*Neesham v Gurruwiwi* [2001] NTSC 53

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| PARTIES: | NEESHAM, Matthew David |
| | v |
| | GURRUWIWI, Johnny Wanamal |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | JA 14 of 2001 |
| DELIVERED: | 28 June 2001 |
| HEARING DATES: | 21 May 2001 |
| JUDGMENT OF: | MARTIN CJ |

**CATCHWORDS:**

APPEAL

Justices – appeal against sentence – unlawful entry and stealing – mandatory sentencing – whether exceptional circumstances provision applies – meaning of "single property offence".

*Justices Act* 1928 (NT)
*Sentencing Act* 1995 (NT), s 78A(1), s 78A(6C)

*Pearce* (1998) 103 A Crim R 372; *Allpass* (1993) 72 A Crim R 561; *R v Tait and Bartley* (1979) 24 ALR 473; *R v Williams* (1981) 28 SASR 362, distinguished.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | G Dooley |
| Respondent: | S Johns |

*Solicitors:*

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| Appellant: | DPP |
| Respondent: | NAALAS |

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| Judgment category classification: | B |
| Judgment ID Number: | mar0118 |
| Number of pages: | 5 |

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

*Neesham v Gurruwiwi* [2001] NTSC 53
No. JA 14 of 2001

BETWEEN:

**MATTHEW DAVID NEESHAM**
Appellant

AND:

**JOHNNY WANAMAL GURRUWIWI**
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 28 June 2001)

[1] Informant's appeal against sentence upon the grounds that the learned Magistrate, constituting the Court of Summary Jurisdiction sitting at Nhulunbuy, erred in holding that the mandatory sentencing provisions of the Sentencing Act 1995 (NT) relating to property offences did not apply to the respondent.

[2] The respondent pleaded guilty to two charges laid upon a single information that firstly, on 25 May 2000 he stole property from Woolworths supermarket, and secondly, that on that day, at night time, unlawfully entered that building with intent to commit the crime of stealing (the second offence, as charged, preceded the first in time).

[3] The facts admitted by the respondent were that on the morning of 25 May 2000 at approximately 5pm he became hungry and discussed his condition with two other offenders. The three of them walked to the rear of Woolworths where they rummaged through bins looking for expired produce to eat. One of the co-offenders walked to a fire door at the rear of Woolworths and pulled on the door handle. When the door opened, the two co-offenders entered the building. The respondent stood outside and remained there as a lookout. The co-offenders returned and passed the stolen goods to the respondent. The goods comprised foodstuffs to the value of $42.51. The co-offender took the food and was shortly afterwards apprehended by police. When interviewed he made full admissions, stating "I stay outside, I only eat one fish that's all". The learned Magistrate found the respondent guilty.

[4] Each of the offences is a property offence prescribed in Sch 1 to the Sentencing Act. His Worship heard submissions from the prosecutor and then counsel for the respondent directed to the exceptional circumstances referred to in s 78A(6C) of the Act. His Worship expressed himself satisfied that they were made out. He proceeded as if the statutory requirement for the imposition of the mandatory minimum sentence of imprisonment for 14 days did not apply. His Worship took into account the sentence passed upon one of the co-offenders where the Court was similarly satisfied. That co-offender was convicted and released upon a conditional

bond to be of good behaviour. The other co-offender had not been dealt with at that time.

[5] This appeal was initially brought upon grounds which attacked his Worship's findings relating to exceptional circumstances. However, shortly before the date fixed for the hearing, notice was given to the respondent's legal representative of intention to add a further ground, that is, that his Worship erred in that the circumstances pursuant to which the statutory sentence might be avoided only applied where the offender was before the Court to be sentenced in respect of a "single property offence" (s 78A(6C)). Here there were two such offences.

[6] That matter was not brought to the attention of his Worship in the sentencing process. The prosecutor and then counsel for the respondent and his Worship had joined together in the debate as to whether exceptional circumstances had been established. No reference was made to what appears to me to be a basic jurisdictional question to be determined before embarking on that issue.

[7] Counsel for the respondent on appeal raised no basis for objecting to the additional ground of appeal and was prepared to argue the merits of it. Given the nature of that ground, it may be that an objection would have been futile. Instead, counsel sought to persuade this Court that in the circumstances of the case the two offences amounted to no more than a single property offence. It was put that the respondent's only criminal act

was to receive the stolen goods. That can not be accepted. He conceded before the Court that he acted as lookout when the co-offenders entered the building and until they returned with the goods. He pleaded guilty to both charges. True it is that in practice a single aggregate penalty is often imposed when two such charges are brought by the one information or indictment, but that is not the test laid down by the parliament. Reference is made to what fell from Kirby J in *Pearce* (1998) 103 A Crim R 372 at par 117, but it does not apply in this case. It does not assist when the accused has pleaded guilty to the preferred charges.

[8] Bearing in mind what seemed to me to be a possibility of injustice to the respondent if the appeal was upheld on the additional ground, I invited the parties to make written submissions on the power of this Court to decline to intervene even if it was satisfied that error had been shown in the original sentencing process, especially given the prosecution conduct at the original sentencing proceedings (*Allpass* (1993) 72 A Crim R 561 at 562). That appeal was concerned with the exercise of discretion of the sentencer in the fixing of the sentence. Here, the appeal goes not to the exercise of that discretion, but to error of law going to the foundation for the discretion. It is with regret that I must hold that the power of the Court referred to in that case is not available.

[9] I have considered the "double jeopardy" principle referred to in *R v Tait and Bartley* (1979) 24 ALR 473 at p 476-477, often enough referred to in connection with Crown appeals in the Territory and the comments thereon

made by King CJ in *R v Williams* (1981) 28 SASR 362 at p 363. However, again those cases are distinguishable because of the nature of the error in this case. The basis of the appeal does not simply lie in a ground which was not argued in the Court below. It lies in the power of that Court to entertain the argument at all.

[10] The respondent was not before the Court of Summary Jurisdiction to be sentenced in respect of a single property offence. To consider whether exceptional circumstances had been made out was irrelevant.

[11] The penalty imposed by the Court of Summary Jurisdiction is quashed. The respondent is sentenced to 14 days imprisonment pursuant to s 78A(1) of the Sentencing Act.

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