LA v Kennedy [2007] NTSC 56

PARTIES:	LA
	v
	KENNEDY, GAVIN DEAN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No JA 27/2007 (20531018)
DELIVERED:	6 November 2007
HEARING DATES:	29 October 2007
JUDGMENT OF:	MILDREN J
APPEAL FROM:	Youth Justice Court

CATCHWORDS:

CRIMINAL LAW – PRACTICE AND PROCEDURE – Sentence – whether conviction should be recorded – juvenile offender – nature of the offence – no prior convictions – appellant undergoing apprenticeship – consequence of recording conviction – Youth Justice Act – appeal allowed

Statutes:
Criminal Records (Spent Convictions) Act, s 6(2), s 7(1), s 7(3)
Sentencing Act, s 4(1), s 7(a), s 8
Youth Justice Act 2005, s 11, s 12, s 136, s 144, s 223, s 223(2), s 3(d), s 3(e), s 4, s 4(m), s 83, s 83(1), s 83(1)(a), s 83(1)(b)

References:
Fox and Freiberg, *Sentencing*, State and Federal Law in Victoria, 2nd ed, Oxford University Press, Melbourne, 1999

Citations:
Referred to:
Carcuro v Norris [2007] NTSC 18
Cook v Nash & McGarvie [2007] NTSC 14
Curtis v Sidik & Najar (1999) 9 NTLR 115
Forrester v Dredge (unreported, Supreme Court of the Northern Territory, 19 February 1997)
Girrabul v The Queen [2003] NTSC 101
Grego v Setter (unreported, Supreme Court of the Northern Territory, 19 December 1997)
LPR v O'Brien (unreported, Supreme Court of the Northern Territory, 15 March 1996)
P (a Minor) v Hill (1992) 110 FLR 42
Parmbuk v Garner [1999] NTSC 108
R v Briese, ex parte Attorney-General (1998) 1 Qd R 487
R v Williams (1992) 109 FLR 1
Simmonds v Hill (1986) 38 NTR 31

REPRESENTATION:

Counsel:

Appellant:	S Barlow
Respondent:	K Sharafeldin

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	mil07413
Number of pages:	11

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

LA v Kennedy [2007] NTSC 56
No. No JA 27/2007 (20531018)

BETWEEN:

LA
Appellant

AND:

GAVIN DEAN KENNEDY
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 6 November 2007)

[1] This is an appeal from the Youth Justice Court pursuant to s 144 of the Youth Justice Act 2005 (the Act).

[2] The grounds of the appeal (as amended) are as follows:

> "1. That the learned Magistrate failed to properly consider whether or not to record a conviction.
>
> 2. That the learned Magistrate erred by failing to properly consider the plea of guilty."

[3] At the conclusion of the hearing, I allowed the appeal, set aside the sentencing order of the learned Magistrate and resentenced the appellant by finding the charge proved and, without proceeding to a conviction,

discharged the appellant without penalty. I said that I would later provide reasons for my decision. These are those reasons.

Background facts

[4] On 6 June 2007 the appellant, who was then aged 16, pleaded guilty to two counts of stealing. The first count (file 20503141) involved stealing a wallet worth $50 and $370 in notes kept in the wallet from a taxi driver just after midnight on 8 March 2003. The appellant at that time was 11 years of age. There were six other offenders in the taxi at the time. The appellant paid the taxi driver $20 from his own money for the fare. The rest of the money was divided up amongst the offenders. The appellant and three of her co-offenders were apprehended. An amount of $170 was returned to the victim. On 12 June 2003 the appellant participated in an electronic record of interview and made full admissions. The appellant had no prior record. The learned Magistrate found the facts proved but declined to record a conviction or impose any further penalty. There is no appeal from that matter.

[5] The second count (file 20531018) related to shoplifting from the Target store at Palmerston on 20 May 2005. At the time she was aged 14 years and 3 weeks. She was in the company of a friend who had a four year old child with her. The friend began stealing items from the store and placing them on the child, so the appellant followed suit. The appellant stole a scrunchee valued at $5.57 and two watches valued at $24.99 each, making the total

value of the items stolen $55.55. The appellant was stopped by store security outside the store and, when questioned, returned the stolen property. She later participated in an electronically recorded interview with the police and made full admissions. At the time of this offending, the appellant had not previously been dealt with by the Juvenile Court.

[6] On 28 June 2005 the appellant was found guilty of similar offences by the Juvenile Court and was dealt with by a no conviction bond and placed on a bond to be of good behaviour for 12 months. So far as the second count was concerned, no charge was laid and the appellant was dealt with by way of diversion. At the time of the offending the relevant Act dealing with juvenile offenders was the Juvenile Justice Act. That Act remained in force until it was repealed and replaced by the Youth Justice Act 2005, which came into force on 1 August 2006. At the time when the appellant was diverted, there were no provisions in the Juvenile Justice Act dealing with diversion and it seems that diversion was an act of the executive not supported by legislation. Diversion is now dealt with in Part 3 of the Act. However, s 223 of the Act provides that the Act applies in relation to offences committed by a youth before the commencement date, but "a youth is not liable to a greater penalty in respect of an offence committed before the commencement date than he or she would be if the repealed Act was still in force" (s 223(2)).

[7] Subsequent to 28 June 2005, the appellant completed her good behaviour bond without re-offending. However, she did not complete the diversion

program, apparently because of lack of effort or interest by the appellant. In December 2005 a report was prepared suggesting that the matter be dealt with by the Court. The information for the shoplifting matter was laid on 4 January 2006. The appellant did not appear in Court in answer to the summons and a warrant was issued. It is not clear when she was arrested, but it would appear likely that she was taken into custody on the warrant on the same day as the matter was dealt with by the learned Magistrate.

Submissions before the Youth Justice Court

[8] Counsel for the appellant submitted that the appellant thought that these matters had been dealt with by the Court in 2005 and that was the reason she did not attend on the summons. No explanation was offered concerning the failure to complete the diversionary program. No point was made of it by the prosecutor, except to explain the delay in bringing the matter before the Court.

[9] On the appellant's behalf it was put that as the appellant had not been before the Court prior to her offending, if this matter had been dealt with on 28 June 2005 the likely result would have been to discharge the appellant without recording a conviction, having regard to her age, her admissions and her plea of guilty. Further it was submitted that since then, the appellant had completed her bond and had not re-offended. It was put that the appellant has commenced an apprenticeship. She lives at home and assists her mother in looking after five younger siblings and in "cleaning up". The level of

offending was minor, the property was all recovered and it was put that, as she had already spent a little time in custody, it was appropriate to deal with the matter by a no conviction discharge.

[10] Counsel for the prosecution submitted that a conviction with no further penalty was appropriate "due to the fact that the [appellant] had been dealt with in relation to similar offending previously. She's had the opportunities (sic) although of being diverted, however did not engage with that process".

The decision of the learned Magistrate

[11] The learned Magistrate gave very short reasons. So far as this matter is concerned, after noting that the appellant had an apprenticeship, helped her mother at home and had not been in trouble since, the learned Magistrate said "… these sort of offences unfortunately are too prevalent and in my view a conviction should be registered against your name". Consequently, a conviction without further penalty was imposed.

Ground 1 – failed to properly consider whether to record a conviction

[12] In my opinion this ground is made out. The Act provides, by s 83(1), for the alternative dispositions available to the Youth Justice Court by an ascending order commencing with dismissal of the charge and ending with detention or imprisonment. In each case, the Court has the power, if the charge is proven, not to record a conviction and the Act contemplates that the power might be used even in a case where the Court orders detention or imprisonment. However, no specific guidance is provided by the Act as to the factors to be

considered by the Court in deciding whether or not to record a conviction. The Court is given a complete discretion, although there are indications to be found in the Act which may be of some relevance.

[13] Section 3 of the Act sets out the objects of the Act. Of relevance are s 3(d) and s 3(e):

> "(d) to ensure that a youth who has committed an offence is made aware of his or her obligations (and rights) under the law and of the consequences of contravening the law;
>
> (e) to ensure that a youth who has committed an offence is given appropriate treatment, punishment and rehabilitation."

[14] Section 4 sets out the general principles that must be taken into account in the administration of the Act. Of relevance to this question are the following:

> "(b) the 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;
>
> (c) a youth should only be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time;
>
> (d) a youth must be dealt with in the criminal law system in a manner consistent with his or her age and maturity and have the same rights and protection before the law as would an adult in similar circumstances;
>
> (e) a youth should be made aware of his or her obligations under the law and of the consequences of contravening the law;

(f) a youth who commits an offence should be dealt with in a way that allows him or her to be re-integrated into the community;

(g) a balanced approach must be taken between the needs of the youth, the rights of any victim of the youth's offence and the interests of the community;

…

(m) 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;

(n) punishment of a youth must be designed to give him or her an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways; …"

[15] I note that s 4 does not specifically refer to general deterrence as a factor which the Court must consider. That is not to say that general deterrence is entirely irrelevant: see for example *Girrabul v The Queen* [2003] NTSC 101 at [18] per Martin (BF) CJ; *Forrester v Dredge* (unreported, Supreme Court of the Northern Territory, 19 February 1997) per Mildren J; *Grego v Setter* (unreported, Supreme Court of the Northern Territory, 19 December 1997) per Thomas J; *LPR v O'Brien* (unreported, Supreme Court of the Northern Territory, 15 March 1996) at [13] per Kearney J; *R v Williams* (1992) 109 FLR 1 at 6 per Mildren J; *P (a Minor) v Hill* (1992) 110 FLR 42 at 48 per Mildren J; *Curtis v Sidik & Najar* (1999) 9 NTLR 115 at [19]-[21] per Mildren J; *Parmbuk v Garner* [1999] NTSC 108 at [24]-[28] per Bailey J; *Cook v Nash & McGarvie* [2007] NTSC 14 at [29] per Southwood J;

Carcuro v Norris [2007] NTSC 18 at [18], [24] per Southwood J; but it also clear from those authorities that when the offending is minor little or no weight is to be given to general deterrence: see also *Simmonds v Hill* (1986) 38 NTR 31 at 33 per Mildren J.

[16] The provisions of s 4, to which I have referred, make it clear that the emphasis is on rehabilitation, ensuring juveniles understand the consequences of their wrongdoing and their re-integration into the community. A balance must be struck between the needs of the youth, the rights of the victim and the interests of the community. In relation to first offenders committing minor offences, the interests of the community are seldom met with a disposition which emphasises the deterrent aspects of sentencing and much greater emphasis is given to reform, particularly when the offender is very young or immature.

[17] Prevalence as a sentencing factor is a matter which, in the case of adults, may be taken into account in imposing a sentence which gives more emphasis to general deterrence: see generally Fox and Freiberg, *Sentencing*, State and Federal Law in Victoria, 2nd ed, Oxford University Press, Melbourne, 1999, paras 3.630-3.631. However, prevalence is not a matter referred to in s 4 of the Act and in the case of minor offending by juveniles it has in my opinion the same weight to be given to general deterrence.

[18] Another factor of relevance to this question arises from s 4(m) of the Act. By implication, the Act as a whole and s 4(m) in particular recognises that

juveniles should never be dealt with more harshly than adults. Although s 8 of the Sentencing Act does not apply to the Youth Justice Court (see Sentencing Act, s 4(1)), plainly if the appellant were an adult and would, on normal principles applicable to adults, be entitled not to have a conviction recorded under s 7(a) and s 8 of the Sentencing Act, it follows that the youth should not have a conviction recorded. That is not to say that s 8 provides much in the way of guidance; but it does in my view provide the outer limit of the Court's discretion.

[19] I note also that, so far as Courts other than the Youth Justice Court are concerned, s 136 of the Act provides that there is a distinction between offenders who are under 15 years of age and youths in the 15-18 year age group when a court finds a youth guilty but does not record a conviction. This suggests that a more sympathetic approach is taken, as one would expect, in the case of very youthful offenders.

[20] In my opinion, another relevant consideration is the fact that recording a conviction is a punishment which has consequences even for persons under 18. In *Cook v Nash & McGarvie* (supra) at [31], Southwood J correctly observed that "a conviction for an offence of dishonesty is detrimental to a person's prospects of employment". I would add that a conviction has other possible consequences as well. Persons who have an interest in convictions for dishonesty would include insurers, government departments and immigration officials including officials overseas: see *R v Briese, ex parte Attorney-General* (1998) 1 Qd R 487 at 491 per Thomas and White JJ. Under

the provisions of the Criminal Records (Spent Convictions) Act, a conviction by the Youth Justice Court does not become spent unless the youth has, for a period of 5 years after the date of conviction, not been convicted of an offence punishable by imprisonment (s 6(2)), whereas if the Court has not recorded a conviction, the criminal record is treated as a spent conviction immediately a person is discharged (s 7(1)) or if the Court has made an order under s 83 of the Youth Justice Act (other than under s 83(1)(a) or s 83(1)(b)) immediately the period specified in the order is discharged, etc (see s 7(3)). The effect of a spent conviction is dealt with in s 11 and s 12 and includes inter alia that the offender is not required to disclose the record to another and persons with access to the record commit an offence if they disclose the record except as permitted by the Act.

[21] In this case, the learned Magistrate's sole reason for deciding to record the conviction was the prevalence of the offence. In my opinion in the circumstances of this case, that consideration could carry no weight. The learned Magistrate should have had regard to the appellant's age at the time of the offending, her plea of guilty, her good behaviour since then, the fact that she had no prior record at the time of her offending, the fact that the appellant had undertaken an apprenticeship, the minor nature of the offence, the fact that the appellant had spent some time in custody, the fact that a full recovery of the property was made and the potential consequences to the appellant of recording a conviction. Those factors properly considered should have led to the appellant being discharged without penalty under

s 83(1)(b) of the Act. Accordingly I was satisfied that error has been shown and that the proper course was to set aside the conviction and order that the appellant be discharged without penalty.

[22] In the circumstances it is not necessary to deal with the other ground of appeal.

[23] Before leaving this matter, I should observe that the learned Magistrate placed no weight on the fact that the appellant had not completed the diversion arranged for her. On the facts of this case I do not think that this militated against an order not to record a conviction for two reasons. First, the matter was not raised by the prosecutor except by way of reply to counsel for the appellant's submissions. The learned Magistrate did not give the appellant's counsel an opportunity to respond, but proceeded immediately to sentence the appellant. I do not know what response or explanation may have been made if the opportunity had been given. Secondly, in my view the relevance of failure to comply with diversion is that it may have a bearing on the appellant's prospects of rehabilitation. In this case there is no doubt that the appellant's prospects are (and were) excellent and, to the extent that the appellant needed to have driven home to her that she needs to be accountable for her behaviour, that was achieved by charging her and bringing her before the Court.
