CITATION: *Police v JL* [2010] NTMC 069

PARTIES:	POLICE
	v
	JL
TITLE OF COURT:	YOUTH JUSTICE COURT
JURISDICTION:	CRIMINAL
FILE NO(s):	21014233 & 21001186
DELIVERED ON:	16 November 2010
DELIVERED AT:	Alyangula
HEARING DATE(s):	21 June 2010
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS

YOUTH JUSTICE ACT - Sentencing – Length of Sentences

REPRESENTATION:

Counsel:

Informant:	Ms Garraway
Defendant:	Ms Swift

Solicitors:

Informant:	ODPP
Defendant:	NAAJA

Judgment category classification:	A
Judgment ID number:	[2010] NTMC 069
Number of paragraphs:	28

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

No. 21014233 & 21001186

[2010] NTMC 069

BETWEEN:

POLICE
Informant

AND:

JL
Defendant

REASONS FOR DECISION

(Delivered 16 November 2010)

Ms Sue Oliver SM:

1. JL, who is now 14 years of age, was sentenced to an effective term of 15 months detention arising out of two separate offences on 10 September 2010. The sentence was initially backdated to commence on 27 August 2010 but subsequently corrected to reflect the correct date on which he was taken into custody of 18 August 2010. The sentences are to be partially suspended after he has served three months detention on conditions of supervision by Corrections and other conditions directed at his rehabilitation. On 17 September when I corrected the backdating for the sentence JL's Counsel raised the question of whether a term of detention that exceeded 12 months could be imposed on JL as he was under the age of 15 years.

2. As the issue raises a point of considerable significance for the sentencing of youths in the Youth Justice Court, I agreed to take written submissions with respect to the power of the court to impose such a term and to reconsider, if necessary, the sentences imposed.

The History of the Offences

3. On 19 February 2010 the defendant pleaded guilty and was found guilty of an offence of unlawfully causing serious harm. The offence was committed on 30 December 2009 at which time the youth was 13 years of age. The victim of the assault was his girlfriend of 15 years of age. The youth had become jealous when seeing the victim in the company of her friends at around 2am on a Saturday morning in the community of Angurugu. He walked towards the group and threw a machete at the victim which missed her. He then retrieved the machete and swung it downwards at her striking her across the top of her left hand as she tried to defend herself. The force of the blow sliced all four fingers on the victim's hand to the bone, severing tendons and fracturing her fingers. He left the area. The victim was flown to Royal Darwin Hospital for surgery.

4. The matter proceeded in court by way of a community court process which involved the defendant's parents, his Aunt and senior women from his community as panel members. The Principal of his school also attended court and spoke of his educational progress and potential which she considered to be outstanding, describing him as being capable of being a leader of his people. The participants in the community court raised as the primary issue that he had grown up in an atmosphere of domestic violence and in a community where there was a prevalence of resorting to weapons to settle disputes. Female family members proposed that he be enrolled in a boarding school in Queensland. His father expressed reservation about the proposal. JL had no previous offending behaviour. He was released on a two year probation order under pursuant to s 83 (1)(f) under supervision of Corrections with directions as to his residence with female relatives, non association with the victim, enrolment at a boarding school and counselling for violence and emotional trauma.

5. There was poor compliance with those orders. In particular, the family did not pursue his enrolment at boarding school as they had undertaken to do, nor did he remain with his female relatives as directed by the court but was after a short time returned to his father. He did not comply with reporting although this would appear to have been due to his father not making arrangements for his attendance and failing to inform JL of alternative arrangements that had been made for him by the Corrections Officer to report at the Men's Safe House at Angurugu.

6. Most significantly however, on 27 April 2010 the youth re-offended by assaulting the same victim. The circumstances of the assault, which was an aggravated assault contrary to s 188(2) of the Criminal Code, was that the youth and the victim were sitting next to each other, on a fence in front of the Angurugu School at 11pm that evening. The defendant became jealous after hearing stories from his brother involving the victim. He took a knife from somewhere on his person and stabbed the victim twice to the back. The victim left the area. She was treated for two lacerations to her lower back at the Angurugu Health Clinic and was then flown to Gove for x-rays to determine the extent of her injuries. The two lacerations were approximately 1.5cm in length to her lower back.

7. The defendant pleaded guilty to the charge of aggravated assault and a pre-sentence report was ordered. On 10 September 2010, after consideration of the pre-sentence report and other material, including references from teachers that again spoke of his potential, the youth was sentenced on the charge of aggravated assault and re-sentenced on the serious harm charge, the good behaviour bond having been revoked. A sentence, without conviction, of 12 months detention was imposed for the serious harm offence. On the aggravated assault, he was convicted and sentenced to 8 months detention, of which 5 months was ordered to be concurrent with the sentence for the serious harm charge. That produced an overall effective sentence of 15 months detention.

Sentencing provisions *Youth Justice Act*

8. Section 83 of the *Youth Justice Act* provides for the orders that a court may make on finding a charge proven against a youth. These include ordering that the youth serve a term of detention or imprisonment that is suspended wholly or partly (s83(1)(i)). Section 83(2)(b) imposes a limitation on this power providing that if the court orders that the youth serve a term of detention or imprisonment, the term must not exceed the lesser of the maximum period that may be imposed under the relevant law in relation to the offence, or for a youth who is less than 15 years of age the period of 12 months. Where a youth is 15 years of age the court must not impose a period of more than 2 years. In addition, imprisonment cannot be ordered for a youth who is less than 15 years of age (S83(3)).

9. Counsel for JL submits that the Youth Justice Court does not have power to impose a sentence of 15 months detention on JL because it exceeds the 12 month limitation imposed by s83(2).

10. In my view section 83 is in very clear terms. It provides for the orders that the court may make when it has found a charge proven against a youth. The Court is empowered to make one or more of the dispositional orders set out in s83(1). Section 83(2) imposes a limitation on the disposition of detention or imprisonment by providing that if the Court orders that the youth serve **a** term of detention or imprisonment, **the** term must not exceed the lesser of the maximum period that may be imposed under the relevant law in relation to the offence or if the youth is less than 15 years of age – 12 months. Section 83(2) is clearly expressed in the singular and in my view relates to orders made under subsection (1), that is, a sentence imposed in respect of a single charge that is found proven. I do not accept the argument that section 24 of the Interpretation Act should be applied so as to read the singular reference in the plural. Section 24(2) provides that in an Act words in the singular include the plural and words in the plural include the singular. That

presumption will apply unless a contrary intention is evident. The argument for reading the references in s83 as including the plural is said to be based on the reasoning in *Schluter v Perry* [2003] NTSC 8. In that case Thomas J considered the question of whether restitution orders made by the Juvenile Court under the then *Juvenile Justice Act* could exceed in total the amount of $5000. Section 55 of that Act provided that where the Court made an order for monetary compensation for an offence, the amount of compensation was not to exceed $5000. The Juvenile Court had made two separate orders for compensation, one of $5000 and the other for $4000. The appeal was allowed on the basis that the learned magistrate had failed to take into consideration the means of the juvenile to pay those amounts. However, her Honour also made remarks regarding the limit of the power to award monetary compensation, concluding that there was a limitation of a total amount of $5000 regardless of the number of offences for which restitution could be ordered. Her Honour referred to *R v Pilkington* [2002] NTSC in which Martin (BF) CJ had concluded both that $5000 was the maximum restitution that could be ordered and that no term of detention greater than 12 months could be imposed on a juvenile because there was no power to accumulate sentences which, therefore, were required to run concurrently. In *Pilkington*, the 16 year old juvenile was sentenced to serve a maximum term of 12 months for 32 property offences involving a number of offences that individually carried a maximum penalty of 14 years for an adult. His Honour said at p 2 with respect to the sentencing powers of the Juvenile Justice Court

> "The actual penalties for those various offences range up to 14 years' imprisonment. The maximum period of detention which can be imposed under the Juvenile Justice Act is 12 months. There the sentences cannot be accumulated and they must all run concurrently. That is the law in that jurisdiction."

His Honour then commented on the "inconvenient consequences" of the Supreme Court being limited in its sentencing powers to those under the *Juvenile Justice Act* that had been spelt out in detail by Mildren J in *Braun v Ebatarinja*. His Honours view as to the maximum amount of restitution able to be ordered seems to have been based on taking a consistent approach to the maximum term of detention that could be set.

11. If the *Youth Justice Act* were in identical terms to the *Juvenile Justice Act* then the decisions to which I have referred would be applicable. However, there are significant differences between the repealed *Juvenile Justice Act* and the *Youth Justice Act*, not the least of which is that the latter contains powers of accumulation with respect to sentences imposed by the Youth Justice Court, a power that was not conferred on the Juvenile Court. Absent a power of accumulation it is apparent that when sentencing for multiple offending, no term greater than 12 months could be reached, given that 12 months was clearly the maximum term able to be imposed for a single offence.

12. Sections 126 and 127 deal with concurrency and accumulation of sentences. Section 126 is in my view effectively a default provision. It provides that sentences of detention or imprisonment shall be served concurrently unless the court otherwise orders. Section 127 provides that if a youth is serving or has been sentenced to serve a term of detention or imprisonment for an offence and is sentenced to serve another term of detention or imprisonment for another offence, the court may direct the term of detention or imprisonment for the other offence to start from the end of the term of detention or imprisonment for the first offence or an earlier date. There is nothing in the terms of that provision that suggest the power of accumulation is limited to produce a sentence with maximum terms as provided in s83(2) when sentencing for a single offence.

13. The *Youth Justice Act* also allows for the Court to impose an aggregate sentence of detention or imprisonment, that is, to impose one term of detention or imprisonment in respect of two or more offences in circumstances where the offences arise out of the same incident or course of conduct. Where an aggregate sentence is set, a limitation on the term of that sentence, effectively in the same terms as section 83(2)(b) is imposed, that is, that for a youth who has turned 15 years of age the term of detention or imprisonment must not exceed two years and for a youth who is under 15 years of age it must not exceed 12 months. In my view, the provision for a limitation of a sentence of detention or imprisonment in the same terms as s83(2) on an aggregate sentence, an the absence of such a limitation on the power to accumulate, provides a clear indication that sentences may be accumulated past the s83(2) maximums. If the power of accumulation were to be subject to a limitation then it would be expected to have been expressly provided for as in s125(2) with respect to aggregate sentences.

14. An aggregate sentence cannot be imposed if one of the offences is a violent offence or a sexual offence within the meaning of the *Sentencing Act* (s125(3)). Absent this provision, a youth who was being sentenced for multiple violent or sexual offences arising out of the same incident or course of conduct might be sentenced to a maximum of 12 months or 2 years depending on his or her age. The provision suggests to me that such offences were intended to be dealt with according to the ordinary determination of concurrency or accumulation and therefore not subject to the maximum term provision in recognition of the generally serious nature of such offences.

15. The *Youth Justice Act* also provides for a power of the Court to set a non parole period when sentencing a youth to a term of detention or imprisonment longer than 12 months that is not suspended in whole or part. The Court is required to fix a non-parole period unless it considers that the nature of the offence, the past history of the youth or the circumstances of the particular case make the fixing of such a period inappropriate (s85(1)).

The *Juvenile Justice Act* did not contain that power. Whilst it is true that the provision is capable of being read as applying to circumstances where the Court is dealing with a youth who has turned 15 years of age and who can therefore be sentenced for a term in excess of 12 months for an offence, the power is expressed in general terms.

16. Significantly, s85(2) provides

> "If the sentence is in respect of more than one offence, the non-parole period fixed under subsection (1) is in respect of the aggregate period of detention or imprisonment that the youth is liable to serve under all the sentences imposed."

In my view this provision is supportive of the proposition that the Court may, set an overall sentence in excess of the limitations imposed by s83(2) and in those circumstances is to consider the setting of a single non parole period with respect to the "aggregate period of detention or imprisonment" ordered.

17. Section 87 requires that the court must fix a new non-parole period in circumstances where a youth has been detained or imprisoned for an offence and a non parole period has been set and, before the end of the non-parole period the youth is sentenced to a further term of detention or imprisonment in respect of which the Court proposes to fix a non-parole period. In those circumstances the Court must fix a new single non-parole period in respect of all the sentences the youth is to serve or complete which is to supersede the previous non parole order and cannot be a non parole period less than the earlier one set.

18. Section 131 deals with re-offending by a youth who is on parole. It applies where a youth is sentenced to a term of detention or imprisonment for an offence committed while a parole order under the *Parole of Prisoners Act* is or was in force in relation to the youth and by reason of that sentence, the

parole order is taken to have been revoked. In those circumstances, the Court must order the youth to be detained or imprisoned for the term that the youth had not served at the time when released from detention under the parole order **and** that term does not commence until the expiration of the term of detention or imprisonment to which the youth is sentenced for the later offence. There is no discretion to do otherwise.

19. The setting of a non parole period cannot come into play unless a youth receives a sentence of detention or imprisonment that is more than 12 months. If, as is argued, the Court has no power to set an overall sentence for a youth under the age of 15 years of more than 12 months, then sections 87 and 131 can have no work to do and a youth under that age cannot receive the benefit of a non parole period. Non parole period would simply not be applicable to a youth less than 15 years being sentenced in the Youth Justice Court, although noting that the Supreme Court might fix a non parole period when dealing with a youth less than 15 years of age if a youth was sentenced by that court.

20. If accepted, the argument that the court cannot fix a total sentence of greater than 12 months for a youth under 15 years or greater than 2 years for those over that age, no matter how many offences are being dealt with and no matter when those offences were committed would create a significant impediment to the proper operation of sections 87 and 131. Sentences for re-offending whilst on parole or for matters unresolved at the time of initial sentence may well be severely constrained by the in ability to exceed what is argued to be the statutory limitations on multiple sentences.

21. Likewise, where the Court had sentenced a youth and released the youth on a fully or partially suspended sentence that was then breached by re-offending, the courts ability to set an overall sentence that properly reflected the offending would be severely constrained, because the court would either not be able to set what it considered to be the proper term for that offending

or, would be required to order considerable or full concurrency of sentences in circumstances where a full or partial concurrency order would not be appropriate under general sentencing principles.

22. Section 81 provides for the principles and consideration that are to apply when sentencing a youth. Amongst these considerations are that the court must consider any previous order in relation to an offence that still applies to the youth, and any further order that is liable to be imposed if the youth has not complied with the terms of the previous order (s81(2)(e)) and must dispose of the matter in a way that is in proportion to the seriousness of the offence (s81(3)). It is difficult to see how the Court could give proper and full effect to these considerations if the provisions dealing with accumulation, re-sentencing on breaches of suspended sentence orders, and parole breaches could not be given full effect.

23. The submission that without the limitation urged the Court could set a term of detention or imprisonment that was excessive, is in my view answered by the application of the general principle of totality and by the special principles spelt out in sections 4 and 81, in particular that a sentence of detention or imprisonment is imposed as a last resort (s81(6)).

24. Turning to this matter, if the argument that the term should be limited to 12 months for this youth, it would mean that he could not receive any effective additional sentence of detention for the further offence of aggravated assault, an offence that falls objectively into the more serious category of offences of that nature, given that a sentence of 12 months has been imposed for the serious harm offence first in time. Such an outcome would seem to me to be inconsistent with general principles set out in section 4 of the Act, including, but not limited to the requirement in s4(e) that a youth should be made aware of his or her obligations under the law and of the consequences of contravening the law. Where no effective additional term of detention

could be required to be served, no consequence for contravention of the law would arise.

25. The Youth Justice Court has been given broad jurisdiction to deal with youth offending. The court may hear and determine all criminal offences except those which carry a maximum penalty of life imprisonment. I reject the submission that comparison should be made, in determining the limits of the sentencing power of this court, to the sentencing limitations of the Court of Summary Jurisdiction. Whilst it is true that each court is or may be presided over by a Stipendiary Magistrate, the powers of the individual Courts are determined by the statutory authority given to that **Court** not by the identity of the presiding judicial officer. It is the legislative instrument that determines power. In any event I do not accept that the power of the Court of Summary Jurisdiction is limited to a maximum of 5 years imprisonment when sentencing for multiple offences. So far as I am aware there is no authority that supports that proposition.

26. The Youth Justice Court has a specialised jurisdiction. It is not simply a Court created for the purpose of imposing lesser sentences upon a youthful offender than might be imposed for the same or similar offending by an adult. The *Youth Justice Act* seeks to establish an entire regime that recognises that a different approach will generally required in the criminal justice system to deal with and address issues of youth offending. The Act provides for a youth justice system commencing with apprehension and the powers of police in that regard, diversion of youthful offenders from the court system, the establishment of the Youth Justice Court and the conduct of proceedings in that court including sentencing dispositions, the establishment and conduct of detention centres, interstate transfers of detainees and supervised youths and the establishment of a Youth Justice Advisory Committee. In my view it is necessary to consider the interpretation of provisions of the Act in the context of the youth justice system established by it including the general principles set out in section 4.

Conclusion

27. In my view there is no ambiguity in section 83. It is clear in its terms to the imposition of a finds a charge proven against a youth that the youth serve a term of detention or imprisonment, which term must not exceed the statutory limitations provided. The provision is expressed in the singular. To read the provision in the plural, so as to impose an overall restriction on the length of sentences for multiple offending would defeat the purpose of the provisions that deal with powers of accumulation, non parole periods and suspended sentence orders.

28. I am satisfied that the effective sentence that I imposed on JL of 15 months detention for the two offences of causing serious harm and aggravated assault were ones that could be imposed in accordance with the law and that it is not necessary for me to re-open the proceedings under section 141.

Dated this 16th day of November 2010.

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Sue Oliver
STIPENDIARY MAGISTRATE