Eupene v Hales [2000] NTCA 9

PARTIES:	SAMUEL EUPENE
	v
	PETER WILLIAM HALES
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 80 of 1999 (9823301)
DELIVERED:	4 September 2000
HEARING DATES:	3 March and 26 May 2000
JUDGMENT OF:	MARTIN CJ, ANGEL and THOMAS JJ

CATCHWORDS:

APPEAL – GENERAL PRINCIPLES – CRIMINAL LAW – PROCEDURE – PLEAS
Whether Crown facts contained unequivocal proof of offence charged – whether plea of guilty amounts to an unequivocal admission of guilt – whether court should reject plea

Supreme Court Act (NT) s 21

Stewart [1960] VR 106, considered.
Inglis [1917] VR 672 at 674, 676; *Maxwell* (1996) 70 ALJR 324 at 3209, 335 – 37; *R v Fonyodi* [1963] VR 86 at 87, referred to.
Ferrell v Burrows (1973) 4 SASR 416 compared with *Murphy* [1965] VR 187 at 191.

JUDICIAL PRONOUNCEMENT
Whether "the offence was trivial in nature"

Sentencing Act 1995 (NT) ss 78A(6B), 78A(6C) and s 78A(6C)(a). See also s 5(1)(c) and Schedule 1.
Summary Offences Act 1923 (NT) s 61.

R v Torres SCNT, 19 August 1999, unreported, followed.
Curnow v Pryce (1999) 131 NTR1, not followed.
Walden v Hensler (1987) 163 CLR 561 at 577 and 595, considered.

REPRESENTATION:

Counsel:

Appellant:	J Tippett
Respondent:	R Wild QC and J Blokland

Solicitors:

Appellant:	De Silva Hebron
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Ang20005
Number of pages:	29

Ang20005

IN THE FULL COURT OF THE
SUPREME COURT OF THE
NORTHERN TERRITORY
OF AUSTRALIA

Eupene v Hales [2000] NTCA 9
No. JA 80/1999 (9823301)

BETWEEN:

SAMUEL EUPENE
Appellant

AND:

PETER WILLIAM HALES
Respondent

CORAM: MARTIN CJ, ANGEL and THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 4 September 2000)

MARTIN CJ:

[1] I have had the benefit of the draft reasons for judgment of Angel J.

[2] My concern in this matter was that the agreed facts contained no reference to who held the reasonable suspicion of the property having been stolen or unlawfully obtained, when that suspicion arose or the basis of it. However, the deficiency was made up by a volunteered admission made by the appellant's counsel before the Court of Summary Jurisdiction (AB p 20). I am now satisfied that the appellant was aware of that element of the offence when he entered his plea, and that he has admitted it.

[3] In my opinion, it is not within the power of this Court to order as proposed by the other members of the Court. The proceedings in the Court of Summary Jurisdiction were concluded when the appellant was found guilty, convicted and sentenced in the manner prescribed by law. *Maxwell v The Queen* (1996) 70 ALJR 324 demonstrates that when those judgments and orders are made the case is finalised, subject only to any right of appeal. There is an appeal against conviction in this case, but not going to the merits of the finding of guilt of the offence charged. It raises questions in relation to the circumstances in which a conviction could be avoided in the sentencing process (s 78A(6) and s 78A(6C) *Sentencing Act* 1995 (NT)).

[4] It was only the learned Magistrate who had power to intervene and invite a change of plea. That was not done. The appellant was given the opportunity before this Court to apply for relief by way of an order setting aside the finding of guilt, and expressly declined to do so. Whether or not this Court had such power if application had been made has not been determined. The appellant is prepared to put forward the circumstances as to his finding of the property by way of submission in mitigation, but not to advance the same by way of evidence in defence of the charge.

[5] *Maxwell's* case is also a helpful authority in my view going to the question of prosecutorial discretion.

[6] Since the other members of the Court would set the conviction aside and remit the matter for hearing on the grounds which they express, I do not

think that it is desirable that I should express any views about the matter raised on the appeal.

ANGEL J:

[7] This is a Full Court reference pursuant to s 21 Supreme Court Act 1979 (NT).

[8] On 19 October 1999 in the Darwin Court of Summary Jurisdiction the appellant pleaded guilty to a charge that on 30 October 1998 at Darwin he did have in his custody seven pearls which at a time before making the charge were reasonably suspected of having been stolen or otherwise unlawfully obtained, contrary to s 61 Summary Offences Act (NT). He was convicted and a mandatory sentence of 14 days imprisonment was imposed pursuant to s 78A Sentencing Act 1995 (NT). The learned Stipendiary Magistrate who heard the matter held there were no exceptional circumstances such as to justify not imposing the mandatory sentence of imprisonment. He said:

> "I have no hesitation in saying that but for the provisions of s 78A of the Sentencing Act, I would not contemplate sentencing this conviction free young man to gaol".

[9] The sole ground of appeal to the Supreme Court from which the reference to this Court has proceeded was that the learned Magistrate erred in failing to find that there were exceptional circumstances as contemplated by the Sentencing Act.

[10] In the course of the hearing members of this Court questioned whether the admitted Crown facts before the learned Magistrate contained proof of the offence charged. Counsel for the appellant indicated that the appellant had no wish to change his plea or challenge the conviction. The Court was informed that in the event the conviction under the Summary Offences Act was set aside, the Director of Public Prosecutions intended to proceed with a charge of stealing under s 210 Criminal Code Act 1983 (NT) which had previously been withdrawn.

[11] It is not suggested that the appellant's plea of guilty in the present case was made by a material mistake but for which it would not have been made, see *Stewart* [1960] VR 106. The appellant's plea of guilty appears to have been a tactical plea. It constituted an admission of all the essential elements of the offence charged. In *Inglis* [1917] VR 672 at 674, Madden CJ said that if after a plea the Court considers that on any point of law there is no evidence to support the charge the proper course is for the Court to advise the accused to withdraw his plea to enable the facts to be examined, but that if the accused does not withdraw his plea then that must be considered as final. The learned Chief Justice observed that an accused could not be compelled to do anything against his will. Cussen J in the same case (at 676) said that if a prisoner upon having been advised to withdraw his plea of guilty did not withdraw his plea "the judge might seriously consider whether he should not empanel a jury to try whether the prisoner was sane".

[12] The circumstances in which a court might reject a plea of guilty were discussed in *Maxwell* (1996) 70 ALJR 324. Dawson and McHugh JJ (at 329) said:

> "An accused is entitled to plead guilty to an offence with which he is charged and, if he does so, the plea will constitute an admission of all the essential elements of the offence. Of course, if the trial judge forms the view that the evidence does not support the charge or that for any other reason the charge is not supportable, he should advise the accused to withdraw his plea and plead not guilty. But he cannot compel an accused to do so and if the accused refuses, the plea must be considered final, subject only to the discretion of the judge to grant leave to change the plea to one of not guilty at any time before the matter is disposed of by sentence or otherwise.
>
> The plea of guilty must however be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered. But otherwise an accused may insist upon pleading guilty. That is illustrated by *R v Martin* (1904) 21 WN (NSW) 233 at 235 where the trial judge, the Chief Justice, suggested that the accused should enter a plea of not guilty. The accused declined to do so and insisted upon pleading guilty. Upon a case stated by the Chief Justice, the judgment of the court was delivered by Owen J, who said:
>
> > 'It has been said that a plea of not guilty should have been entered, but it appears to me that where a man who evidently knows what he is about insists upon recording a plea of guilty, the judge cannot interfere. If there is any doubt as to the nature of the plea, or any reason to suppose that the accused is not thoroughly aware of what he is doing, a plea of not guilty should be entered; but I can see no reason why the Chief Justice should have taken that course in this instance.'.".

Toohey J (at 335) said:

> "The court has the power to allow a plea of guilty to be withdrawn at any time before sentence. This is so even where the jury has formally returned a guilty verdict by direction following a change of plea by the accused. A defective plea of guilty may be withdrawn and a conviction set aside on various grounds. This is part of the inherent jurisdiction of courts to see that justice is done and some, if not most, of the decisions mentioned are explicable on the footing that, in the view of the court, the accused lacked full understanding of the plea or there was some other vitiating factor. To this end the court may refuse to accept a guilty plea or direct that a not guilty plea be entered."

At 336, he further said:

> "However, it is one thing to say that the court may permit an accused to withdraw a plea of guilty in the various circumstances mentioned. It is another to say that the court may reject a plea of guilty to a lesser offence …… when the accused wishes to maintain that plea. The interests of the accused, which feature in the decisions mentioned earlier, do not then provide a basis for rejecting the plea. Where then does any power to reject the plea reside? Is it part of some general rule that in all circumstances the court may reject a plea of guilty before sentence? If it is part of such a rule, it must be on the basis that the interests of justice so require."

And (at 337)

> "While the court cannot insist that the Crown proceed with a particular charge, there are circumstances in which it is empowered to reject a plea of guilty where the consequence is to acquit the accused of a more serious charge on which he or she was indicted. The court's power to act in the interests of justice permits it to go that far. It is true that the Crown may elect to call no evidence on the more serious charge or it may enter a nolle prosequi. In that event the court can do little more than suggest that careful consideration should be given to the course the Crown proposes to adopt. However in *R v Ferguson; Ex parte Attorney-General* held that the court has an exceptional power to refuse to return an indictment to enable a nolle prosequi to be endorsed if that would result in an abuse of process.

……

"As the Privy Council observed in *Richards v The Queen* [1993] AC 217 at 226-227

'[W]hen a plea of guilty to a lesser offence than that charged has initially been accepted by the prosecutor with the approval of the court, there can . . . be no finality in that 'acceptance' until sentence is passed.'

While Gleeson CJ spoke of a 'residual discretion' in the trial judge to reject the lesser plea, it seems to me preferable to emphasise the existence of a power, to be exercised when the interests of justice so require.".

Gaudron and Gummow JJ (at 342-43) said:

"The first qualification to what has been said as to the rejection of a plea accepted by a prosecutor ….. is that it is a different question entirely whether the plea amounts to a confession of guilt or, for some other reason, there is reason to think the accused is not guilty of the offence to which the plea has been offered. In such circumstances, it is always open to a court to reject a plea. And that must be so whether the offence is the offence charged in the indictment or a lesser offence to which a plea has been accepted ….. .

The second qualification is that, of necessity, a court always retains power to prevent abuse of its process, including its criminal process. It is conceivable that, in some circumstances, it might be an abuse of process for a court to proceed on a plea accepted by a prosecutor ….. . Should a question arise in that regard, it will also be separate and distinct from the question whether the plea should be rejected."

[13] In my opinion the agreed Crown facts did not contain unequivocal proof of the offence charged. There being reason to think the appellant is not guilty of the offence charged and that his plea of guilty did not amount to an unequivocal admission of guilt I am of the opinion his plea should have been rejected.

[14] S 61 Summary Offences Act provides, inter alia, as follows:-

> "(2) A person who –
>
> (a) has in that person's custody any personal property;
>
> .....
>
> being personal property which, at any time before the making of a charge for an offence against this section in respect of the personal property, is reasonably suspected of having been stolen or otherwise unlawfully obtained is guilty of an offence:
>
> Penalty: $2,000 or imprisonment for 12 months
>
> (3) It is a defence to a charge for an offence against subsection (2) if the defendant gives to the court a satisfactory account as to how the defendant obtained the personal property referred to in the charge."

[15] The admitted Crown facts before the learned Stipendiary Magistrate appear from the following extract of the transcript:-

> "PROSECUTOR: At about 6.20 pm on Friday, 30 October 1998, the defendant attended at flat 3, number 9 Delatour Street, Coconut Grove to visit the occupant. At the time, police were conducting a search of the premises in relation to a drug-related matter.
>
> A search of the defendant's bag revealed seven pearls in a tobacco tin. The pearls were wrapped in tissue paper inside the tin. The defendant was arrested and later interviewed in relation to the pearls. He stated he had found the pearls on the evening of Wednesday 28 October 1998 whilst he was walking along Vestey's Beach.
>
> HIS WORSHIP: Sorry, what date in October?
>
> PROSECUTOR: The 28th, sir, two days before. The defendant stated the pearls were contained in a small plastic bag which, in turn, was in a larger plastic bag. The larger bag was located wedged in a fork in a tree.

HIS WORSHIP: By the defendant or by the police?

PROSECUTOR: Found by the defendant, sir.

HIS WORSHIP: Yes, right.

PROSECUTOR: The defendant then removed the pearls from the bags and placed them into his pocket. The defendant then took the pearls to his residence where he cleaned them and placed them in the tobacco tin. The defendant also stated that the pearls had been in his bag since Wednesday evening.

He stated that they looked expensive and he thought they were worth a lot of money and that he would just keep them. At no time did the defendant make any attempts to locate the owner, nor did he have permission to retain possession of the pearls.

At the conclusion of the interview, the defendant was advised he would receive a summons. Sir, the pearls are valued at $1,000 and ownership of the pearls, as yet, cannot be established."

[16] In the course of the hearing counsel for the appellant had the following exchange with the learned Stipendiary Magistrate:

"COUNSEL: Okay. Your Worship, there is nothing in relation to the charge of breaching section 61 that needs to involve my client in the theft of these pearls. That's not the issue. Okay. In relation to the commission of the offence against section 61 itself, Your Worship, what has occurred here on the facts before you is the finding of these pearls, taking of the pearls home, the cleaning of them and, less than two days later, being found by police.

He found them on the Wednesday evening. He agreed, when questions were put to him, Your Worship – and that is the context – that is the context in which these comments that were in the facts before Your Worship – he stated that they looked expensive and he thought they were worth a lot of money and that he would just keep them.

Those matters were put in the record of interview to Mr Eupene and he agreed with them. They aren't his exact words. Your Worship, he instructs me that he found them; they looked valuable; he didn't know whether or not they were valuable; he took them home; he

cleaned them. He did nothing else with them whatsoever other than to put them in the tin and throw them in his bag.

He tells me, Your Worship, that he didn't really think about them again. He's gone off to work on Thursday, he's gone off to work again on Friday, and then after work on Friday he goes to a friend's place and there are the police. He had that bag that they'd thrown them in, Your Worship. That's the bag he uses every day; it's just his normal bag.

Your Worship, he does - - -

HIS WORSHIP: But why do you say that any of those matters are mitigating circumstances reducing the extent to which he's to blame?

COUNSEL: Yes, if I can – yes, I'll get to that, Your Worship. He doesn't say that at the time he was spoken to or searched by police that he was on his way to Berrimah Police Station. That's not what he's saying. But what he does say, Your Worship, is that upon finding them and soon after subsequently being caught, he had formed no intention in respect of the unlawful – sorry, I withdraw that, Your Worship.

In respect of the continued attempt to try and keep these goods away from the owner on a permanent basis.

YOUR WORSHIP: We formed no intention to keep them permanently and to permanently deprive.

COUNSEL: Yes, Your Worship, those are my instructions. Your Worship, it is true that he cleaned them, but he didn't, Your Worship, make any attempt to try and change the form of these pearls; to try and change their identity so as to make them difficult to try and return to the owner. He didn't make any attempt to make them, say, for example, into a pearl necklace for his mum or his girlfriend.

He didn't try to sell them, Your Worship. What he has done is simply picked them up, cleaned them off and thrown them in his bag and not thought about them again … .".

[17] The learned Magistrate accepted the appellant's explanation as to how he found the pearls. It appears that it was <u>after</u> the pearls came into the

possession of the appellant that the appellant decided to keep them, if at all. It was the appellant's state of mind at the time the appellant first obtained the pearls that was the critical issue: *Ferrell v Burrows* (1973) 4 SASR 416, and that issue was never squarely addressed in the Court of Summary Jurisdiction. In the present case the appellant's account as to how he found the pearls provided a defence to the charge, that is, he innocently obtained them. Given the failure to address the real question and not being satisfied the plea of guilty arose wholly or partially from the appellant's consciousness of guilt of the offence charged, cf *Murphy* [1965] VR 187 at 191 per Sholl J, I am of the opinion the appeal should be allowed, the conviction set aside and the matter remitted for a rehearing.

[18] This conclusion means it is unnecessary to decide the principal questions argued on the reference namely, whether there were exceptional circumstances as contemplated by s 78A (6B) and (6C) Sentencing Act such that would enable the appellant to escape the mandatory sentencing provisions of s 78A(1) Sentencing Act. The matter having been fully argued I will nevertheless express a view.

[19] S 78A provides, inter alia, as follows:

> "(1) Where –
>
> (a) an offender who has been found guilty of one or more property offences is before a court to be sentenced in respect of those offences; and

(b) the offender has not on any previous day been sentenced under a section by that court or any other court in respect of one or more property offences,

subject to subsection (6B), the court must record a conviction and order the offender to serve one term of imprisonment of not less than 14 days in respect of the offences referred to in paragraph (a).

……

(6B) A court is not required to make an order under subsection (1) if exceptional circumstances for not doing so exist and may instead impose any other sentence or make any other order authorised by this or any other Act.

(6C) For the purposes of subsection (6B), exceptional circumstances will only exist if the offender is before the court to be sentenced in respect of a single property offence, the offender has not on any previous day been dealt with by a court under subsection (6B) and the court is satisfied of all the following:

(a) that the offence was trivial in nature;

(b) that the offender has made, or has made reasonable efforts to make, full restitution;

(c) that the offender is otherwise of good character and that there were mitigating circumstances (which it is noted do not include intoxication due to alcohol or the use of illegal drugs) that significantly reduce the extent to which the offender is to blame for the commission of the offence and demonstrate that the commission of the offence was an aberration from the offender's usual behaviour;

(d) that the offender co-operated with law enforcement agencies in the investigation of the offence,

the onus of proving the existence of the matters referred to in paragraphs (a), (b), (c) and (d) being on the offender".

[20] The learned Stipendiary Magistrate found that the offence was not trivial in nature and that there were no mitigating circumstances that significantly

reduced the extent to which the appellant was to blame for the commission of the offence.

[21] On the question of triviality we were referred to *Torres* (Bailey J, unreported 19 August 1999) and *Curnow v Pryce* (1999) 131 NTR 1. In the latter case Mildren J (at 6) held that an offence would be "trivial in nature if the objective circumstances of the offence were such that a term of imprisonment would probably be unjust and disproportionate to the objective circumstances of the offence".

[22] I am, with respect, unable to agree with that conclusion. The courts daily make non custodial orders with respect to offences which are far from trivial. *Curnow v Pryce*, supra, should be overruled.

[23] In my opinion, an offence to which the mandatory sentencing provisions apply can be said to be trivial in nature if the offender's conduct constitutes a petty example or instance of the offence as defined by the Legislature.

[24] For the reasons expressed earlier I would allow the appeal, set aside the sentence and conviction and remit the matter back to the lower court for a rehearing.

THOMAS J:

[25] This matter comes before the Full Court of the Supreme Court by way of a reference pursuant to s 21 of the Supreme Court Act 1979 (NT).

[26] The reference followed an appeal to the Supreme Court from a decision of a stipendiary magistrate delivered on 19 October 1999.

[27] On 6 October 1999 the appellant entered a plea of guilty to the following charge that:

> "On the 30th day of October 1998 at Darwin in the Northern Territory of Australia.
>
> 2. did have in your custody, personal property, namely, 7 x pearls, which at the time before making the charge was reasonably suspected of having been stolen or otherwise unlawfully obtained:
>
> Contrary to Section 61 of the Summary Offences Act."

[28] The following charge was withdrawn:

> "On the 28th October 1998 at Darwin in the Northern Territory of Australia
>
> 1. did steal 7 x pearls, valued at $2,634-00, the property of a person unknown:
>
> Contrary to Section 210 of the Criminal Code."

[29] With respect to the charge under s 61 of the Summary Offences Act 1923 (NT) the learned stipendiary magistrate convicted the appellant and imposed the minimum mandatory sentence pursuant to s 78A of the Sentencing Act 1995 (NT) of 14 days imprisonment.

[30] The learned stipendiary magistrate heard submissions and made findings relevant to s 78A(6C) of the Sentencing Act as to whether or not there were exceptional circumstances and thus provide a reason for not imposing the mandatory sentence of imprisonment.

[31] The learned stipendiary magistrate found he could not be satisfied of the matters provided in s 78A(6C) of the Sentencing Act and that he had no alternative other than to impose the mandatory 14 days imprisonment.

[32] The learned stipendiary magistrate stated in the course of his reasons for decision (t/p 43):

> "I have no hesitation in saying that but for the provisions of section 78A of the Sentencing Act, I would not contemplate sending this conviction free young man to gaol."

[33] The Notice of Appeal to the Supreme Court was on the following ground:

> "1. That the Magistrate erred in finding that the facts of the matter did not fall within the exceptional circumstances provisions of the Sentencing Act."

[34] The reference to the Full Court proceeded on this basis. At the completion of submissions from both counsel for the appellant and the respondent on this ground the Full Court advised that the decision was reserved.

[35] Subsequently the associate to the Chief Justice on behalf of the Full Court forwarded a letter dated 13 March 2000 to both counsel, which omitting formal parts, provides as follows:

"In the course of considering this matter, members of the Full Court have noted that:

1. there was nothing in the Statement of Facts going to who held the reasonable suspicion of the property having been stolen or unlawfully obtained, when that suspicion arose and the basis of it;

2. no regard appears to have been had to the provisions of s 61(3) of the *Summary Offences Act* as to how the defendant obtained the property referred to in the charge;

3. the reason for the appellant's arrest prior to being interviewed in relation to the pearls is not disclosed.

It appears that the agreed facts may not disclose an offence and that the appellant may have a good defence to the charge. Notwithstanding the plea of guilty, it may be that the learned Magistrate should have advised a change of plea. If that be so, and no decision has been made in that regard, it may be that the appellant should consider the course which he wishes to adopt.

In drawing attention to these matters, the Court has referred to the following authorities, *Ferrell v Burrows* (1973) 4 SASR 416, *Griffiths v The King* (1932) 23 Cr App R 153; *R v Inglis* [1917] VLR 672; *R v Stewart* [1960] VR 106 and *R v Fonyodi* [1963] VR 86.

The parties are invited to make further submissions in the light of these matters at a time to be fixed by reference to the Registrar."

[36] When the matter was re-listed for further submissions, counsel for the appellant, Mr Jon Tippett, indicated that he had instructions from the appellant not to challenge the conviction for the offence. The instructions on which counsel for the appellant proceeded were to the effect that the Full Court be advised the appellant did not wish to put further submissions going to the issue of whether the elements of the offence had been established. The appellant sought to have the matter proceed on the basis of the earlier submissions as to the application of s 78A(6B) and (6C) of the Sentencing Act.

[37] The Court was informed that the appellant was concerned if there was a finding that the elements of the offence under the Summary Offences Act had not been established then the Crown would proceed in the Court of Summary Jurisdiction with the charge of stealing under s 210 of the Criminal Code Act 1983 (NT) previously withdrawn.

[38] Counsel for the Crown, Mr Rex Wild QC, submitted that in fact the elements of the offence under s 61 of the Summary Offences Act had been established and the appellant had been rightly convicted. He referred the Court to the finding made by the learned stipendiary magistrate at t/p 39 and quoted in full in paragraph 47 of these reasons for judgment.

[39] I propose to deal firstly with whether the elements of the offence under s 61 of the Summary Offences Act were established.

[40] Section 61(2) of the Summary Offences Act provides as follows:

> "(2) A person who –
>
> (a) has in that person's custody any personal property;
>
> (b) has in the custody of another person any personal property;
>
> (c) has in or on any premises any personal property; or
>
> (d) gives any personal property to a person who is not lawfully entitled to it,
>
> being personal property which, at any time before the making of a charge for an offence against this section in respect of the personal property, is reasonably suspected of having been stolen or otherwise unlawfully obtained, is guilty of an offence."

[41] The Crown facts which were agreed were as follows:

[42] About 6.20 pm on Friday 30 October 1998, the defendant attended at flat 3 number 9 Delatour Street, Coconut Grove, to visit the occupant. At the time, police were conducting a search of the premises in relation to a drug related matter.

[43] A search of the defendant's bag revealed seven pearls in a tobacco tin. The pearls were wrapped in tissue paper inside the tin. The defendant was arrested and later interviewed in relation to the pearls. He stated he had found the pearls on the evening of Wednesday 28 October 1998 whilst he was walking along Vestey's Beach. The defendant stated the pearls were contained in a small plastic bag which in turn was in a larger plastic bag. The larger bag was located in a fork in a tree. These were found by the defendant who removed the pearls from the bags and placed them into his pocket. The defendant then took the pearls to his residence where he cleaned them and placed them in the tobacco tin. The defendant also stated that the pearls had been in his bag since Wednesday evening.

[44] He stated that they looked expensive and he thought they were worth a lot of money and that he would just keep them. At no time did the defendant make any attempts to locate the owner, nor did he have permission to retain possession of the pearls.

[45] At the conclusion of the interview, the defendant was advised he would receive a summons. The pearls are valued at $1000. Ownership of the pearls cannot be established.

[46] This concludes the agreed facts. No reason is given as to why the defendant was arrested and no reference made to a police officer holding a reasonable suspicion the pearls were stolen or otherwise unlawfully obtained before the making of a charge for an offence against this section.

[47] The learned stipendiary magistrate made his findings of facts as follows (t/p 39):

> "The relevant admitted facts of the police precis can be summarised in the following terms; upon an occasion of the police executing a search warrant at the flat of a friend of the defendant on 30 October 1998, a police officer located in a tobacco tin, in a carrier bag owned by the defendant, seven pearls. Upon being questioned as to how they'd come into his possession, the belief being formed by the officer that they were reasonably believed stolen.
>
> The defendant indicated that on 28 October 1998, he'd been walking at Vestey's beach. Whilst he was so doing, he'd located in the fork of a tree, a small bag inside a larger bag and ultimately found the seven pearls in question. He decided to keep them. He took them to his residence. He cleaned them and put them in a tobacco tin. He thought they were worth a lot of money and he made no attempt to locate the owner.
>
> The seven pearls are valued at $1000 as at 6 October 1999 when the matter came before the court. No person had been located and identified as the owner. The pearls in question at this time remaining in the possession of the police."

[48] The difficulty I have with the matter is that on the Crown facts as agreed there was no statement to the effect that the police officer who arrested the appellant reasonably suspected the pearls had been stolen or otherwise unlawfully obtained.

[49] Neither was there a statement of fact to the effect that before the making of a charge for an offence against this section a police officer reasonably

suspected the pearls were stolen. The suspicion that goods were reasonably suspected of being stolen is an essential element of the offence under s 61 of the Summary Offences Act.

[50] At t/p 18 there is the following interchange between counsel for the appellant and the learned stipendiary magistrate:

> "MS TRUMAN: No, but, Your Worship, what you have to remember, in my respectful submission to you, in relation to this offence section 61 is unlawful possession.
>
> HIS WORSHIP: Yes.
>
> MS TRUMAN: It looks at whether the person, prior to laying the charge, that is the police officer, had a reasonable suspicion.
>
> HIS WORSHIP: Yes.
>
> MS TRUMAN: He did, Your Worship. Okay? He's then spoken to my client. My client has given him an explanation, but tied in with that explanation, Your Worship, is an admission on behalf of my client that he's made no attempt to try and discover the owner."

[51] The learned stipendiary magistrate makes reference (t/p 25) to the defence adverting to police suspecting the appellant of having stolen goods.

[52] This would appear to be an admission by counsel for the appellant that the police officer did have a reasonable suspicion. However, there is still no clear statement as to what the police officer had a reasonable suspicion about, or the basis of his suspicion. The holding of a reasonable suspicion by the police officer that the pearls were stolen or otherwise unlawfully obtained being an essential element of the offence I consider that should be clearly stated by the Crown and accepted by the defence or otherwise properly proved without any room for ambiguity. The way in which it was

raised in the Court of Summary Jurisdiction does not in my opinion satisfactorily establish an essential element of the charge.

[53] However, the more important deficiency in the agreed Crown facts is dealt with by Angel J in his reasons for decision.

[54] I agree that the issue of the appellant's state of mind at the time the appellant first obtained the pearls was never squarely addressed in the Court of Summary Jurisdiction. The appellant provided an account that he innocently found the pearls. The appellant did not give evidence. On the agreed Crown facts the appellant's account of how he found the pearls is not in dispute. His explanation was accepted by the magistrate. *Ferrell v Burrows* (1973) 4 SASR 416 is authority for the principle that it is the appellant's state of mind when he first obtained the pearls that is the critical issue. The explanation given by the appellant as to how he found the pearls could have established a defence to the charge. Section 61(3) of the Summary Offences Act provides as follows:

> "It is a defence to a charge for an offence against subsection (2) if the defendant gives to the court a satisfactory account as to how the defendant obtained the personal property referred to in the charge."

[55] The appellant's explanation to police as to how he found the pearls not being in dispute means the issue of his state of mind when he first obtained the pearls has not been adequately addressed.

[56] I have concluded that the learned stipendiary magistrate did not have sufficient material before him to find the offence proved. If there was no material upon which to find the offence proved then there is no jurisdiction to impose a penalty of imprisonment because the defendant could not in law have been convicted of the offence charged (*R v Stewart* [1960] VR 106 Herring CJ and O'Bryan J at 108):

> "It is on this material that this Court has to consider the application for leave to appeal against conviction. That the Court can entertain an appeal against a conviction upon a plea of guilty, is undoubted, but it is only in very exceptional circumstances that it can do so. Halsbury, (3rd ed.), vol. 10, p. 521. Avory J., when delivering the judgment of the Court of Criminal Appeal in *R. v. Forde*, [1923] K.B. 400, put the matter thus, at p. 403: 'A plea of guilty having been recorded, this Court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit that he was guilty of it, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged.'"

See also *R v Fonyodi* [1963] VR 86 at 87.

[57] The whole focus of the submissions made before the learned stipendiary magistrate was whether this matter falls within the provisions of s 78A(6B) and (6C) of the Sentencing Act with particular emphasis on the submissions as to whether the offence was trivial in nature.

[58] The appellant came before the Full Court for a pronouncement on this issue.

[59] Mr Tippett, on behalf of his client, indicated he was in a most difficult position because his client had instructed him not to pursue the point raised as to whether an offence under s 61 of the Summary Offences Act had been

established. The appellant seeks to have the matter proceed solely on the interpretation of s 78A(6B) and (6C) of the Sentencing Act. The reason at least in part for this is because the Crown have indicated to the appellant that if the Full Court concludes there was no offence established under s 61 of the Summary Offences Act then the Crown will proceed with the previously withdrawn charge of stealing under s 210 of the Criminal Code. Whether or not the Crown does proceed with the alternate charge of stealing is a matter for prosecutorial discretion.

[60] However, I consider the issue as to whether or not the offence under s 61 of the Summary Offences Act is proved is so fundamental that it would be contrary to the interests of the administration of justice to allow the matter to proceed on a false basis.

[61] An offence is either proved on the admitted or proven facts in a plea of guilty or it is not. If it is not, then there is no lawful reason to impose a penalty.

[62] In this matter, I am not satisfied that the admitted facts disclose an offence under s 61 of the Summary Offences Act.

[63] I would allow the appeal, set aside the conviction and sentence and remit the matter to the Court of Summary Jurisdiction for rehearing.

[64] Although I would allow the appeal and remit the matter for rehearing, the focus of the argument before the Full Court of the Supreme Court was as to the meaning of the words "that the offence was trivial in nature".

[65] Accordingly, I propose to continue on to express an opinion on the issue that was argued.

[66] Section 78A(6B) and (6C) of the Sentencing Act provides as follows:

> "(6B) A court is not required to make an order under subsection (1) if exceptional circumstances for not doing so exist and may instead impose any other sentence or make any other order authorised by this or any other Act.
>
> (6C) For the purposes of subsection (6B), exceptional circumstances will only exist if the offender is before the court to be sentenced in respect of a single property offence, the offender has not on any previous day been dealt with by a court under subsection (6B) and the court is satisfied of all of the following:
>
> (a) that the offence was trivial in nature;
>
> (b) that the offender has made, or has made reasonable efforts to make, full restitution;
>
> (c) that the offender is otherwise of good character and that there were mitigating circumstances (which it is noted do not include intoxication due to alcohol or the use of illegal drugs) that significantly reduce the extent to which the offender is to blame for the commission of the offence and demonstrate that the commission of the offence was an aberration from the offender's usual behaviour;
>
> (d) that the offender co-operated with law enforcement agencies in the investigation of the offence,
>
> the onus of proving the existence of the matters referred to in paragraphs (a), (b), (c) and (b) being on the offender."

[67] In his submission counsel for the appellant, Mr Tippett, contended that the learned stipendiary magistrate adopted the approach of Bailey J in the case of *R v Torres* (SC (NT), 19 August 1999, unreported). On the submission of counsel for the appellant the correct approach to the provision of the Act is to be found in the reasoning of Mildren J in *Curnow v Pryce* (1999) 131 NTR 1 at 6 paragraph 20 which states as follows:

> "The fundamental principle of sentencing to be applied in every case, subject to any mandatory minimum fixed by the legislature, is the principle of proportionality in sentencing: see *Veen v The Queen* (No. 2) (1988) 164 CLR 465. Given the history and purpose of the provision, the fact that a full range of sentencing options are theoretically open, the fact that ss78A(6B) and (6C) are remedial provisions, and the other factors I have mentioned above, I consider that the intention of the legislature is that the courts are at liberty to conclude, if subparagraphs (b), (c) and (d) are made out, that the offence is 'trivial in nature' if the objective circumstances of the offence are such that a term of imprisonment would probably be unjust and disappropriate to the objective circumstances of the offence. Having regard to s40(3) of the *Sentencing Act*, an offence would not be trivial in nature if the objective circumstances probably warranted a sentence of imprisonment, albeit suspended. Applying that test to the instant offence, I consider that the conclusion should have been drawn by the learned Magistrate that the offence in this case was trivial in nature."

[68] Whilst this is a very attractive argument, I am not persuaded that this is the law. The appellant is not able to provide any other authority for the proposition that an offence is "trivial in nature" if the objective circumstances of the offence are such that a term of imprisonment would probably be unjust and disproportionate to the objective circumstances of the offence. I agree with the argument of counsel for the Crown, Mr Wild

QC, who supports the finding of the magistrate who in turn had applied the reasoning of Bailey J in *R v Torres* (supra).

[69] The Sentencing Act imposes a scheme of mandatory sentencing for designated offences. The offence of unlawful possession pursuant to s 61 of the Summary Offences Act is one of these offences (see Schedule 1 of the Act).

[70] Pursuant to the Sentencing Amendment Act (No. 2) 1999 (NT), Act No. 33 of 1999, the Act was amended and provided (78A(6B)) that a court may exercise its' sentencing discretion without regard to the mandatory sentencing scheme when exceptional circumstances exist. Section 78A(6C) as set out herein provides those exceptional circumstances.

[71] The High Court have considered the meaning of the word "trivial" in the matter of *Walden v Hensler* (1987) 163 CLR 561. This was a consideration of s 657A of the Queensland Criminal Code, the relevant part of which was:

> "(1) Where a person charged before a Court or justices has been found guilty of or has pleaded that he is guilty of an offence punishable by that Court or those justices and the Court thinks or the justices think that having regard to –
>
> …….
>
> (b) the trivial nature of the offence;"

Brennan J at 577 said:

> "….. Triviality must be ascertained by reference to the conduct which constitutes the offence for which the offender is liable to be

> convicted and to the actual circumstances in which the offence is committed. ….."

and Dawson J at 595:

> "….. the offence to be considered in determining triviality is clearly the offence committed by the offender and not the offence in the abstract. ….."

[72] With respect I adopt the approach of Bailey J in *R v Torres* (supra) (t/p 37):

> "It is not necessary to attempt to define trivial in nature in any detail, for present purposes. Indeed, if it is possible at all to provide any more than the broadest guidelines for interpreting that phrase. I agree, with respect, with the approach of Brennan and Dawson JJ, that an assessment of whether something is trivial can be made only in the light of particular circumstances."

[73] I do not think it appropriate to attempt to define "trivial" any further. A trivial offence in the terms already discussed is either trivial on the face of the facts found by a court or it is not. Such a finding will always depend on the circumstances of the case.

[74] The proper test to apply is to look at the objective circumstances of the offence without regard to the result or consequences of a finding that such offence is not trivial. The effect of the decision of Mildren J is that any offence which, on its objective circumstances, does not justify a sentence of imprisonment whether suspended or otherwise is trivial in nature. I do not agree with this approach. The courts deal with a whole range of serious or non-trivial offences and impose a range of dispositions including fines or conditional orders.

[75] Mr Tippett further argued that trivial means taking into account the consequences of the penalty when deciding whether or not an offence is trivial. This argument is based on a reading of s 5(1)(a) of the Sentencing Act which reads:

> "(1) The only purposes for which sentences may be imposed on an offender are –
>
> (a) to punish the offender to an extent or in a way that is just in all the circumstances;"

[76] It is Mr Tippett's argument that s 5(1)(a) takes a pre-eminent position in the context of the Sentencing Act. That s 78A(6C) was a beneficial amendment which should be liberally interpreted. It is the appellant's argument that to send the appellant to gaol for this offence would not be "just in all the circumstances" and would fly in the face of the legislative purpose for which sentences are to be imposed.

[77] I do not agree with this submission. Section 5(1) of the Sentencing Act must be looked at in its entirety. Section 5(1) provides:

> **"5. Sentencing guidelines**
>
> (1) The only purposes for which sentences may be imposed on an offender are –
>
> (a) to punish the offender to an extent or in a way that is just in all the circumstances;
>
> (b) to provide conditions in the court's order that will help the offender to be rehabilitated;
>
> (c) to discourage the offender or other persons from committing the same or a similar offence;

(d) to make it clear that the community, acting through the court, does not approve of the sort of conduct in which the offender was involved;

(e) to protect the Territory community from the offender; or

(f) a combination of 2 or more of the purposes referred to in this subsection."

On a reading of the whole provision it is clear that there are a number of purposes for which sentences may be imposed on an offender of which (1)(a) is but one.

[78] I have indicated my view of the meaning of s 78A (6C)(a) "that the offence was trivial in nature". I do this to deal with the primary argument before the Full Court. I am aware there are other matters awaiting a decision of the Full Court on this issue.

[79] I confirm that for other reasons I would allow the appeal.

[80] The order I would make is to allow the appeal, set aside the conviction and sentence and remit the matter to the Court of Summary Jurisdiction for rehearing.

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