PARTIES:	GEORG DIRR
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA5 OF 1996
DELIVERED:	14 March 1997
HEARING DATES:	12 March 1997
JUDGMENT OF:	Martin CJ, Angel & Priestley JJ

REPRESENTATION:

Counsel:

Appellant:	S. Cox
Respondent:	R.Wild QC with A. Fraser

Solicitors:

Appellant:	NT Legal Aid Commission
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	ang97001
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ang97001

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. CA5 OF 1996

BETWEEN:

GEORG RUDOLF DIRR
Appellant

AND:

THE QUEEN
Respondent

CORAM: Martin CJ, Angel and Priestley JJ

REASONS FOR JUDGMENT

(Delivered 14 March 1997)

THE COURT:

The appellant appeals by leave against a net sentence of eighteen months imprisonment (suspended after he has served four months upon entering into a bond in the sum of $2,000-00 to be of good behaviour for a period of three years subject to supervision) imposed in respect of three aggravated unlawful entry counts and three associated stealing counts for which he was convicted upon his plea of guilty. The only ground of appeal is that the learned sentencing judge erred in not giving sufficient weight to the circumstances of

mitigation relied on by the appellant, in particular his youth - he was eighteen at the time he offended - that he was a first offender having no prior convictions, that he cooperated with police, his early plea of guilty, his remorse, that the offending was totally out of character, that he had good prospects for rehabilitation, that the Crown did not allege that offences of this type were prevalent, that the appellant's personal circumstances had changed for the good in the interim between offending and being before the Court, that the appellant had attempted restitution before going before the Court and that he was willing to make full restitution. No specific error on the part of the learned sentencing judge was alleged but rather it was said that, in all the circumstances, to impose actual imprisonment upon this young first offender for these offences was to err. The appellant does not say the sentence was manifestly excessive or that it was disproportionate to his offending or to sentences imposed on his co-offenders.

The circumstances of the offending was as follows:-

On three separate occasions at night, namely, on 13 October 1995 on 14 October 1995, on 17 October 1995 and on 25 October 1995, the accused, in company, smashed a plate glass window at the Jape Mitre 10 Store with a metal baton, gained entry and stole electrical goods. On the first occasion he was accompanied by one Gawlik, caused $1,552-00 damage to the premises and stole $1,786-18 worth of electrical equipment. On the second occasion the appellant, accompanied by Gawlik and one Kakauskas, caused $1,580-30 damage to the premises and stole $2,697-43 worth of electrical goods. On the

third occasion, accompanied by Gawlik and another, the appellant caused $888-00 damage to the premises and stole $3,302-62 worth of electrical equipment. The police were on duty in the vicinity on the third occasion. They apprehended the offenders including the appellant. The appellant had dropped a bag containing some of the stolen property and fled the scene but was eventually located hiding in bushes at the corner of Brayshaw Crescent and Old McMillans Road, some distance from the break in. He told the police he intended to sell the stolen property to friends to support a marijuana habit. Gawlik also made full admissions. All three before the Court, ie the appellant, Gawlik and Kakauskas, cooperated with the investigating police.

The aggravated unlawful entry counts each carry a maximum penalty of fourteen years imprisonment. His Honour the learned trial judge described the offences as serious offences of their type.

He said:

> "It is particularly serious, of course, as regards Georg Dirr and Gene Gawlik, who, in what I consider to be a most brazen fashion, broke into the same store on three occasions within a period of two weeks, stealing a very considerable value of electrical goods. I accept that these repeated raids on the same premises displayed determination, even if not much common sense. They also, of course, display a complete contempt for the law and for the law enforcement authorities. These were not, certainly, opportunistic or spur of the moment crimes. They involved some degree of preparation and, they, indeed, stole items which were readily saleable, TVs, videos, cassette players and objects of that type."

With the exception of a portable stereo valued at $197-26 stolen by the appellant on the second occasion, all the stolen property was recovered. However none of the items were saleable as new items as they were scratched and in a used condition. The cost of the three lots of glass repairs to the premises totalled $4,020-30. In sentencing the appellant his Honour said, after mentioning that at the time of offending he had left his parents' home, shared a flat with a friends and faced financial difficulties having recently lost his job:

> "You did not try to mitigate your lifestyle it seems. You increased your expenditure on cannabis and you got behind in your rent. You appear to me really, Mr Dirr, to have shown complete irresponsibility in your behaviour and the way you were organising your life and in your values; and eventually of course you descended to committing what really are very brazen crimes, simply to obtain money to keep this lifestyle going.
>
> It seems to me that you clearly merit a sentence of immediate imprisonment, indeed beyond the slightest doubt, for that behaviour."

His Honour also said :

> "You have been in Darwin for 15 years. Your mother and father are obviously very solid people. You left school after Year 11. You started to smoke cannabis in Year 10. You became a heavy user of cannabis. You have got a good work record for a young person. I am told at the moment you are pursuing further education in the field of computer maintenance, so it seems to me you are laying out your life in a more reasonable fashion right now. Indeed, your life has clearly changed for the better.

> It is really, amongst the other matters that Ms Cox has put to me, this change for the better in your young life; the fact that you are young; you have a previous clean record; your efforts to make restitution for your crimes as best you can and the strong possibility that you will not offend again which Ms Cox really relies on, I think, to make her submission that you should not be sentenced to a term of immediate imprisonment, despite the fact as I say that such a term is really richly deserved in your case.
>
> I bear in mind that there is a need, in punishing you, to make your punishment such that other like-minded young people may be deterred from committing such crimes. It is a matter which has caused me considerable trouble but, after giving such consideration as I can last night and this morning to Ms Cox's submissions, I have decided that you must serve some time in prison for your offences."

His Honour then proceeded to impose a net effective sentence of eighteen months imprisonment partially suspended in the manner already related. The appellant's co-accused Gawlik, who played a secondary role to the appellant in these matters and who was seventeen at the time of the offending, received an eighteen months net sentence which was fully suspended upon his entering into a good behaviour bond for a three year period.

This Court was referred to some of the many authorities which stress that in sentencing any first offender, rehabilitation should be a prominent consideration in fixing sentence and that it is a grave step to impose upon young offenders the potentially devastating experience of a prison term. See eg *Weaver* (1973) 6 SASR 265; *McCormack* [1981] VR 104; *Paterson v Stevens* (1992) 57 SASR 213; *Bainbridge, Cullen and Ludwicki* (1993) 74

A Crim R 265; *Duncan* (1983) 47 ALR 746. It was also submitted that an offence which is "so serious that only a custodial sentence can be justified for the offence" does not necessarily mean that the offender must be given a custodial sentence. If personal mitigating factors are present the Court may impose some other form of sentence. See *Edwards* (1993) 67 A Crim R 486. None of these principles are in doubt. In this case the learned sentencing judge correctly directed himself to each of the subjective mitigatory matters and also correctly directed himself to the circumstances of the offending and the balancing of the competing sentencing principles applicable. In our opinion the sentence imposed was within the learned judge's sentencing discretion and that no error is shown. He referred to the gravity of the crime of aggravated unlawful entry as indicated by the maximum penalty therefor, the circumstances of the offending and the offender. All relevant factors were referred to and considered by the learned sentencing judge, and, as is well established, it is not for this Court to substitute its discretion for that of the learned sentencing judge where no error is shown.

The appeal is dismissed.
