*Gorey v Winzar* [2001] NTSC 21

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| PARTIES: | GOREY, Jamsie<br><br>v<br><br>WINZAR, Kevin David |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION |
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| JUDGMENT OF: | MARTIN CJ |

**CATCHWORDS:**

APPEAL

Justices – appeal against sentence – possession of personal property reasonably suspected of being stolen or unlawfully obtained – mandatory sentencing – whether exceptional circumstances exist – whether offence trivial in nature – whether mitigating circumstances exist.

*Justice Act* 1928 (NT)
*Sentencing Act* 1995 (NT), s 78A(1), s 78A(6B) and s 78A(6C)
*Summary Offences Act* 1923 (NT), s 61

*R v Torres* (Bailey J, unreported, 18 August 1999), approved
*Curnow v Pryce* (1999) 131 NTR1, approved.
*Eupene v Hales* (2000) NTCA 9, considered.
*Walden v Hensler* (1987) 163 CLR 561, considered.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | D Conidi |
| Respondent: | R Noble |

*Solicitors:*

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| Appellant: | CAALAS |
| Respondent: | DPP |

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| Judgment category classification: | B |
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Mar0108

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

*Gorey v Winzar* [2001] NTSC 21
No. JA 14 of 2001

BETWEEN:

**JAMSIE GOREY**
Appellant

AND:

**KEVIN DAVID WINZAR**
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 4 April 2001)

[1] Appeal against sentence involving questions relating to the "exceptional circumstances" provisions under the Sentencing Act 1995 (NT) whereby the mandatory sentencing regime in relation to property offences might be avoided.

[2] The appellant was convicted before the Court of Summary Jurisdiction at Alice Springs on 6 December 2000 on his plea of guilty for that on 14 July 1998 at Alice Springs he did have in his custody personal property, namely a jacket, which at the time before making the charge was reasonably suspected of having been stolen or otherwise unlawfully obtained (Summary Offences Act 1923 (NT) s 61).

[3] The admitted facts relating to the offence were:

[4] At about 9.15pm on Tuesday 14 July 1998 an unknown person smashed a window of a motor vehicle in a car park adjacent to Anzac Hill in Alice Springs and removed a jacket from the car and gave it to the appellant. He was arrested a short time later. He was detained in custody because of his level of intoxication. At the time of the offence he was wearing the jacket, which was recovered. It was valued at $50.

[5] It is problematic whether on the agreed facts his Worship should have accepted the plea. There is nothing before the Court going to an essential element of the offence, that is, that the property was reasonably suspected of having been stolen before the laying of the charge. Whether such a belief existed, who held it and when it was formed, is not disclosed. Suspicion must attach to the property and not the person (*O'Sullivan v Tregaskis* [1948] SASR 12; clear evidence is required on the facts upon which the suspicion is formed to enable the Court to judge its reasonableness, *Dent v Hann* (1984) 56 ALR 271, *Nichols v Fleming* [1954] Tas SR 165).

[6] Counsel for the appellant informed the Court that when the police approached the appellant about the matter he was asked where he obtained the jacket and he told them that another person had given it to him; that he was then asked if he knew that the jacket was stolen and that he had replied "Yes, the person told me". Those admissions would make up for the deficiency.

[7] The appellant had not suffered any prior convictions and had not been in any trouble with the police after the date of that offence, a period well in excess of two years to the time the matter was before the Court. His mother informed the Court, through counsel, that the appellant was a "good boy" and helped her out at home in Ti Tree.

[8] The appellant was an Aboriginal person aged 18 years at the time of the offence. He was unemployed and received benefits of $280 per fortnight. On the occasion of the offence he had come to Alice Springs from Ti Tree where he normally lived with his family at a "bush camp". He was very intoxicated at the time of the offending. He had spent a total of 12 days in custody in relation to the matter, having failed to appear as required because of lack of transport or funds to pay a bus fare. Those matters were all conveyed to the Court through his counsel.

[9] In his sentencing remarks, his Worship noted the matters placed before him and, in addition, that the date of the offence fell in mid winter in Alice Springs (a notoriously cold time of year). His Worship noted that he must convict and sentence the offender to not less than 14 days imprisonment unless exceptional circumstances, as defined, were proved (Sentencing Act, s 78A(1), s 78A(6B) and s 78A(6C). The last of those provisions is as follows:

> "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 (d) being on the offender".

[10] In considering each of the matters referred to in that subsection, his Worship held:

(a) The appellant had not proved that the offence was "trivial in nature", reasoning that a jacket valued at $50 may be insignificant when compared with "$40,000 worth of motor vehicle", but not when compared with a "Smartie or a paper clip". No other mention was made of the nature of the offence.

(b) That the offender had made full restitution in that the jacket was recovered by the police when he was arrested.

(c) (i) that he was otherwise of good character (no prior convictions), and his mother's assertion that he was a good boy)

(ii) that there were no mitigating circumstances because he was intoxicated

(d) That he cooperated with law enforcement agencies and he made admissions to the police at the time.

[11] His Worship proceeded to convict and imposed a sentence of 14 days imprisonment, but took into account the time spent in custody

[12] The grounds of appeal are:

1. That the sentencing Magistrate erred in that he found that the offence was not trivial in nature.

2. That the sentencing Magistrate erred in that he found there were no mitigating circumstances that significantly reduced the extent to which the offender was to blame for the offence.

3. That the sentencing Magistrate erred in that he made no finding that the commission of the offence was an aberration from the offender's usual behaviour.

*Was the Offence Trivial in Nature?*

[13] The focus is on the nature of the offence, that is, the facts and circumstances which go to make up the offence, the particular qualities belonging to it. It is not the offence as such, for example, murder or failure to produce a driver's licence when required, which must be considered. If it were

otherwise, it might be thought that this particular offence, under the Summary Offences Act, when compared with others embraced by the mandatory sentencing regime, could be universally regarded as trivial. But as his Worship rightly pointed out, there is a difference between a case where the personal property in question is a motor vehicle worth $40,000 and one where the property is a paper clip.

[14] But, the value of the property is not the only factor to take into account. There will be gradations of culpability in relation to the circumstances in which the personal property came into the custody of the offender, and the nature of the custody itself may also be a factor to be considered. To this extent I agree with Bailey J who said in *R v Torres* (unreported, 18 August 1999) that: "An assessment of whether something is trivial can be made only in the light of the particular circumstances". To which I would add, with respect, "of the offence". I agree with the observations of Mildren J in *Curnow v Pryce* (1999) 131 NTR 1 that the expression in (a) requires the Court "to focus on the objective circumstances of the offence" and his Honour's opinion that the criteria is fulfilled "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". But I am unable to agree if by that his Honour meant that an offence would always be trivial in nature if the just and proportional sentence was anything less than imprisonment, albeit suspended.

[15] In *Eupene v Hales* [2000] NTCA 9 Angel and Thomas JJ commented, obiter, on the question. His Honour was of the opinion that:

> "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".

[16] Her Honour said that the proper test to apply "is to look at the objective circumstances of the offence without regard to the result or consequence of a finding that such offence is not trivial" and adopted the approach of Bailey J in *R v Torres*:

> "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".

Bailey J was there referring to what fell from their Honours in *Walden v Hensler* (1987) 163 CLR 561.

[17] For reasons already indicated, I consider that the question of whether an offence was trivial in nature or not can only be determined by paying regard to the objective circumstances of the offence, that is, the nature of the offence.

[18] In this case the circumstances of the offence, as demonstrated by the guilty plea, were:

- The appellant accepted into his custody one item of personal property namely
    - A jacket valued at $50.
- Which property a police officer, at some later time, reasonably suspected had been stolen

[19] It is not an element of the offence that the offender be suspected of having stolen or unlawfully obtained the property or that he obtained the property knowing or suspecting that it was stolen or unlawfully obtained. The suspicion is that of another person and it attaches to the property. The account of the background which led to the appellant obtaining the property does not go to any element of the offence other than the required suspicion. His state of mind, other than going to his custody of the property, is irrelevant to the nature of the offence. It is the state of mind of another person which is brought into consideration (if proved).

[20] In my opinion, once the elements of the offence are clearly recognised and the nature of it determined in this particular case, it should be caterogised as trivial.

[21] For the reasons given I am unable to accept the submissions of counsel for the appellant that circumstances other than the nature of the offence can be brought to bear upon the triviality question. They are to be considered under the various matters set forth in subpar (c).

[22] His Worship was satisfied that the appellant was "otherwise of good character", but not the conjoined requirement that there be mitigating circumstances as described.

[23] In my opinion, all the words following "mitigating circumstances" qualify that phrase. Accordingly, for an offender to succeed in proving those circumstances, it must be shown that they:

- were mitigating, and
- significantly reduced to 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.

[24] It seems to me that the blameworthiness of an offence and the aberrant offending behaviour are distinct concepts each to be assessed by reference to the mitigating circumstances. Failure on the part of an offender to satisfy the Court in respect of any of those elements denies the existence of the exceptional circumstances.

[25] The expression "mitigating circumstances" is normally understood as relating to circumstances which operate so as to moderate the severity of the sentence. Here, attention is firstly directed to those that can be advanced to **significantly** reduce the offender's blameworthiness (emphasis added). There may be one or more such circumstances, but whether standing alone

or in combination, they must produce the result if the offender is to succeed. The word "blame" introduces the concept of responsibility of the offender for the commission of the offence. In that regard the only element of the present offence for which the offender is responsible is the having of the personal property in his custody.

[26] Counsel for the appellant before the Court drew upon the facts put before his Worship and the inferences which could be fairly drawn from them to formulate the mitigating circumstances. Summarised they were:

- The taking of the property into custody was not planned, the appellant was given the jacket. If he had not been in that place at that time he would not have received it.

- The offence occurred in Alice Springs in mid winter and the appellant put the jacket on; it was received for personal use, not for profit.

- The appellant did not disguise the jacket or damage it in any way.

- The appellant was 18 years of age, thus attracting the special mitigating considerations available in the sentencing of young offenders, were it not for the mandatory sentencing requirements.

[27] Those mitigating circumstances combine to significantly reduce the extent to which the appellant was to blame.

[28] His Worship rightly referred to the appellant's intoxication. The statute does not exclude intoxication as mitigation, it notes the position of the common law that it does not ordinarily do so. (It might be considered fair to introduce into this area the notion of voluntary intoxication rather than leave it at large). However, his Worship made a remark which I do not consider was warranted on the material before him that "all we know is this would not have happened if he had not been drunk". An appraisal was required of all of the matters properly advanced as mitigation.

[29] There is no finding as to whether the commission of the offence was an aberration from the appellant's usual behaviour. It clearly was.

[30] His Worship erred and the appeal must be allowed to the extent that the sentence of 14 days imprisonment is quashed. Taking into account the 12 days spent in custody the appellant is discharged. As the appellant has not offended since this event I do not consider that there is any need to order his release upon conditions. The conviction stands.

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