Gunn v Howie [2006] NTSC 21

PARTIES:	GUNN, Tom
	v
	HOWIE, Richard Gordon
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 75 of 2005 (20517013)
DELIVERED:	30 March 2006
HEARING DATES:	14 March 2006
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

MAGISTRATES - Appeal against sentence – whether sentence manifestly excessive – whether appropriate to have recorded conviction – whether criteria expressed in s 8(1) of Sentencing Act correctly applied having regard to existence of significant mitigatory and extenuating circumstances – discussion of meaning and effect of criteria – appeal allowed.

Sentencing Act s 8(1)

Briese (1997) 92 A Crim R 75; *Davis v Hayward* No JA 64/1996 par 9 (reproduced at [1997] 1 NTSC 203; *Hesseen v Burgoyne* [2003] NTSC 47; *Webb v O'Sullivan* (1952) SASR 65; *Yardley v Betts* (1979) 22 SASR 108, applied

Brown (1993) 68 A Crim R 367; *Cranssen v The King* (1936) 55 CLR 509; *Eupene v Hales* [2002] NTCA 9; *O'Hanlon v SA Police* (1994) 62 SASR 553; *Salmon v Chute and Anor* (1994) NTR 1; cited

Hanburg (1979) 1 Crim App R (S) 243; *Raggett, Douglas and Miller* (1990) 50 A Crim R 41, considered and applied

Gorey v Winzar [2001] NTSC 21, considered

House v The King (1936) 55 CLR 499, followed

REPRESENTATION:

Counsel:

Appellant:	J Lewis
Respondent:	C Heske

Solicitors:

Appellant:	Anthony Buckland
Respondent:	Office of the Director of Public Prosecutions

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

Gunn v Howie [2006] NTSC 21
No. JA 75 of 2005 (20517013)

BETWEEN:

TOM GUNN
Appellant

AND:

RICHARD GORDON HOWIE
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 30 March 2006)

Introduction

[1] In this matter the appellant appeals against a sentence imposed on him on 4 October 2005, by a stipendiary magistrate sitting as a court of summary jurisdiction at Nhulunbuy.

[2] On that day, the appellant pleaded guilty to a charge that, on 1 July 2005 at Nhulunbuy, he unlawfully damaged property, namely a 30 x 30 metre shade cloth to the value of approximately $2222, being the property of Alcan Gove.

[3] The learned magistrate was informed that, at about 10.00 pm on 1 July 2005, the appellant drove his mother's vehicle, a white Toyota Echo, to the family

flats in Eugenia Street, Nhulunbuy. He parked the vehicle on the side of the road, got out of it and walked across a nearby oval in the direction of what is known as the CATS shed. This is a social club room of a local football team. A birthday party was in progress at the CATS shed, with about 30 persons present.

[4] The court was told that, at the time, the appellant was carrying a marine flare. When he was about 20 metres from the CATS shed, he hid in some bushes, ignited the flare and then threw it towards the location of the party. As it happened the flare landed on the shade cloth attached to the roof of the building above the entry and exit door. The area of shade cloth was approximately 30 square metres.

[5] Having thrown the flare, the appellant ran back to his vehicle and drove home. The flare burnt for several minutes, despite efforts to extinguish it. Several holes were burnt in the shade cloth, with the result that it had to be replaced at a cost of $2222.

[6] When interviewed by the police on 10 July 2005, the appellant admitted throwing the flare. He said that he did so, "for a bit of fun, I guess".

[7] It was conceded that the appellant had shown remorse for his actions by approaching the manager of the premises and offering to pay for new shade cloth.

[8] The learned magistrate was informed that the appellant was 19 years of age and had no prior record of offending. He had arranged to make restitution for the damage caused and had expressed remorse for what he recognised was a childish and silly prank. He was not intoxicated at the time. He knew the persons at the party as ex school mates. It had not been his intention to lob the flare on the shade cloth. He had merely intended to land the flare short of the building and generate some excitement.

[9] The learned magistrate was told that the appellant was seeking to obtain an apprenticeship as a diesel mechanic. In the meantime he was working seven days a week as a trades assistant with his father. He had a prior excellent character. He was heavily involved in sport.

[10] The appellant's counsel exhorted the learned magistrate not to record a conviction.

[11] When invited by the learned magistrate to respond, the prosecutor indicated that he had no submissions to make. By that I take it that the prosecutor did not seek to join issue with what had been put by counsel for the appellant.

[12] At the conclusion of submissions the learned magistrate commented:

> "Mr Gunn, you are a young man who's done something more than silly. It seems to me that putting you on a bond might be useful but it seems you are getting on with your life anyhow, you don't really need that. Fining you would be all right but that's just money and you've already got a lot of money to pay back for the damage. Doing some community work might teach you a lasting fashion [sic] to think a bit more before you do something stupid and also give you a

> chance to put something back into the community, not that you are not doing that already with your sport and work.
>
> So that's why I've got that in mind. If it turns out that you're too busy, then I'll have to think of something else. But community work seems a good idea in this case. So I'll stand the matter down. If you can, with Mr Lewis's help, hunt down the Community Corrections court officer".

Note: The reference to the appellant having a lot of money was a reflection based on a submission to the learned magistrate that the appellant was working seven days per week and earning $820 per week after tax.

[13] The matter was stood over until 2.00 pm the same day. It was then reported to the learned magistrate that the appellant was not considered suitable for a community work order, due to his existing work commitments.

[14] Having reviewed the facts and accepted that the appellant had not intended to cause the relevant damage and had immediately embarked upon paying back the cost of that damage, the learned magistrate had this to say:

> "Mr Gunn, you're a young man and only 18 at the time this happened, now 19, and you have no previous convictions, you're not known to the law before this. I don't know that that is an extraordinary achievement, there's lots of 18, 19-year-olds that have never got into any trouble at all, but it couldn't be any better, Mr Gunn, than having no convictions when you come before the court the first time, and that's the way it is with you. You get for credit for that today.
>
> You get for credit for your plea of guilty, your cooperation with police and for your sensible grown-up conduct in seeking out the people responsible for-this shape [sic] of making that offer to compensate them and indeed coming through on that offer. It's a pretty unusual collection of circumstances. You've done all that in the space of about three months, that's very much to your credit.
>
> Mr Gunn, for offences like this your youth is some sort of excuse. There may be some men and there's certainly some women who have

grown up without doing anything really stupid in their lives, but there aren't many, and fortunately for most of us the stupid things we do generally don't cause too much harm or we have an opportunity to make good the damage we've caused, and that's what you've done here.

In a way you may pay a penalty outside the court for this offence, quite apart from the compensation you've paid. One of your hopes in life is to get an apprenticeship with Alcan here at Gove. Ultimately Alcan is the owner of the shade cloth, so they know all about what you've done and it might be that your actions will turn out to be something that those who choose who is going to get the apprenticeship will decide that's one reason to prefer this bloke and we'll take this bloke, we won't take Tom Gunn.

Maybe it will work out like that, maybe not, but that sort of ripple-on effect might give you further reason to reflect upon the consequences that flow from actions like yours and the reason to pull your head in next time you feel the impulse to do something which seems funny at the time.

Mr Gunn, Mr Lewis has asked that no conviction be recorded in this case, but it doesn't seem to me that the misuse of something as dangerous and inflammatory as a flare like this ought to meet with that disposition. If this flare hadn't hit the shade cloth, it had found its way into the crowd, as it might have done, I think you might be looking at a much more serious charge than this, rather more like the one Mr O'Loughlin faced a minute ago, but in any event it seems to me this kind of stupid, destructive and possibly dangerous conduct needs to be discouraged and you'll have to live with the consequences of that.

I'm going to convict you of this offence. I'm going to fine you $500 with a $40 victim levy and I'm also going to order that you be of good behaviour for two years on security of a promise to pay $1000 if you're not. That's a s 13 bond.

So Mr Gunn, you have already paid $2000 and a bit to the owner of the thing, you'll have to pay $540 now to the government and you'll have to sign a bond promising to be of good behaviour for two years. Good behaviour means you don't break the law for the next two years. Do you understand that?"

[15] It appears from the submission of the respondent on this appeal that, at the time of the offending, the appellant had been accompanied by a juvenile co-offender, who was dealt with by way of juvenile diversion. He was thus not alone in the carrying out of the practical joke.

Grounds of appeal

[16] By his grounds of appeal the appellant complains that the sentence imposed by the learned magistrate was manifestly excessive in all circumstances.

[17] In essence, the appellant complains of what is, in a real sense, an asserted inconsistency in the logic and reasoning expressed by the learned magistrate.

[18] Mr Lewis, counsel for the appellant, pointed to the significant number of mitigating aspects recognised by the learned magistrate, as above recited, and the attitude of the prosecutor. His submission was based on the proposition that the essential rationale of the sentencing disposition arrived at was simply that the appellant's act had been potentially dangerous. He contended that the actual sentencing disposition did not, on the face of it, recognise (or at least adequately recognise) the criteria set out in s 8(1) of the Sentencing Act. Nor did it, he submitted, appropriately apply considerations of personal and general deterrence to the facts before the court.

[19] I took Mr Lewis to argue that, having regard to the circumstances accepted by the learned magistrate, the sentencing disposition was unreasonable and

unjust, within the meaning of those expressions in *House v The* King (1936) 55 CLR 499 at 505, in that it did not adequately recognise the established sentencing principles applicable to young first offenders who demonstrate remorse, plead guilty at the earliest time and are unlikely to re-offend.

[20] He particularly joined issue with the refusal of the learned magistrate to refrain from recording a conviction. I took him to submit, in effect, that the adverse effects of recording a conviction in this case, coupled with the imposition of a substantial fine, constituted a penalty that was manifestly excessive in the circumstances.

Issues identified by the respondent

[21] Counsel for the respondent submitted that the gravity of the offending was, in fact, its potential to cause actual or potential danger to persons at the CATS shed. That element, she said, raised the need for imposition of a sentencing disposition that adequately recognised the factor of general deterrence. The learned magistrate had clearly proceeded on that basis.

[22] It was argued on behalf of the respondent that the learned magistrate plainly took into account all relevant mitigatory factors and was entitled to bear in mind that the appellant was found unsuitable for community work and had substantial financial means. The learned magistrate was entitled to conclude that the offence was not one that was so trivial as to warrant a minimal disposition. The sentencing strategy adopted appropriately reflected both the gravity of the offending and the appellant's mitigatory factors.

[23] Accordingly, the respondent contended that no error of sentencing principle had been demonstrated. It followed that the sentence imposed by the learned magistrate ought not to be interfered with.

Discussion

[24] The principles related to appeals of this type are well settled.

[25] It is not enough that this court would have adopted a different sentencing strategy, had it been dealing with the matter at first instance. There must be some reason for regarding the relevant sentencing disposition as having been improperly exercised. Error may appear in what a sentencer has said in the proceedings at first instance or the sentence itself may be such as to exhibit manifest error (*Cranssen v The King* (1936) 55 CLR 509 at 519 - 520).

[26] It follows that the onus is on an appellant to demonstrate some identifiable error in the sentencing process (either of principle or in misunderstanding or wrongly assessing some salient feature), or that the sentence imposed is so very obviously excessive that it is "unreasonable or plainly unjust" (*Raggett, Douglas and Miller* (1990) 50 A Crim R 41 at47*, Salmon v Chute and Anor* (1994) NTR 1).

[27] In the instant case, it is important to bear in mind the published authorities that are particularly pertinent to young first offenders who, like the appellant, have clearly demonstrated remorse, entered a timely plea and are unlikely to re-offend.

[28] The basic commencement point is to be found in the oft cited dictum of Napier CJ in *Webb v O'Sullivan* (1952) SASR 65 at 66 which is as valid today as it was when first expressed:

> "The Courts should endeavour to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be. Our first concern is the protection of the public, but, subject that, the Courts should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest".

[29] Those sentiments were reiterated in the judgment of the Full Court in *Yardley v Betts* (1979) 22 SASR 108 at 112-113, in which King CJ commented that:

> "The protection of the public must remain our first concern, but if, consistently with that, we can, in our compassion, assist another human being to avoid making ruin of his life, we ought surely to do so".

[30] In applying the foregoing conceptual approaches, it is to be borne in mind that, because the recording of a conviction is a formal act marking public disapproval of the defendant's wrongdoing, it is to be regarded as a component of the sentence and to be accorded weight in considering whether or not the sentence is proportionate to the relevant offence (See Fox and Freiberg, "Sentencing. State and Federal Law in Victoria", 2nd ed at 191, 192 and the authorities there cited). It is a relevant consideration that to record a conviction against a young person, particularly a young first offender, may stigmatise that person for the rest of his life or blight his possible future

career (cf *Hesseen v Burgoyne* [2003] NTSC 47, *Brown* (1993) 68 A Crim R 367, *O'Hanlon v SA Police* (1994) 62 SASR 553).

[31] It may fairly be said that all of the foregoing dicta are trite, but it is important to bear in mind that they constitute important counsels of common sense and fairness.

[32] All that need be added is that the sentencing discretion in this matter fell to be exercised in accordance with the following criteria established by s 8(1) of the Sentencing Act:

> "(1) In deciding whether or not to record a conviction, a court shall have regard to the circumstances of the case including -
>
> (a) the character, antecedents, age, health or mental condition of the offender;
>
> (b) the extent, if any, to which the offence is of a trivial nature; or
>
> (c) the extent, if any, to which the offence was committed under extenuating circumstances."

[33] As the Chief Justice pointed out in *Gorey v Winzar* [2001] NTSC 21, the concept of whether or not an offence is "*trivial*" has, as its focus, the facts and circumstances that go to make up the offence and the particular qualities belonging to it - not the category of offence, as such. It is concerned with relative gradations of culpability, having regard to the objective circumstances of the offending. An offence is clearly trivial if it is a mere petty example or instance of the offence, as defined by the legislature (*Eupene v Hales* [2002] NTCA 9).

[34] In *Hesseen v Burgoyne* the learned Chief Justice was at pains to point out that each of the three prongs of s 8(1) of the Sentencing Act requires a separate consideration focus. It is stating the obvious to say that the decision not to record a conviction may be founded on any one or more of the stipulated areas of consideration.

[35] As Martin CJ commented in *Hesseen v Burgoyne*, extenuating circumstances are those circumstances related to the commission of the offence that lessen the seeming magnitude of guilt or, to express the concept in other words, which tend to diminish the offender's culpability. They must be such as to excuse, to some degree, the commission of the offence charged.

[36] It is to be noted that, in discussing the approach proper to be adopted under s 8(1), His Honour went on to cite with approval the dictum of the Queensland Court of Appeal in *Briese* (1997) 92 A Crim R 75 at 79 to the effect:

> "It is reasonable to think that this power has been given to the Courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received".

[37] Such dictum was and is singularly apposite in the present case.

[38] In the instant case it seems to me that the following circumstances, as accepted by the learned magistrate, were fundamentally important considerations in relation to the exercise of the sentencing discretion:

(1) The appellant was a young man only 18 years of age;

(2) He had a prior impeccable record;

(3) The offending occurred in concert with a younger co-offender;

(4) There was no malice or antisocial intention involved. What occurred was no more than a practical joke that went awry in an unintended fashion;

(5) There was ample material before the learned magistrate, that he accepted, to indicate genuine remorse on the part of the appellant;

(6) The appellant sought out the manager of the premises immediately after the event, tendered his apology and arranged to make restitution out of his own earnings;

(7) He then made good his undertaking in that regard;

(8) That, as the learned magistrate accepted, the appellant had made a substantial commitment to the community through his work and sport;

(9) The appellant cooperated with the police and entered a timely plea;

(10) There was material before the learned magistrate, consistent with common experience, that the recording of a conviction could seriously prejudice the appellant in securing an apprenticeship or in his future employment.

[39] In their totality, these features constituted a powerful basis for argument that a conviction ought not to have been recorded.

[40] That situation was lent considerable weight by the intimation of the prosecutor to the learned magistrate that he did not desire to advance a contrary argument and thus did not seek to challenge what had been put to the learned magistrate. Whilst that was not, of course, binding on the learned magistrate, nevertheless, it constituted a situation in which the Court ought to have been slow to reject what was put to it and should only have

done so if there were truly compelling reasons to depart from what appeared to be common ground between prosecution and defence.

[41] Perhaps even more importantly, it seems to me that, with respect, the learned magistrate allowed himself to be diverted by some degree of illogical reasoning and it was certainly not apparent that he gave specific overt consideration to all three aspects of the relevant statutory criteria. Whilst I accept that primary consideration must be given to his final sentencing remarks, it does seem to me that he vacillated somewhat, over time, as to the proper sentencing approach. I am left with the uneasy feeling that, in the final result, he does not seem to have given due weight to his own findings relating to the relevant mitigatory features identified to him that, in their totality, plainly constituted very substantial extenuating circumstances for the purposes of s 8(1) of the Sentencing Act.

[42] In so saying, I would make these additional remarks:

(1) There was simply no material before him to found his conclusion that, had the flare not landed on the shade cloth as it did, it would *necessarily* have constituted an actual serious danger to other persons. That seems to have been his own assessment -- one that was not, as a fact, promoted by the prosecution. The appellant did not, of course, set out to lob the flare amongst those attending the party or foresee any potential creation of danger.

(2) Although he accepted that what occurred was a mere prank, the circumstances were "pretty unusual", and that what had occurred might well prejudice the appellant's hopes of an apprenticeship with Alcan, nevertheless, the learned magistrate seems to have concluded that the use of something that he perceived as inherently dangerous as a flare *necessarily* required the recording of a conviction, as well as the imposition of a not insignificant fine and entry into a bond.

I infer that, in so saying, the learned magistrate was intending to intimate that he did not consider the offence trivial. What he did *not* advert to was the issue as to whether, even if the offence was not trivial, there were, nevertheless, extenuating circumstances that might warrant a non-recording of a conviction (As to which the dictum of Martin CJ in *Davis v Hayward* No JA 64/1996 par 9 (reproduced at [1997] 1 NTSC 203 at 210, 211) is pertinent).

It seems to me that, having regard to the facts (and his own characterisation of them) this was an important omission. I am left with the uneasy feeling that the learned magistrate was preoccupied with certain aspects to which he did refer, and did not separately give appropriate weight to the issues potentially

arising under s 8(1)(a) and s 8(1)(c) of the Sentencing Act. His ultimate conclusion does not, in my opinion, sit easily with the many mitigatory and extenuating features to which I have referred, notable amongst which, as I have said, is the total absence of malice or anti-social intent on the part of the appellant, viewed in concert with his young age and past impeccable background and his demonstrated contrition. Nor was there any recognition that this was a joint enterprise in which the appellant was somehow involved. He was not the sole participant in the offence.

(3) It is clear that the learned magistrate focused his primary attention upon attempting to impose on the appellant some obligation beyond a mere fine. He initially said that he recognised that there was little point in placing the appellant on a bond, but subsequently did so when he received a report that a community work order was not really a viable strategy, because of the appellant's existing work commitments. Why he did so, bearing in mind his earlier expressed conclusion in that regard, remains unexplained.

It is further to be remembered that, prior to calling for that report, the learned magistrate commented that fining the appellant would be all right, but "that's just money and you've

already got a lot of money to pay back for[sic] the damage". To the extent that this may have coloured his ultimate thinking it was, in my view, an inappropriate line of reasoning.

As a matter of fact, it could scarcely be said that the appellant was a wealthy man. True it was that he earned a good wage, but he did so at a cost of consistent physical labour, seven days per week. He had undertaken to meet the liability of $2222 and was doing so. There is no reason to believe that a substantial fine would not be a significant penalty to him. As the learned authors of "Sentencing" (ibid 373) point out, while it is proper to impose a fine lower than might otherwise be appropriate to an offence in the case of an impecunious offender, the reverse situation does not apply. Sentencing approaches should avoid imposing sanctions that produce grossly unequal effects on offenders with differing resources. The proportionality principle demands that any fine imposed ought not to be greater than is fairly warranted by the gravity of the offence, regardless of the financial circumstances of the offender (cf *Hanbury* (1979) 1 Crim App R (S) 243).

Conclusion

[43] In the particular and unusual circumstances of this case, minds might fairly differ as to whether the offence could properly be categorised as trivial. However, it seems to me that the implicit conclusion of the learned magistrate in that regard cannot fairly be challenged. Indeed, Mr Lewis, of counsel for the appellant, did not seek to do so, having regard to the nature of the offence.

[44] However, a consideration of the criteria expressed in s 8(1)(a) and s 8(1)(c) of the Sentencing Act in relation to the established facts, leads in a different direction. One's initial reaction to the ultimate sentencing disposition, having regard to the prior acceptance by the learned magistrate of the many mitigatory and extenuating features in the context of what he, himself, described as "a pretty unusual collection of circumstances", is necessarily one of surprise.

[45] I am driven to the conclusion that the learned magistrate fell into error in not adequately taking into account the features referred to that, logically, compelled an acceptance of that which had been put to him without challenge -- that this, indeed, was one of those extra-ordinary situations in which a conviction ought not to have been recorded.

[46] To slightly paraphrase the language of Martin CJ in *Davis v Hayward* -

> "…… His Worship erred in the way he approached the sentencing of the appellant by placing too much weight on matters which he regarded called for the imposition of punishment befitting what he

> perceived to be the circumstances of the offence, and not giving sufficient attention to the circumstances of the offender, and extenuating circumstances in which the offence was committed."

[47] I am reinforced in that conclusion, by my assessment that he took into consideration circumstances of danger that were not demonstrated to have actually existed and failed to give due cognisance to what was, in reality, a minimal degree of criminal culpability on the part of the appellant.

[48] That being so, there must be an order allowing the appeal and setting aside the conviction and penalty appealed against.

[49] It falls to this Court to sentence the appellant afresh. I will hear counsel as to what is an appropriate sentencing disposition.