms Smyth at the time of the offence he was "having horrors" meaning, "I just had no brain as if I wasn't there anymore." Further, he told her "I did it. I drank so much I was just doing anything. I just fired it. I just went in and fired at the mattress. It was as if the devil went into me". He also told Ms Smyth he was not aware that the bullet had struck Ms Thardim. He stated "I thought it hit the cement floor."

9. It has been suggested and I accept, the Defendant was most likely withdrawing from both alcohol and cannabis when he was first remanded at Don Dale. Ms Smyth's report indicates he was troublesome when he was first in detention and was described as "flighty and agitated". The institutional report from Don Dale indicates he was initially involved in threatening, swearing and physical altercations with other detainees. The report also indicates he has displayed a remarkable improvement in terms of behaviour, attitude and participation in programmes. He has enrolled in the Don Dale Education Unit. His reading age was initially assessed as 5 years 10 months, much lower of course than his chronological age. The report notes his literacy and numeracy skills are improving every day. He has voluntarily been participating in the "Prison In-Reach" programme that

provides interventions with alcohol and other drug issues. I have disregarded Mr Mals report annexed to Ms Smyth's report indicating there may be issues around fitness to plead. I note the Defendant was interviewed on that occasion without an interpreter. While some of the other evidence points to possible cognitive or learning difficulties, it is not anywhere to a suspicion of impairment that might give rise to a fitness issue. Mr Mals report is inconclusive but does suggest further testing. Both parties take the view it is appropriate to disregard it.

10. As noted, the Defendant has expressed he would never have committed the offence if he had been sober. He has said he felt in "low spirits" regarding the offence, was "sorry", "embarrassed" and "ashamed" (Ms Smyth's Report, page 5). His counsel has told the Court he is deeply remorseful. He realises the victims, who he was very close to will most likely not want to have contact with him. He has pleaded guilty early, once there had been some negotiation of charges. The quality of the plea is significant. It is timely and occasioned by expressions of remorse. It has saved the prosecution and the court significant time and resources. It has meant the victims have not had to endure the strain of travelling from a remote area and testifying. The Defendant has good prospects of rehabilitation provided he is placed on a structured programme that continues to address alcohol and substance abuse and that he lives with relatives who are prepared to have him at Wadeye, (a dry community). The Pre-Sentence Report indicates he is suitable for supervision with a number of conditions.

11. As noted previously in these reasons, the Defendant turns 18 in July of this year and would at that time be transferred to the adult prison. I note the authority *R v Mills* (1998) 4 VR 235 put by Ms Musk indicating that rehabilitation rather than custody in an adult prison should be a priority. That case is of significant relevance, dealing as it does with a case of recklessly causing serious injury and a youthful offender. The following propositions were accepted by the Victorian Court of Criminal Appeal:

"(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 youthful 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 focussing 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. (This proposition is a particular application of the general principle expressed in s. 5(4) of the Sentencing Act 1991.)"

12. I note and adopt also the approach taken by His Honour the Chief Justice in relation to balancing the relevant factors set out in *s* 4 *Youth Justice Act* in *RP v The Queen* [2008] NTCCA 8. I accept that matter concerned the different setting of sexual assault and a very young offender. I have mentioned s 4(g) Youth Justice Ace above. Other principles from s 4 highly relevant and integrated into this sentence are:

(a) if a youth commits an offence, he or she must be held accountable and encouraged to accept responsibility for the behaviour;

(b) the youth should be dealt with in a way that acknowledges his or her needs and will provide him or her with the opportunity to develop in socially responsible ways;

(c) a youth should only be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time;

(d) a youth must be dealt with in the criminal law system in a manner consistent with his or her age and maturity and have

the same rights and protection before the law as would an adult in similar circumstances;

(e) a youth should be made aware of his or her obligations under the law and of the consequences of contravening the law;

(f) a youth who commits an offence should be dealt with in a way that allows him or her to be re-integrated into the community;

(g) a balanced approach must be taken between the needs of the youth, the rights of any victim of the youth's offence and the interests of the community;

(h) family relationships between a youth and members of his or her family should, where appropriate, be preserved and strengthened.

13. I am reminded that prior to this episode of detention the Defendant has not previously been in custody. Given his age, lack of other relevant criminal history and that he is engaging in productive programmes, it may be destructive to the process of rehabilitation to order a term that would require him to enter the adult prison. In any event, the *Youth Justice Act* requires that detention or imprisonment be ordered "*only as a last resort*": (*s* 81(6) *Youth Justice Act* (NT)). The principles in *s* 4 (c) require a youth should only be kept in custody for an offence as a last resort or "*for the shortest appropriate period of time.*" In my view the seriousness of the offence requires a significant period of detention but the Defendant should be released before being required to serve a term of imprisonment in an adult prison. The sentence I am passing today would be wholly inappropriate if the Defendant were a mature adult. In my view the principles under the *Youth Justice Act* readily permit his release before he turns 18.

14. On Count 3 he will be convicted and sentenced to 14 months detention commencing 5 December 2008 to be suspended after serving 7 months detention on the following conditions:

To be of good behaviour for two years.

To be subject to the supervision of Correctional Services in terms of residence, reporting, employment, education and training and attendance at Centa Care Wadeye or similar programme as determined by Correctional Services for counselling for drug and alcohol issues. To reside at Wadeye and not leave Wadeye for the first 12 months of this order unless permission is given by Correctional Services or if for medical or other emergency. To attend and complete to the satisfaction of Correctional Services the Indigenous Family Violence Programme.

15. Counts 9 and 10 would normally be dealt with by way of fine, however, given the Defendant will not have any financial means for some time, I will impose convictions on each counts without further penalty save for two victims levies totally $40.

Dated this 20th day of May 2009.

_____

Jenny Blokland
CHIEF MAGISTRATE