Girrabul v The Queen [2003] NTSC 101

PARTIES:	ISAAC GIRRABUL
	v
	THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	JA 92 of 2002 (20305920) JA 93 of 2003 (20303878) JA 94 of 2003 (20303587) JA 146 of 2003 (20305912) JA 91 of 2003 (20305912)
DELIVERED:	26 September 2003
HEARING DATES:	19 September 2003
JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Counsel:

Appellant:	G. Bryant
Respondent:	B. Harris

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	mar0341
Number of pages:	14

mar0341

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

Girrabul v The Queen [2003] NTSC 101
Nos. JA 92 of 2002, JA 93 of 2003, JA 94 of 2003,
JA 146 of 2003, JA 91 of 2003

IN THE MATTER OF the Justices Act

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

ISAAC GIRRABUL
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 26 September 2003)

[1] This is an appeal against an order that the appellant, a juvenile, be convicted and detained in a detention centre for a period of six months as from 4 July 2003. That order was made in the Juvenile Court at Darwin on 27 August 2003 consequent upon the appellant's pleas of guilty to numerous offences

committed at a time when he was 13 years old, 14 at the time the order was made.

[2] The following is an edited summary of the facts admitted in relation to the commission of the large number of offences to which the appellant had pleaded guilty, taken from his Worship's sentencing remarks of 4 June 2003:

> 7 February 2003, at the age of 13, he and others went to the Gunbalanya Health Clinic to steal petrol but they stole bandages and medical equipment. A glass panel was smashed to get in, $400 worth of damage was caused.
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> On 8 February, he and others broke into Gunbalanya Pre-school with intention of steal food. A security mesh grille was forced off the window, louvres were removed, co-offender got in and allowed the defendant and others in and whilst in the school, the defendant removed drinks and food from a classroom fridge and he removed a Sony video camera, valued at $2500 which was fortunately recovered.
>
> On 18 February he and a group of co-offenders attended the caretaker's workshop – workshed at the Gunbalanya school with the intention of stealing petrol. Co-offender climbed onto the roof, used a shifting spanner, iron sheeting was unscrewed. This defendant, Isaac Girrabul stayed outside as a lookout. Co-offender went in and got a small quantity of petrol which the co-offender and the defendant used to sniff.
>
> 22 February 2003, there was a trespass at the Gunbalanya Police Station. They went there to steal petrol from the fire truck. The defendant jumped over a 6-foot fence, approached the fire truck, used a garden hose and siphoned the petrol, that is a $1.50 from the fuel tank, that petrol was sniffed.
>
> Then on 24 February 2003, the defendant and others went to the Gunbalanya Social Club with the intention of stealing petrol. Cut a large hole in the 6-foot wire perimeter fence, the co-offender did that. The defendant and the co-offenders then climbed through the fence, climbed onto a roof. The co-offender used a shifting spanner

to unscrew sheets of roofing iron, to allow a smaller co-offender to enter, damage valued at $600 was caused.

The defendant and co-offenders waited on top of the roof, while a smaller co-offender entered the building, passed up two cartons of Victoria Bitter beer, two cartons of Melbourne Bitter beer. And then some petrol was siphoned into four 1.25 litre soft drink bottles from the lawn mowers and passed to the defendant. They left and the petrol was used to sniff.

On 28 February 2003, the defendant and three co-offenders went to the residence of Peter Plavins, at unit 1, lot 514, Gunbalanya, they went there to steal petrol. The victim was away in Darwin, they went to the front sliding door, they jemmied open the door. They got in and they removed beer, PlayStation, a rechargeable search light, and a socket set, and food, and they left with those items.

On 6 March 2003, the defendant and two others go to Gunbalanya Police Station, where petrol was stolen from the police vessel. The co-offender cut the fuel line to the outboard motor and petrol was drained into three 1.25 litre soft drink bottles. The defendant was arrested on 6 March, he spoke to police, made admissions and was bailed. The trouble is, after he was bailed he got into more trouble, he was bailed on 6 March.

On 7 March after he was bailed he and a group of co-offenders went to Gunbalanya Police Station to steal petrol. Went to the police vessel, petrol was drained into a 1.25 litre soft-drink bottle, and they left, they used the petrol to sniff.

8 March, the next day the defendant and others went to Gunbalanya Police Station, jumped the fence, went to the police vessel, drained petrol. The defendant and the co-offenders used the petrol to sniff.

9 March, the day after, three days from when he was released on bail, again went to Gunbalanya Police Station, jumped the fence, went to the police vessel, drained petrol into two 1.25 litre soft drink bottles, left, used the petrol to sniff.

10 March, did it again, this is a person who is on bail, is going to a police station to steal petrol. The petrol was drained into three 1.25 litre soft-drink bottles, and was used to sniff.

> 12 March, he was arrested, he told police that he committed the offences to steal petrol, he was refused bail. He was in custody on the night of 12 March, came to court on 13 March and was granted bail to reside at Mamadawerre Outstation, not to enter Oenpelli until court on 26 March, save for necessary medical treatment.
>
> He did not leave Oenpelli. Having been released on bail with a condition that he go to Mamadawerre he offended again on 19 April.
>
> About 1am on 19 April, with another person, they went to the house of Anthony Murphy, at lot 382 Gunbalanya. A decision was made to enter and steal food, they entered and stole a small amount of food.
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> On 20 April in the early hours of the morning he went with another to the Gunbalanya Store. A decision was made to enter the shop through a hole in the floor of the shop, to steal cigarettes, they were apprehended in the shop, with the defendant in possession of two packets of cigarettes.

[3] The juvenile was represented by counsel who especially pointed to the appellant's age at the time he committed the offences and that he had not previously been before the Juvenile Court to be dealt with for any form of offending. It was suggested by counsel, not disputed by the prosecutor, that the appropriate form of disposition was a bond to be of good behaviour under supervision for a period of time up to 12 months.

[4] However, noting that the appellant had failed to abide by bail undertakings, his Worship took the view that an undertaking to be of good behaviour would be of no value. The distinction between a bail undertaking without sureties as opposed to compliance with an order of the court supported by appropriate supervision was not taken into account. The learned magistrate also took the view that those responsible for the care of the appellant had

not been able to control him such that he could leave an outstation where he should have remained, go to Gunbalanya, fall into bad company, take to petrol sniffing and commit the offences.

[5] Although reminding himself that an overriding consideration when dealing with juveniles is to achieve a result whereby the juvenile becomes a law-abiding adult, his Worship emphasised the need for the protection of the community and said that the community needed protection from the appellant. His Worship said that, arising from unlawful entry and stealing allegations of late December 2002, there had been a family conference and a caution given by the police, notwithstanding which the offending took place. His Worship stated categorically that: "The community of Oenpelli is at great risk of this juvenile. This juvenile will not be released to return to that community". He rejected a suggestion that he go to Mamadawerre, an outstation where he had been brought up by his paternal grandmother, who had admittedly failed to control him of recent times.

[6] However, rather than deal with the appellant on that date, his Worship decided to seek a report under s 52 of the Juvenile Justice Act, being of the opinion that he was a person who should be declared in need of care. In that context his Worship noted the background to the offending, the appellant's express desire to join the Navy, the need to obtain appropriate education to enable him to pursue that objective, and that he could very well have a better life if he pursued a non-Aboriginal education in Darwin, whilst in care.

[7] S 52 of the Juvenile Justice Act provides that if the Juvenile Court believes, on reasonable grounds, that a juvenile against whom proceedings for an offence are brought is, or may be, a child in need of care, within the meaning of s 4(2) of the Community Welfare Act, or the welfare of a juvenile against whom proceedings for an offence are brought, is in danger in any way, it may require the Minister responsible for the administration of the Community Welfare Act to make an investigation of the circumstances of the juvenile and to take appropriate action to secure the proper care of and attention to the juvenile's welfare. His Worship did not go so far as to make any requirement of the Minister to secure the proper care and attention to his welfare. It is apparent that his Worship was of the view that the appellant was in need of care, within the meaning of the Community Welfare Act, because he was not subject to effective control and was engaging in conduct which constitutes a serious danger to his health or safety, namely, petrol-sniffing (s 4(2)(d)).

[8] When the hearing was resumed on 27 August the court had the requested report. It canvassed the appellant's family background in detail and noted in particular that he had come to be in his paternal grandmother's care when he was about eight months old. The majority of the appellant's life had been spent at Mamadawerre with her, although he had spent some periods at another outstation. He was described by his grandmother as being a good boy when he was away from petrol, and helpful around the outstation with cleaning up and helping to care for other children who reside there. It was

noted that the grandmother was a non-drinker who had support through extended family residing at the outstation.

[9] Information available to the Community Welfare worker disclosed that the appellant's difficulties with sniffing petrol and subsequent criminal activity began when he was approximately 11 years old when he went to GUnbalanya to live with members of his extended family so that he could see his father. When the grandmother became aware of this, she arranged for the appellant to be returned to Mamadawerre. However, he continued to travel between there and Oenpelli where he continued the petrol-sniffing activity, under the influence of a ringleader amongst those who undertake that activity. The appellant also said that he was bored and that influenced his conduct.

[10] The report indicates that the grandmother had ceased to be able to exercise sufficient control over the appellant to restrain his movement from the outstation into Gunbalanya. There were other members of his family who were concerned as to his petrol sniffing and criminality and who believed that a good education and a solid foundation in Aboriginal culture through family input at an outstation, away from Gunbalanya, would be of benefit to him. The report makes plain the obvious, that there is a need to separate the appellant from his petrol-sniffing peers. Residence at another outstation had been under consideration and there was a plan for him to go to boarding school, which would be considered as an option pending the outcome of the proceedings in the Juvenile Court.

[11] The Community Welfare worker frankly assessed the difficulties associated with the appellant arising from his petrol sniffing, his behaviour as a result of it and the difficulties which members of his family had experienced in endeavouring to assist him. They recognise, however, the need for the appellant to be away from his petrol-sniffing peers. The Mamadawerre outstation is too close to Gunbalanya and access between the two places is easy. It was reported that proposals had evolved for the appellant to live at a place further away with other members of his family. It was acknowledged that the family would be likely to require continuing Family and Community Services support, but said that given there is a suitable family member willing to take responsibility and care of the appellant, there was at that stage no need for him to be considered in need of care and thus brought within the provisions of the Community Welfare Act.

[12] His Worship rejected the assessment and recommendations contained in that report, emphasising the past and obviously discounting the work done by FACS in proposing the means by which the root causes of the appellant's criminality might be overcome and a means of rehabilitation instituted.

[13] There was also available to the Juvenile Court a report from Northern Territory Correctional Services in which much the same background was reviewed and with an assessment that, if the appellant remained at Oenpelli, his risk of re-offending would be high considering that petrol sniffing in the community appeared to be rife. The Probation and Parole officer who prepared the report suggested that the court consider suspending part of a

period of detention upon the appellant being subjected to supervision by Correctional Services. The service would thus be able to monitor his behaviour and movements and direct him where he should reside. It was suggested that there be a condition that he not sniff petrol.

[14] His Worship clearly had no faith in the prospects of the appellant's rehabilitation by releasing him so that he could reside with members of his family under the supervision of Correctional Services officers and with the assistance of Family and Community Services welfare workers.
His Worship asserted that the appellant was not amenable to control as administered by a court since he had failed in his undertakings in respect of bail.

> "This is a case where quite simply the juvenile is not subject to effective control, where the juvenile will offend. This is a case where the protection of the community dictated this 14-year old be locked up, for the simple reason that the community can have a break from him. …… I'm thoroughly convinced that this is a matter where the community has to be protected from the juvenile, because he's not subject to effective control. He is not amenable to effective control and because he will not honour a promise that he will be of good behaviour."

[15] I consider that his Worship erred taking such a strong view against affording the appellant, members of his family and officers of Correctional Services and Family and Community Services the opportunity to work together so as to change the course of the appellant's way of life. He wrongly rejected relevant considerations.

[16] Given the facts before his Worship and the views expressed, particularly in the Family and Community Services report, it seems to me that by placing the appellant in detention for six months the complaints of the people of Gunbalanya as to the activities of young petrol sniffers will not be relieved. There will be other juveniles, and apparently some over the age of 18, who will continue to pose the same threat to the community's property. The courts cannot be expected to make any significant impact upon crime committed by juveniles induced by petrol sniffing by simply locking one of them up for a few months. I think his Worship was of a similar view in that, towards the conclusion of his sentencing remarks, he referred to the needs of a juvenile to be brought up in an environment away from petrol where he receives incentive or encouragement in an environment where there is sufficient distraction from that sort of behaviour. His Worship was appropriately concerned about the welfare needs of people like the appellant, but, in my opinion, he erred in principle in thinking that the protection of the community and the dealing with those needs could only be met by an order such as was made.

[17] I will not repeat the many consistent statements of principle to be applied in the sentencing of juveniles as is to be found in the Act itself, and the oft repeated judgments in this court such as *Nelson v Chute* (1994) 72 A Crim R 85; *M v Waldron* (1988) 90 FLR 355; 56 NTR 1; *Simmonds v Hill* (1986) 38 NTR 31; *Yovanovic v Pryce* (1985) 33 NTR 24; *P v Hill* (1992) 110 FLR 42.

[18] The sentencing remarks in those cases derive from particular circumstances of the offence and the juvenile offender there under consideration. However, there is a theme which recognises that in the case of juveniles the sentencer is required to consider sentencing options by firstly taking into account the psychological and social needs of the individual wrongdoer and applying that which can be best directed towards meeting his or her needs and aiding rehabilitation. The appropriate resources of the state available to support that welfare objective are often to be engaged both before the sentencing and after. Accountability, personal responsibility for the offending, and deterrence both personal and general, may be brought to bear within that framework by the imposition of restraints which can work together with the rehabilitative measures. The two models are not mutually exclusive. Striking the desirable balance between divergent objectives may often be a difficult task but the nature of the offending must not be allowed to overshadow its cause. The offender's background, including age and criminal history, will always be relevant factors as will the family and state resources available.

[19] The court imposing the sentence does not lose overall control of the juvenile during the period of its order since it maintains jurisdiction pursuant to s 53(4) of the Juvenile Justice Act to vary or revoke the order as the occasion requires. The juvenile has standing to make application in that regard.

[20] Courts dispensing criminal justice see the end product of various factors which have influenced the offender to commit the crime. Often they disclose failure on the part of the state to recognise or attempt to deal with those influences. In the case of juvenile offenders the opportunity for remedial measures to be ordered by the court is available upon the expectation that the necessary resources of the state will be effectively applied. The shame is that the trigger for that opportunity has been the commission of a crime or crimes in the course of which innocent members of the community have suffered loss.

[21] His Worship was rightly concerned about the appellant's disregard of the law as indicated by his offending and breach of bail undertakings. (As to the latter, I wonder whether the appellant really understood what they meant, whether or not it was explained to him in a manner consistent with his age and level of maturity and whether anyone endeavoured to ensure that he met his obligations.) However, this was his first appearance in court for criminal offending, the offences were committed over a relatively short period of time when he was aged 13 and, in respect of many of the particular crimes, acting in concert with and probably under the influence of others. He comes from a dysfunctional background and had found ways of avoiding the control of his grandmother so as to obtain easy access to the source of his ultimate criminal conduct.

[22] The order that he be detained for six months was made in error, without sufficient regard to the principles governing the sentencing of juveniles, I

propose measures whereby he will be subject to supervision of others within his family to assist in providing him with the care and guidance needed to protect him from the deleterious effects of petrol sniffing, and the community from criminal conduct brought about by that pernicious habit. The restrictions upon his freedom of movement are designed to aid his rehabilitation primarily as well as to operate as a form of punishment.

[23] It was for these reasons that I made the following orders on 24 September:

ORDERS:

1. That the order made in the Court of Summary Jurisdiction on 27 August 2003 that the appellant be convicted and detained for 6 months in a detention centre be quashed;

2. the appellant be released without conviction upon his entering into a bond in his own recognizance in the sum of $10 that he will be of good behaviour for 12 months from today;

3. the appellant reside in such place and with such person as nominated by a probation officer appointed by the Director of Correctional Services, being a place and person determined after consultation with Jill Nganjmirra, his paternal grandmother, and such other persons as that person thinks fit;

4. that the appellant obey the reasonable directions of the person appointed by the Director, including directions prohibiting his

leaving the nominated place of residence or going to any particular place or places except for specified periods of time and for specified purposes;

5. that the appellant refrain from petrol sniffing and undergo such counselling in that regard as he may be directed by that person.

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