EB v Bacon & Ors [2013] NTSC 202

PARTIES:	EB v DANIEL THOMAS BACON, ANTHONY STUART DEUTROM, and SUZANNE LOUISE KENDRICK
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 8-16 of 2013 (21303814, 21305672, 21305664, 21244459, 21305669, 21309455, 21245852, 21246164 & 21244451)
DELIVERED:	26 April 2013
HEARING DATES:	19 April 2013
JUDGMENT OF:	HILEY J
APPEAL FROM:	HANNAM CSM

CATCHWORDS:

CRIMINAL LAW – Sentencing – youth – Griffiths Remand orders – s 83(1)(d) *Youth Justice Act* – orders are to reflect the objects and purposes of the *Youth Justice Act*

CRIMINAL LAW – Bail – conditions are to reflect the objects and purposes of the *Youth Justice Act* – appeal against conditions requiring youth to reside and attend school at an place near where he committed offences in

circumstances where a more suitable place of residence and schooling is available – appeal allowed

APPEALS – appeals under s 144 *Youth Justice Act* – nature of appeal – relief

Care and Protection of Children Act s 21(d)

Justices Act ss 163, 165, 177

Youth Justice Act ss 3, 4, 51(2), 63, 81, 83(1)(d), 144

Griffiths v R (1977) 137 CLR 293

REPRESENTATION:

Counsel:

Appellant:	R Wild QC and J Hunyor
Respondent:	M Nathan

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

EB v Bacon [2013] NTSC 22
No. JA8-16 of 2013
(21303814, 21305672, 21305664, 21244459, 21305669, 21309455, 21245852, 21246164 & 21244451)

BETWEEN:

EB
Appellant

AND:

DANIEL THOMAS BACON
First Respondent

ANTHONY STUART DEUTROM
Second Respondent

SUZANNE LOUISE KENDRICK
Third Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 26 April 2013)

[1] On 19 April 2013 I set aside orders made on 8 April 2013 by her Honour the Chief Stipendiary Magistrate, sitting as the Youth Justice Court, and I replaced them with other orders. I indicated that I would provide written reasons for my decision, which I now do.

[2] The (nine) appeals concern orders made by her Honour following pleas of guilty by EB (the appellant) on 11 March 2013. The pleas concerned various offences regarding theft of and damage to property worth about $9000, spanning over a period between 20 November 2012 and 29 January 2013 while the appellant was living at Groote Eylandt, and (two) breaches of bail conditions.

[3] Submissions in relation to sentence for those offences were made on 8 April 2013. Her Honour made orders under s 83(1)(d) of the *Youth Justice Act* (**YJA**) (sometimes referred to as Griffiths Remand orders), adjourning those matters to 7 June 2013, and granting bail on certain conditions.

[4] The first condition of bail was that the appellant reside at the home of his aunt Ms JB and his uncle Mr NB at Umbakumba (on Groote Eylandt) and that he not leave home between 7pm and 7am unless in the immediate company of one of them. The second condition was that he attend school at Umbakumba. (Her Honour also ordered a further report under s 68 of the YJA.)

[5] I made a number of orders including that the matters be adjourned to 18 December 2013 and granting bail on certain conditions, one of which was that the appellant reside and attend school at Shalom Christian College, in Townsville, Queensland.

[6] The Court heard these appeals as a matter of urgency because arrangements had already been made for the appellant to attend school at Shalom Christian

College immediately in the event that the appeals were successful and the Court's orders so permitted. The school term commenced on 15 April 2013 and it was common ground that the appellant should be able to commence at Shalom at the earliest opportunity.

Jurisdiction and Relief Sought

[7] These appeals were brought as of right, pursuant to s 144 of the YJA.

[8] The orders from which these appeals were brought were made under s 83(1)(d) of the YJA, the so-called Griffiths Remand provisions (see *Griffiths v R* (1977) 137 CLR 293). In short, those provisions enable a court to remand a youth who has been found guilty of one or more offences for a period of time not exceeding 12 months, inter alia for the purpose of assessing the youth's capacity and prospects for rehabilitation and or allowing the youth to demonstrate that rehabilitation has taken place.

[9] Appeals under s 144 of the YJA may be made on grounds involving error or mistake, on matters of fact or law or both. (S 144(3) YJA and s 163 *Justices Act*.)

[10] The powers of this Court upon the hearing and determination of appeals under s 144 of the YJA are set out in s 177 of the *Justices Act*, and include powers to remit a matter for further hearing and or to substitute such orders as it might consider appropriate.

[11] The appellant sought orders effectively disposing of the outstanding proceedings by now sentencing the appellant. Alternatively, the appellant sought an enlargement of the Griffith Remand period to the end of the 2013 school year.

[12] In either event, the appellant sought orders and/or conditions that would enable him to attend Shalom Christian College in Townsville for the remainder of the school year.

[13] I indicated that I was not prepared to make the first order sought, mainly because I considered that the Youth Justice Court was the more appropriate forum for the initial determination of sentences in matters. I informed the parties that I considered that the sentencing should be carried out by a magistrate other than the magistrate who made the orders under appeal and which I have set aside, and I so direct.

[14] I note at this stage that the respondents conceded the grounds of appeal raised in the notice of appeal and agreed with most of the submissions made on behalf of the appellant. Accordingly much of what follows is extracted from the written submissions of the parties, which included detailed references to transcript and exhibits tendered before the Youth Justice Court. The parties also agreed with the orders that I made, including the conditions of bail.

Relevant background

[15] The appellant is an Aboriginal child born in Queensland on 15 December 1996 and is now aged 16 years. He has lived most of his life in Groote Eylandt where he has an extended network of cousins, aunts and uncles.

[16] The appellant has had no contact with his mother since he was a baby, and no contact with his father for approximately 13 years.

[17] The appellant has been in the care of his aunt, Ms JB, and his uncle, Mr NB, since 2009. The appellant identifies Ms JB and Mr NB as his carers. The appellant has also lived with other members of his extended family on Groote Eylandt for some periods of time.

[18] The appellant boarded and attended school at Shalom Christian College for about five months in 2012 (from 23 April to 17 September), apparently without any behavioural problems. While there he also did work-placement activities after school hours, involving activities such as gardening, lawn mowing and tree-lopping using a chainsaw.

[19] The appellant went back to Umbakumba to attend a funeral, but did not return to Shalom as his then carers did not make any arrangements to facilitate this. It was while he was back at Groote Eylandt that he fell into bad company and committed the various offences noted above.

[20] Prior to his release from detention on 8 April, the appellant had been in detention for one month and 19 days – between 7 and 22 February 2013, and between 5 March and 8 April.

Submissions to the Youth Justice Court

[21] Counsel for the appellant asked the Youth Justice Court to deal with the appellant in such a way that he could attend boarding school in Townsville at Shalom Christian College from 15 April 2013 under a bond or suspended period of detention.

[22] This was the course of action recommended by the Office of Children and Families (**OCF**) as part of their case plan for the appellant (Youth Justice Court Report 8 April 2013, Clohesy & Blume, p 7). The recommended case plan also included therapeutic support through Shalom Christian College and support from OCF for the appellant and his family during school holidays.

[23] This course of action was supported by the police prosecutor.

Appellant's submissions to this Court

[24] Counsel for the appellant, Messrs Wild QC and Hunyor, submitted that her Honour appears to have accepted that no further period of actual detention was necessary for any sentence to meet the requirements of a just sentence under the YJA.

[25] However, her Honour adjourned the matters pursuant to s 83(1)(d) of the YCA and ordered that the appellant return to Groote Eylandt to live at Umbakumba under conditions including those noted in paragraph [4]above.

[26] Counsel submitted that such orders were inappropriate in the circumstances. In particular, they submitted that the condition that the appellant return to Umbakumba and attend secondary school there was inappropriate, in the circumstances where there was no evidence of the availability of a place there for the appellant or of its suitability for a youth of his age and background, and where there was known to be a place available for the appellant at Shalom Christian College, which he had previously attended with success. Moreover, given the appellant's background, the disposition was such as to 'set him up to fail'.

[27] Counsel contended that significant to her Honour's reasons for this course of action were that:

(a) allowing the appellant to attend boarding school at Shalom Christian College would be a 'reward';

(b) the appellant needed to demonstrate that he could behave himself and accept parental responsibility before it would be appropriate to allow him this 'reward';

(c) the appellant's family needed to show they could take parental responsibility for the appellant before he should be given the opportunity to go to Shalom Christian College; and

(d) if the appellant were to get into trouble again, 'maybe the department [OCF] will step in, in a more meaningful way' and take parental responsibility.

[28] Counsel submitted that her Honour's reasoning in these significant respects was in error. Counsel for the appellant then outlined the following facts (which the respondents accepted).

Evidence concerning Shalom Christian College

[29] The appellant had previously attended Shalom Christian College from 23 April 2012 to 17 September 2012 (Youth Justice Court Report 8 April 2013, Clohesy & Blume, p 5).

[30] The appellant did not display any behavioural or learning concerns and the school had no concerns regarding his return there (Youth Justice Court Report 8 April 2013, Clohesy & Blume, 5).

[31] The appellant had no previous engagement with any therapeutic services at the school, but the school counsellor was happy to provide support and engage with the appellant if he returned to the school (Youth Justice Court Report 8 April 2013, Clohesy & Blume, p 5).

[32] Shalom Christian College provides specialist literacy and numeracy programs, structured work-placements and deals with a lot of Indigenous students.

[33] Her Honour accepted that there was 'no doubt that Shalom would help' the appellant.

[34] Mr MB and Ms JB supported the appellant going to Shalom Christian College (Youth Justice Court Report 8 April 2013, Clohesy & Blume, p 6).

[35] The present offending started after the appellant returned to Groote Eylandt for a funeral and his family failed to arrange for his return to Shalom Christian College.

Evidence concerning Umbakumba

[36] Her Honour raised the prospect of the appellant returning to Umbakumba to reside with his aunt (Ms JB) and uncle (Mr NB).

[37] The appellant was asked to respond to this suggestion and he indicated through his lawyer that he was willing to agree to this course of action. It was noted that this course of action allowed for the appellant to be released from custody forthwith.

[38] The appellant had previously indicated that he would be 'happy' to return to Umbakumba to undertake community work or a Community Development Program (Pre-Sentence Report for 8 April 2013, Gray and Cass, p 9). But

his views regarding returning to Umbakumba to go to school were not canvassed in that report.

[39] Ms JB had recently indicated that she was unwilling to have the appellant live with her (Pre-Sentence Report for 8 April 2013, Gray and Cass, p 9). However, when asked for her view in open court (on 8 April 2013), Ms JB indicated that she was 'willing to take him home'.

[40] The evidence before the Youth Justice Court in relation to the appellant's likely circumstances at Umbakumba was that:

(a) Ms JB and Mr NB wished to remain as carers for the appellant but recognised that they had been unsuccessful in preventing the appellant from offending and had struggled to address the appellant's behaviour (Youth Justice Court Report 8 April 2013, Clohesy & Blume, p 7).

(b) OCF were of the view that the Ms JB and Mr NB required more support to ensure that the caring arrangement did not 'break down' (Youth Justice Court Report 8 April 2013, Clohesy & Blume, 7).

(c) The appellant was unlikely to be supported by pro-social family members should he return to Groote Eylandt (Pre-Sentence Report for 8 April 2013, Gray and Cass, p 9).

(d) The appellant first 'began experiencing trouble with the law when he moved from Umbakumba to Angurugu' (Pre-Sentence Report for 8 April 2013, Gray and Cass, p 9). This move was by way of 'self-

placement' (ie of the appellant's own volition: see Youth Justice Court Report 8 April 2013, Clohesy & Blume, p 5).

(e) Ms JB had expressed a concern about the appellant returning to Groote Eylandt, as 'he quickly aligns with negative peers and willingly engages in behaviours she does not approve of' (Pre-Sentence Report for 8 April 2013, Gray and Cass, p 9; see also Youth Justice Court Report 8 April 2013, Clohesy & Blume, p 20).

(f) The police held concerns about the prospect of the appellant reoffending should he return to Groote Eylandt (Youth Justice Court Report 8 April 2013, Clohesy & Blume, p 4).

[41] According to the appellant's submissions, apart from the fact that it existed, there was no evidence concerning the school at Umbakumba. It was not known whether there are other students there of the appellant's age, although it appears to have been accepted by the Court that he was likely to be older than his peers at the school. There was no evidence as to any additional support or services that might be available to meet the needs of the appellant.

The involvement of OCF

[42] No orders have been sought or made in relation to the appellant under the *Care and Protection of Children Act* (NT). On 8 April 2013, Ms JB was present in Court as a 'responsible adult' for the purposes of s 63 of the *Youth Justice Act*.

[43] Counsel for the appellant pointed out that her Honour was of the view that the appellant was in need of protection under s 21(d) of the *Care and Protection of Children Act*. Her Honour's view was that there was no person exercising parental responsibility over the appellant, and that OCF should take parental responsibility for the appellant.

[44] Her Honour expressed the view that for the appellant to be able to attend Shalom Christian College, 'the department' (OCF) needed to 'take some form of step and some form of responsibility', and she made an order (on 11 March 2013) under s 51(2) of the YJA requiring the CEO of OCF to 'take appropriate action to promote the well-being of the child.'

[45] She suggested that the CEO of OCF ought to take into account that the appellant might 'miss out on the opportunity of something that is in his best interests' if the CEO did not take parental responsibility for the appellant. She said that 'if he gets in trouble again, then maybe the department [OCF] will step in, in a more meaningful way'.

The grounds of appeal

[46] The appellant appealed on the following grounds:

1. *The learned Chief Magistrate erred in failing to correctly apply the principles that must be taken into account in the administration of the Youth Justice Act, namely:*

(a) *a youth should be dealt with in a way that acknowledges his or her needs and will provide him or her with the opportunity to develop in socially responsible ways (s 4(b));*

(b) *there should be no unnecessary interruption of a youth's education or employment (s 4(i)); and*

(c) *a decision affecting a youth should, as far as practicable, be made and implemented within a time frame appropriate to the youth's sense of time (s 4(m)).*

2. *The learned Chief Magistrate erred in failing to have regard to the fact that the rehabilitation of the appellant would be facilitated by giving him the opportunity to engage in education at Shalom College, as required by s 81(4)(b) of the Youth Justice Act.*

3. *The learned Chief Magistrate erred in taking into account irrelevant considerations, including that:*

(a) *allowing the appellant to attend boarding school would be a 'reward';*

(b) *the perceived failure of the Office of Children and Families to become more involved in the care of the youth;*

(c) *if the youth got into further trouble, the Office of Children and Families may become more involved in the matter.*

4. *The learned Chief Magistrate erred in failing to take into account relevant considerations, including:*

   (a) *the absence of adequate pro-social support for the appellant should he return to Groote Eylandt; and*

   (b) *the evidence before the Court of pro-social and rehabilitative influences and supports at Shalom College.*

5. *The learned Chief Magistrate erred in deciding to require the appellant to attend Umbakumba school in the absence of any evidence as to the suitability of the school for the appellant given his age and the absence of any evidence as to its ability to provide support for the appellant's rehabilitative needs.*

Submissions on behalf of the Respondents

[47] As already noted the respondents conceded these grounds of appeal and accepted the appellant's account of the facts set out above.

[48] Counsel for the respondents, Mr Nathan, added that "the offending of the appellant shows an alarming course of property offending spanning almost four months and involving almost $9000 worth of property stolen or damaged. However, it is equally apparent that the accused is still a young man without an extensive criminal history who had spent some time in pre-sentence custody for these offences. Further, during the entirety of the

offending it seems he was under the influence of a negative peer/family group from Angurugu who placed some pressure upon him to offend."

[49] The respondents also referred to her Honour's opinions that there was no responsible adult prepared to take responsibility for the appellant should he return to Groote Eylandt and that he should be placed into the care of OCF.

[50] Counsel submitted that her Honour became so concerned about the refusal of the OCF to assume legal guardianship of the appellant that she dismissed the real and beneficial option of sending him to the College deeming it as some sort of 'reward' for misconduct.

[51] The respondents also noted that the appellant had stayed at the Shalom College previously and "based upon all of the evidence before the Youth Justice Court, it had been a positive experience in which the appellant was engaged and motivated in his education. To portray a second opportunity for the appellant as some form of unwarranted 'reward' is to misapply the appropriate considerations of the court in sentencing juvenile offenders and in itself is descent into error." I agree.

[52] The respondents also submitted that the orders for the appellant to reside at Umbakumba until 7 June 2013 appear inconsistent with the Court's own concerns as to the ability or legitimacy of Ms JB to be a responsible adult. "On a number of occasions the learned Chief Magistrate refused to accept that Ms JB could act as a responsible adult and yet the order made by the

Court sees the appellant placed into her care at Umbakumba with no further support."

[53] "In fact, the learned Chief Magistrate seems to express the view that this placement is an opportunity to show the Court that the appellant can behave in the community before earning the right to attend the College at a later date. This fails to reflect the concerns of Ms JB and the police, not to mention the [OCF], of the risk in placing him so close to negative influences for further offending. It also fails to reflect the principles of sentencing set out in the [YJA] and referred to in the appellant's outline of submissions."

[54] The respondents also submitted that no clear evidence was requested or put before the Court about the ability or appropriateness of the school at Umbakumba to address the educational needs of the appellant during his stay there. In contrast there was evidence about the suitability of the Shalom Christian College and the confirmation of a place for the appellant for the immediate school term and beyond.

Consideration

[55] In short, I consider that the grounds of appeal are made out.

[56] Primary regard must be had to the objects and principles set out in ss 3 and 4 of the YJA, and the principles and considerations set out in s 81. Of particular relevance to these appeals are the provisions regarding the youth's awareness of his obligations under the law and of the consequences of contravening the law (ss 3(d) & 4(e)), appropriate treatment and

rehabilitation (ss 3(e) and 81(4)), his needs and opportunity to develop in socially responsible ways (ss 4(b) & (n)), the continuation of his education (ss 4(i) and 81(4)(b)) and his ability to re-integrate into the community (ss 4(f), (g) & (o)).

[57] I do not consider that the orders requiring EB to reside with Ms JB and Mr NB at Umbakumba, and to go to school there, are consistent with these objectives and principles. They effectively place EB under the care and responsibility of people who her Honour found are not responsible adults, and who have recently expressed, and demonstrated, some reluctance and inability to control his activities particularly when he gets into the bad company of some other members of the Groote Eylandt community.

[58] On the contrary, the opportunity for him to board and be educated at a place such as Shalom Christian School is more likely to better satisfy those objectives and principles. Such a course will not only remove him from the unsatisfactory environment which has been a troubled one for him recently, but should also assist him to progress his education and to develop skills which should help him become a better and more responsible person when he does return to his family and community at Umbakumba.

[59] The prospects of such outcomes are enhanced by the fact that he has already attended the Shalom Christian School, apparently without blemish, and that the school was prepared to take him back again.

[60] This opportunity for EB to mature and develop as a result of spending the rest of this year at Shalom before being sentenced also better reflects the main objectives of s 83(1)(d) of the YJA, usually referred to as the Griffiths Remand provisions. To use the language of Barwick CJ in *Griffiths v R* (1977) 137 CLR 293 at 306, this is a case "in which the guilty person will accept the delay in the determination of the sentence and submit to the compulsion towards reformation which that delay and the terms of the recognizance may involve: and in which there is a real expectation founded upon solid ground and not mere sentimentality that such reform is likely to occur."

[61] I consider that her Honour erred in fact and law in the respects identified above. I also consider that her Honour erroneously focused too much on the "responsible adult" issue and upon endeavouring to force the OCF to exercise its powers under the *Care and Protection of Children Act*. Moreover she failed to recognise that there would be several "responsible adults" at Shalom who would supervise and assist EB.

[62] Without needing to dwell on the grounds of appeal and the submissions of the parties in further detail, I agree that her Honour has made errors of fact and law, including taking irrelevant considerations into account and failing to take into account relevant considerations.

Disposition

[63] In addition to making an order dispensing with the need for the appellant to enter into recognisances under s 165 of the *Justices Act*, I made orders allowing the appeals and setting aside the orders of 8 April 2013 that were subject of the appeals.

[64] I made orders under s 83(1)(d) of the YJA adjourning the matters to 18 December 2013 for sentencing by the Youth Justice Court, being the date when I am told the Youth Justice Court will next be sitting at Alyangula after school finishes this year.

[65] Following discussion and agreement between counsel I granted bail on terms that the appellant (a) undertake to appear at the Youth Justice Court at Alyangula at 10.00 am on 18 December 2013 or at any other time and place to which the proceedings may be continued; and (b) agree to comply with the following conditions:

(a) to attend school and reside at Shalom Christian College in Townsville during the school term 2013;

(b) to comply with all reasonable directions of the Principal of Shalom Christian College or his/her delegate and do nothing to cause his expulsion;

(c) during any school holidays, to either remain at Shalom Christian College under the supervision of the Principal or his/her delegate or

reside at Lot 149 Umbakumba Community with Ms JB or Mr NB or such other place as directed by Ms JB or Mr NB;

(d) to be of good behaviour and not commit any offence;

(e) not to use any illicit substance or use alcohol;

(f) to accept the supervision of the Department of Community Corrections including testing for any substance.

[66] I remitted the matters to the Youth Justice Court for its further disposition. I also granted liberty to apply, but would expect that any applications, for example for a variation of the 18 December hearing date in the event that the Youth Justice Court cannot sit at Alyangula that day, would be made to that Court.