

Hatzimihal v Westphal [2011] NTSC 61

PARTIES: PANAYIHI HATZIMIHAL

v

LINDSAY WESTPHAL

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: 33 of 11 (21036453)

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JUDGMENT OF: SOUTHWOOD J

APPEAL FROM: BIRCH SM

CATCHWORDS:

APPEAL AGAINST SENTENCE – Discretion not to record a conviction –
property offences – employee’s breach of trust – appeal dismissed

Criminal Code s 210, s 233(a)

Sentencing Act s 8(1)

R v Yousef (2005) 155 A Crim R 134, applied

R v Bird (1988) 91 FLR 116; *Cobiac v Liddy* (1969) 119 CLR 257; *Hessen v Burgoyne* [2003] NTSC 47; *R v Ingrassia* (1997) 41 NSWLR 447; *The*

Queen v McInerney (1986) 42 SASR 11; *Toohey v Peach* (2003) 143 NTR 1, followed

R G Fox and A Freiberg, *Sentencing State and Federal Law in Victoria* 2nd Ed

REPRESENTATION:

Counsel:

Appellant:	In person
Respondent:	J Tierney

Solicitors:

Appellant:	In person
Respondent:	Office of the Director of Public Prosecutions

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

Hatzimihal v Westphal [2010] NTSC 61
No. 33 of 11 (21036453)

BETWEEN:

PANAYIHI HATZIMIHAL
Appellant:

AND:

LINDSAY WESTPHAL
Respondent:

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Published 18 August 2011)

Introduction

- [1] On 12 August 2011 I dismissed the appellant's appeal against sentence and I ordered the appellant to pay the respondent's costs of and incidental to the appeal. Following are my reasons for decision.
- [2] On 13 May 2011 the appellant pleaded guilty to two counts on information dated 8 February 2011. Count one was that, contrary to s 210 of the *Criminal Code*, the appellant stole one X-Box 360 console, one X-Box controller, one portable DVD player, one UFC Play Station 3 video game, one Apple iPod accessories kit, one Apple iPod, two jumpers, one pair of track pants, one Apple iPod stereo, one 200 piece building block set, one toaster oven and one Optus \$30 phone credit, the property of Target

Australia. The total value of the goods was \$1,755.95. The maximum penalty for this offence is imprisonment for seven years.

- [3] Count 2 was that, contrary to s 233(a) of the *Criminal Code*, on 9 July 2010 at Alice Springs the appellant, with a view to gain, falsified a Target receipt which was made for an accounting purpose. The maximum penalty for this offence is also imprisonment for seven years.
- [4] On 9 June 2011 the sentencing Magistrate convicted the appellant of both counts on the information. For count 1, the count of stealing, the appellant was ordered to undertake 60 hours of community work and pay a victim levy of \$40. For count 2, the count of falsifying a document, the appellant was ordered to undertake 40 hours of community work and pay a victim levy of \$40. The appellant was ordered to complete the community work within 14 weeks from 9 June 2011 and to pay the sum of \$895.89 to the Clerk of the Court of Summary Jurisdiction on or before 15 July 2011. The money was to be forwarded to Target Australia in Alice Springs.
- [5] The only ground of appeal was that the sentencing Magistrate erred in recording convictions against the appellant for the counts on the information.

The facts of the offending

- [6] The appellant is an adult. He was born on 6 May 1990. At the time he was sentenced he was 21 years of age. At the time he committed the offences he was 20 years of age.

- [7] The appellant was born in Greece. He and his mother and two brothers came to Alice Springs in 1992. He attended Bradshaw Primary School and Our Lady of the Sacred Heart College. He completed Year 12 at Charles Darwin University.
- [8] In 2007 the appellant obtained full time employment doing graphic design work at bellette. He worked with that business for two and a half years and he had a reputation as an honest and hardworking employee. He began working at Target as a casual shop assistant six months prior to 9 July 2010. From Target he went to Centralian Motors where he was employed as a sales consultant. At the time he was sentenced he was working for Harvey Norman in Alice Springs as a computer salesman. He is still in that employment. In his employment with Harvey Norman the appellant is responsible for dealing with customers, handling money and opening and closing the store on occasion. He has also continued to do design work for businesses in Alice Springs and to provide computer services to family and friends.
- [9] On 9 July 2010 the appellant was carrying out his duties as a shop assistant at Target. At 10.49 am the appellant went to the sound and entertainment area of the Target store with a large grey tub. He picked up a portable DVD player and an Apple iPod accessory kit along with other items from the shelves and placed them into the grey tub. He then returned to the lay-by area of the store with the grey tub.

- [10] At 11.22 am the appellant returned to the sound and entertainment area of the store and placed more items into the grey tub including an X-Box 360 game console from a locked cabinet. He then returned to the lay-by area of the store with the grey tub and placed it under a bench.
- [11] Between 11.24 am and 12.06 pm the appellant removed the grey tub from under the lay-by bench and signed onto a cash register. He then scanned an X-Box 360 game console, an X-Box 360 controller, a portable DVD player and one UFC Play Station 3 computer game and logged the items to a false name being Mr J Steark of unit 19/32 Bloomfield Street, Alice Springs.
- [12] The appellant then wrapped the X-Box 360 game console into one package. He also wrapped an X-Box 360 controller, a portable DVD player and one UFC Play Station 3 game, all of which he had scanned onto the false lay-by. He then added an unscanned Apple iPod, an unscanned Apple iPod accessory kit and an unscanned X-Box 360 computer game and wrapped these items in another package.
- [13] The appellant then resumed his normal duties until 5.19 pm. At that time he returned to the lay-by area and placed the two previously wrapped packages into separate cream coloured bags. He walked to the front counter with the two packages in the cream coloured bags and placed them into one large red carry bag bearing a Target logo and placed the carry bag beside him at the front counter. He then continued to serve customers.

- [14] At 5.41 pm the appellant served his brother. He scanned two \$49 jumpers and a \$29 pair of track pants and voided them making their price \$0. He then placed these items into the same large red carry bag bearing a Target logo. He then scanned a \$139 Apple iPod stereo and voided the item making the price \$0. He then passed the Apple iPod stereo to his brother along with the red bag containing the track suit pants and two jumpers. The appellant then scanned a 200 piece building block set valued at \$59 and changed the price to \$10.01. He then passed the block set to his brother and scanned a \$129 toaster oven and voided it to make the price \$0. The appellant then generated a \$30 Optus phone credit and discounted the price to \$15.
- [15] The appellant then took \$50 from his brother and gave him \$25 in change along with a receipt for the transaction and the \$30 Optus phone credit. The appellant then passed the red carry bag containing the two packages of items to his brother and assisted his brother to navigate his way out of the checkout area. The items had a total value of \$1,755.95.
- [16] The appellant's offending was detected because the manager of Target was advised by another employee of the store that the employee had been unable to locate the goods which the appellant had recorded as a lay-by to J Steark. As a result CCTV checks were conducted and the appellant's activities were observed on the CCTV footage.

[17] On 6 November 2010 the appellant was spoken to by police but he declined an opportunity to participate in an electronic record of interview.

[18] At the time he was sentenced the appellant did not have a criminal record. He was of good reputation. All of the character references tendered on his behalf including a character reference from the appellant's current employer stated that the offending was out of character. Prior to being sentenced, the appellant had made partial restitution. He had made payments totalling \$361 on an X-Box item which was returned to the store by his mother who was an employee at the store. He made the payments prior to being charged or spoken to by the police. On 21 March 2011 and again on 26 April 2011 the appellant attempted to make complete restitution but the manager of Target refused to accept payment as the matter was in the hands of the police.

Sentencing remarks of the sentencing Magistrate

[19] On 13 May 2011 the sentencing Magistrate made the following remarks.

Taking into account your [the appellant's] position of trust and the amount of property stolen by you and your planning etc, I am not with your lawyer in regard to just letting you go today without a conviction and putting you onto a good behaviour bond. As an initial step, I am going to order a community work order assessment, and I want you to understand that in my view your conduct is a very serious breach of the trust that was placed in you by your then employer. I am seriously considering imposing a period of imprisonment upon you.

[20] On 9 June 2011 the sentencing Magistrate made the following further remarks.

You have pleaded guilty to two charges; one of stealing the property that has been listed in count 1 on the information and also a charge relating to the falsification of the relevant document.

In the case of *R v Bird* the Court of Criminal appeal said:

The matters to be taken into account and the approach in this jurisdiction to sentencing for offences involving a breach of trust by employees are reasonably clear but may conveniently be re-stated. In general, unless the circumstances are very exceptional or the amount of money involved is small, a sentence of immediate imprisonment is the usual and expected punishment in such cases.

So you can see the Courts regard breaches of trust by employees as serious. The matter of *Evans v Davis* involved a small amount of money and I think can be distinguished by the conduct, in that case, and your conduct because although the offence occurred over a very short space of time, it nevertheless required some pre-planning by you. You had to put in place your knowledge of your employer's practices in the conduct of its business and you also enlisted the assistance of your brother to help you with this particular enterprise. In my view, that raises the bar so far as the seriousness of your offending is concerned.

As was highlighted by her Honour in the matter of *Evans v Davis*, and in the matter of *R v Bird*, a number of considerations are in play when the Court comes to sentence young men of prior good character for this sort of offending. Some restitution has been made in the matter and Mr Duwell, on your behalf, has told me that you are prepared to pay the rest of the outstanding funds and that you had made some overtures to Target Australia to pay that, but it was understandable from their point of view that they have said to you that the matter is now in police hands and we don't want anything to do with you. I am sure you can understand that.

The references that have been placed before me speak very highly of you. Although you have been involved in a situation where trust was a significant factor, it seems that other people are still prepared to give you a go and you are working satisfactorily in your current employment and the references that have been placed before me that I have marked Exhibits D4 and D6 speak extremely highly of you.

Your plea of guilty was certainly made at a very early opportunity. Of course, in my view, from what I have heard about the case it was

a particularly strong prosecution case and really there was no other option for you than to accept responsibility for what had happened.

I do place a great deal of weight, today, on the fact you are a young man of good character. Your referees still speak highly of you and I am satisfied that despite the matters that I have mentioned to you this morning, it would be appropriate to proceed in this matter other than by way of a sentence of imprisonment. I note that you are working six days a week. You have been assessed as suitable to undertake some community work and I have decided today that would be an appropriate disposition.

You must understand, though, that I am going down that path rather than the path of imposing a period of imprisonment upon you for the reasons I have talked about. Community work is serious. If you fail to undertake it, the Act provides that it is converted to a sentence of imprisonment. For a young man of your good character and background, that would be a very detrimental outcome. So it might mean that you can only work five days a week or you have to make other arrangements to undertake the community work but you must do it. If you do not, you will find yourself back in Court with that outcome facing you.

I note that you have also indicated that you are prepared to make restitution and I am going to order that you do that. Perhaps you might like to just speak to Mr Duwell or tell him how or at what rate you might like to pay the amount of money which I understand is \$895.95.

Despite your prior good character and your early plea I am of the view that your offending is sufficiently serious for the Court to impose convictions upon you today. I am not prepared to consider, for that reason, a without conviction order.

[21] The sentencing Magistrate took into account the appellant's age and prior good character but determined that the objective seriousness of the appellant's offending was such that convictions should be recorded against him.

The submissions of the appellant

[22] The appellant was self represented during this appeal.

[23] He submitted that the convictions should not have been recorded against him for the following reasons. First, his prior good character. He submitted that he was of positive good character and that the references tendered in the Court of Summary Jurisdiction supported this conclusion. Secondly, he was not a “master mind”. The offending occurred on the spot. His brother was not involved in the planning of the offences. It was a stupid coincidence that the appellant’s brother was there at the end of the day. The offending took place in less than half a day. It was a one off occurrence which was out of character. Thirdly, the appellant had made or attempted to make restitution in full before he was sentenced. He felt remorseful. He realised the error of his ways and he had changed his behaviour. Fourthly, the appellant had good prospects of rehabilitation.

[24] As to the circumstances of the offending, the appellant stated that he decided to commit the crimes on the morning of 9 July 2010. He made the decision “out of the blue”. He still has most of the goods in his possession although some were given to friends on their birthday. He did not return the goods to Target. He does not know why he committed the offences. He “guessed” he had financial difficulties. He was living with his mother but he had made a silly mistake and bought a very expensive motor vehicle which he was still paying off when he stole the goods. The purchase of the motor vehicle precluded him from making full restitution at the time he gave his mother the money to pay for the X-Box. He has now made restitution in full.

[25] The appellant said very little about the impact that the convictions may have on him. He said that in 2012 his whole family was planning to go to Greece for longer than a month. However, he had not made any enquiries about whether he would be precluded from obtaining a passport or visa to enter Greece because of his criminal record. His major concern was that if he stayed in Greece for more than one month he may have to complete some service in the Greek army.

Consideration

[26] An appellate court will only interfere in overturning a conviction if there is some reason for regarding that the discretion conferred upon the sentencing Magistrate was improperly exercised and the magistrate fell into error¹. It is not for the appellate court to substitute its own view of the way in which the discretion should have been exercised. When people are convicted of serious offences, it is important that a conviction be recorded². In the case of indictable offences, it is a rare case where good reason exists not to record a conviction³.

[27] A sentencing court's discretion to not record a conviction for a particular offence is governed by s 8(1) of the *Sentencing Act*. Section 8(1) states that 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

¹ *Hessen v Burgoyne* [2003] NTSC 47 at [20].

² *R v Yousef* (2005) 155 A Crim R 134.

³ *R v Yousef* (2005) 155 A Crim R 134.

which the offence is of a trivial nature; or (c) the extent, if any, to which the offence was committed under extenuating circumstances. The section enables a sentencing court to pass a sentence, in certain circumstances, which enables an offender to avoid the legal and social consequences of a conviction which may extend beyond any penalty imposed by the court⁴.

[28] Before exercising the discretion granted by s 8(1) of the *Sentencing Act* it is well established that the Magistrate must be of the opinion that the exercise of the power is expedient because of the presence and effect of one or more of the stated conditions, namely character, antecedents, age, health, mental condition or because the offence is trivial or there are extenuating circumstances. One of these by itself, or several of them taken together, must reasonably support the exercise of the discretion that the *Sentencing Act* gives⁵.

[29] In considering the factors specified in s 8(1) of the *Sentencing Act* the court is also required to have regard to all the circumstances of the case including the sentencing principles which are applicable to the relevant offences⁶. There must be found some mitigating aspect arising from the circumstances of the case which forms a reasonable basis for the exercise of the discretion under s 8(1) of the *Sentencing Act*⁷.

⁴ *R v Ingrassia* (1997) 41 NSWLR 447 per Gleeson CJ at 449.

⁵ *Cobiac v Liddy* (1969) 119 CLR 257 per Windeyer J at 275.

⁶ *Toohey v Peach* (2003) 143 NTR 1 at par [11].

⁷ *Toohey v Peach* (2003) 143 NTR 1 at par [11].

[30] A conviction is a formal and solemn act marking the court's and society's disapproval of the offender's wrongdoing⁸. It is a component of the sentence and is to be given weight in determining whether or not the sentence is proportionate to the offence. The more serious or blatant an offence, the less proportionate it is for the Court of Summary Jurisdiction to decline to record a conviction⁹.

[31] As to the sentencing principles applicable to the offences in this case, it is necessary to have regard to what the Court of Criminal Appeal stated in *R v Bird*¹⁰. That case establishes that offences of dishonesty committed by an employee against an employer are treated as a particularly serious category of offence, particularly given the significant breach of trust involved. Significant weight is to be given to general deterrence. The public interest in stern deterrence of offences of this type usually substantially prevails over factors such as a person's prior good character. In general, unless the circumstances are very exceptional or the amount of money involved is small, a sentence of immediate imprisonment is the usual and expected punishment in such cases. The sentence must be sufficiently substantial to indicate to the public the gravity of this particular offence.

[32] Apart from the amount of money involved other factors to be considered when imposing a sentence for offences of dishonesty committed against an employer include the period over which the criminal enterprise was carried

⁸ *The Queen v McInerney* (1986) 42 SASR 11 at 124.

⁹ R G Fox and A Freiberg, *Sentencing State and Federal Law in Victoria* 2nd Ed, at 192.

¹⁰ *R v Bird* (1988) 91 FLR 116.

on, the quality and degree of the trust imposed in the offender by his employer including the offender's position in the employer's organisation, the use to which the offender puts the money or goods stolen and the impact of the offence and sentence upon the offender's fellow employees, the impact upon the public confidence in the employer, the effect of the defalcation upon the employer, the effect of the sentence upon the offender, the history and personal circumstances of the offender and any matters of mitigation personal to him¹¹.

[33] The goal of general deterrence must play its proper part in the sentencing process for such offences quite apart from considerations of the rehabilitation of the particular offender which, of course, must not be overlooked. Offences of dishonesty involving a breach of trust by an employee involve a situation where, in the public interest, sentences must be imposed with the goal of stern general deterrence. This goal must predominate over an approach based on the frailties of human nature, the youthfulness of the offender and other factors personal to the offender including prior good character¹².

[34] In my opinion, the sentencing Magistrate was correct to record convictions against the appellant. The offending was objectively serious. The offending was premeditated. It involved some planning and forethought. The offences were committed between 10.49 am and 5.41 pm. They were not committed

¹¹ *R v Bird* (1988) 91 FLR 116 at 132.

¹² *R v Bird* (1988) 91 FLR 116 at 133.

on the spur of the moment and the appellant had ample opportunity to change his mind and not commit the offences. The offending was carefully structured and a number of steps were involved in the commission of the offences. The offences involved a serious breach of trust. In order to steal the goods the appellant had to use his knowledge of his employer's practices in the conduct of its business and he also enlisted the assistance of his brother. The appellant was 20 years of age at the time of the offending and there were no extenuating circumstances. There were no circumstances which excused the commission of the offences. Neither this Court nor the sentencing Court was given an adequate explanation as to why the appellant committed these offences. The goods stolen were "lifestyle" goods which have been largely used by the appellant for his own entertainment. This case was not a case of need over greed.

[35] The sentencing Magistrate took all relevant circumstances into account including the appellant's prior good character and he imposed a sentence that was proportionate to the serious and blatant nature of the offending. The sentences imposed on the appellant were consistent with the principles enunciated in *R v Bird*¹³. It is important that convictions be recorded for such offences. Employers are vulnerable to such crimes and significant weight is to be given to punishment and to discouraging others who may be inclined to offend in a similar manner.

¹³ (1988) 91 FLR 116.

[36] The appellant did not demonstrate that as a result of being convicted he will suffer a detriment that is disproportionate to the gravity of his offending. There was no evidence that he would lose his job or that he would be deprived of a career opportunity or that he could not travel to Greece with his family. The evidence was that his current employer was aware of his offending and nonetheless thought highly of him. The sentence imposed on the appellant facilitates his rehabilitation and holds him accountable for his offending. He has been able to retain his employment.
