Lynch v Dixon [2004] NTSC 45

PARTIES:	DONALD LYNCH
	v
	GARNET ALAN DIXON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 19 of 2004 (20409752)
DELIVERED:	7 September 2004
HEARING DATES:	25 August 2004
JUDGMENT OF:	OLSSON AJ

REPRESENTATION:

Counsel:

Applicant:	K. Banbury
Respondent:	C. Roberts

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	ols0401
Number of pages:	18

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Lynch v Dixon [2004] NTSC 45
No JA 19 of 2004 (20409752)

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 Alice Springs

BETWEEN:

DONALD LYNCH
Applicant

AND:

GARNET ALAN DIXON
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 7 September 2004)

[1] This is an appeal against a sentence imposed on the appellant on 18 June 2004, by the Juvenile Court at Alice Springs constituted by the Deputy Chief Magistrate.

[2] In relation to file 20409752, the appellant, a 17-year-old Arrente male, appeared before the learned Deputy Chief Magistrate charged with four related offences, namely:

(1) Driving a motor vehicle whilst disqualified;
(2) Driving an unregistered motor vehicle;
(3) Driving a motor vehicle without a current compensation contribution; and
(4) Without lawful excuse possessing a plate resembling a number plate calculated to deceive.

[3] The appellant pleaded guilty to each of the counts, which all involved offences committed on 29 April 2004.

[4] Having heard submissions from counsel for the prosecution and the appellant, the following sentences were imposed in relation to that file:

Count (1)	-	two months' detention
Counts (2), (3) and (4)	-	aggregated fine of $1000, with a victims assistance levy of $60

[5] The present appeal is, in terms, primarily brought against the sentence of two months' detention, it being asserted that this outcome failed to reflect a proper application of sentencing principles pertaining to juveniles and a failure to give proper consideration or weight to the positive effect that either a full or partial suspension of the term of detention would have had in relation to the individual rehabilitation prospects of the appellant. It is also pleaded that the fine imposed contravenes the provisions of s53(c) of the Juvenile Justice Act.

[6] It must be borne in mind that these matters did not come before the Juvenile Court for consideration in isolation.

[7] The learned Deputy Chief Magistrate was also called upon to consider two other files.

[8] On file 20406211 the appellant appeared before the Juvenile Court charged with four additional offences said to have been committed on 12 March 2004, all of which were also admitted by him. Those offences related to the driving by the appellant of a different motor vehicle. He pleaded guilty to driving whilst disqualified, driving whilst having a blood alcohol concentration of .158%, driving an unregistered motor vehicle and driving a vehicle that did not have a current compensation contribution. The learned Deputy Chief Magistrate aggregated the penalties and imposed a fine of $1000, with a victims assistance levy of $20. He imposed a licence disqualification of 18 months. A separate appeal was ultimately lodged in relation to the quantum of the fine imposed, having regard to s 53(c) of the Juvenile Justice Act. It was, by consent, heard together with the appeal concerning file 20409752.

[9] On file 20406375 the appellant appeared before the Juvenile Court charged with an offence of having, on 15 March 2004, unlawfully damaged property. This related to the breaking of a window at the house occupied by the appellant's sister Cora Lynch, in Alice Springs. It attracted a conviction without further penalty.

[10] As to file 20409752 the learned Deputy Chief Magistrate was told by the prosecutor that, at about 6.28 pm on 29 April, police observed the appellant driving a Toyota Lexcen Sedan in a westerly direction along Wills Terrace, Alice Springs. The vehicle was displaying NT registration plates 594 035. The Lexcen registration had actually expired on 8 January 2004.

[11] Inquiries made by the police indicated that the registration plates displayed did not in fact belong to the vehicle to which they were affixed. They had originally been issued in relation to another vehicle, the registration of which had not been current since 2001.

[12] When questioned by the police as to who had placed the plates on the Lexcen the appellant said "*Me*". He also conceded that he was aware that the vehicle was unregistered and uninsured and told the police that he drove the vehicle "*To get a feed*". When he was asked why he was driving after having been disqualified for six months from 11 March 2004, the appellant responded that "*I was hungry. That's all*".

[13] In asking the last mentioned question the police had also become aware that, on 11 March 2004, the appellant had appeared before the Juvenile Court charged with four offences, namely, driving with an excess of the prescribed concentration of alcohol, driving a motor vehicle while unlicensed and driving an unregistered and uninsured motor vehicle.

[14] It is to be noted that the offences committed on the following day, as referred to in file 20406211, were virtually identical to those to which I have just referred. This was so notwithstanding an order of disqualification for six months, to which the offences of 11 March 2004 had given rise; and that he had been warned by Mr Birch SM at that time that, if he was caught driving during the period of disqualification, he would be back in court

"*with a very serious offence which could have some big consequences for you*".

[15] The charges related to 12 March 2004 arose from the fact that, at about 3:30 am on that day, a vehicle was seen by police to be driving erratically along Flynn Drive, Alice Springs. The driver proved to be the appellant. When the police stopped the vehicle he got out and ran away. He was apprehended after a foot chase. He was submitted to breath analysis. That analysis established the existence of a blood alcohol concentration of .158%.

[16] The Juvenile Court had the benefit of not only a pre-sentence report, but also detailed submissions from counsel for the appellant.

[17] The learned Deputy Chief Magistrate was made aware of the following facts related to the personal background of the appellant.

[18] The appellant is an initiated Arrente male, who was born in Alice Springs. He attended school until midway through year seven, but left because he did not like school. He had exhibited a significant absentee history prior to that time. When he was in primary school he was diagnosed as being hyperactive, although it later emerged that he actually suffered from acute dyslexia. His mother attempted to get him appropriate expert assistance, but he rejected it.

[19] A significant feature emerging from the pre-sentence report was that issues had arisen concerning the biological origins of his parenthood on the night

after his first court appearance. There had been a big argument during which a query was raised by his stepbrothers as to whether, in fact, he was the son of the man that he had always believed to be his father, or was related to them at all. This had led to taunting from his stepbrothers that had caused him to become angry and frustrated. That, in turn, had led him to drinking alcohol.

[20] He had become alienated from the person who he had always regarded as being his biological father, as well as from various members of the only family that he had ever known. He no longer had a secure residence in Alice Springs where he felt welcome as a second home, because his sister, who lives here, was one of the members of the family from whom he had become alienated. He had been living with her at one stage, but she had ordered him to leave because of his bad behaviour.

[21] The learned Deputy Chief Magistrate concluded that, in a context where everyone had been drinking on the night of 11/12 March, the appellant got very upset. Out of despair he got into a car and went to drive to his grandmother's place. It was in the course of doing so that he was apprehended by the police.

[22] An important feature related to the appellant was that, unlike so many others who appear before the court, he had no record of offending prior to the commission of the offences of 11 March 2004. He had gained employment

on the CDEP program at Black Tank and had been moving in and out of Black Tank and Alice Springs.

[23] On 29 April 2004 the appellant had come into town and attempted to reconcile with his sister. Unfortunately, when he went to his sister's place begging to be admitted, she would not let him in. He was told to leave. He then punched a fist through a window in the premises, causing some $200 worth of damage. This seems to have led to the fact that he could not get a lift back out to Black Tank, where he was then currently living.

[24] The car that was ultimately used by the appellant that day was at the premises occupied by his sister. It did not have any number plates on it.

[25] The appellant became very upset after the altercation with his sister and took some plates from another vehicle and put them on the Lexcen. It was said that he then drove the Lexcen to get some food. An obvious inference to be drawn was that at least his ultimate intention may well have been to have driven the vehicle to Black Tank.

[26] The learned Deputy Chief Magistrate clearly considered the option of suspending the whole or some part of the term of detention. In the course of his sentencing remarks his Worship had this to say:

"*I ordered a pre-sentence report and that expressed some hope for the defendant's rehabilitation, based upon the - that the defendant displayed considerable remorse for the offences and was dismayed that he now possessed a criminal record. Insofar as the report is based on that, and it seems to be, it's flawed because he doesn't display much remorse at all and*

in fact on 29 April he again drove a motor vehicle while he was disqualified by court order from doing so.

He deliberately screwed on false number plates to the motor vehicle, knowing it was unregistered and uninsured, put them on there, calculated to deceive, and drove off. He was only going to get a feed.

The submissions put on his behalf basically are a repeat of the submissions that I had on the previous occasion. The update is that he is said to have been living consistently at Black Tank since the date in March when he was before the court. At least we know on 29 April he came into town, said to be for the purpose of attempting to reconcile with his sister, but another argument intervened and he missed a lift back to Black Tank, or something like that.

If it had just been for the first two groups of offences I would have given the defendant a suspended sentence of detention in an institution, but it seems to me that the time has come, in his own interests, that he's got to understand the law has got to prevail. He can't keep driving a motor vehicle in defiance of court orders."

[27] It is quite apparent from his sentencing remarks that the learned Deputy Chief Magistrate then went on to attempt to develop an overall sentencing strategy that dealt with the various files before him on what might fairly be described, in practical terms, as an integrated basis.

[28] It is clear that he did consider the possibility of the imposition of a suspended detention in an institution. Indeed, he made it clear that, had it not been for the third series of offences, he would have adopted such a course. However, he felt unable to proceed down that path by reason of the continuing flagrant disregard for the order of the court made on 11 March 2004, so shortly after the apprehension of the appellant for the first breach.

[29] The first breach itself occurred on the day following the order of disqualification. Moreover, as the learned Deputy Chief Magistrate

stressed, the driving on 29 April 2004 could not properly be characterised as spontaneous and unpremeditated, as suggested by counsel for the appellant at the time. On the contrary, the appellant had deliberately sought some false plates and transferred them to the vehicle for the occasion. In his view the time had arrived at which it had to be made clear to the appellant that thumbing his nose at the court and the law would not be tolerated.

[30] So it was that he imposed a short sentence of detention, actually to be served, in relation to the second offence of drive disqualified. The licence disqualification separately ordered, as above recited, was as mandated by the relevant legislation.

[31] I am only justified in interfering on appeal if it can be shown that the learned Deputy Chief Magistrate erred as a matter of proper sentencing principle in the approach that he adopted, misapprehended the facts, or that, on the face of it, the impugned sentence is manifestly excessive in all of the circumstances. (See *R v Nagas* (1995) 5 NTLR 45 at 52 and the authorities therein referred to).

[32] It is well established that, absent particular circumstances that may fairly be regarded as exceptional, a custodial sentence is to be regarded as the norm in relation to drive disqualified offences committed by adults, where the driving is contumacious of the Court and the law (see *Hales v Garbe* [2000] NTSC 49, *Police v Cadd* (1997) 94 A Crim R 466).

[33] However, it was argued by Mr Banbury, of counsel for the appellant, that such authorities were irrelevant in the instant case because a different sentencing approach was mandated by the Juvenile Justice Act and the decided authorities, where the offender was a juvenile.

[34] He submitted that a consideration of the statute and the relevant authorities established these principles;

(1) Juveniles are to be dealt with in the criminal law system in a manner consistent with their age and level of maturity (Preamble, Juvenile Justice Act);

(2) Whilst the ultimate aim of any criminal justice system is the protection of the community, it must be borne in mind that an inappropriate disposition of a juvenile may well lead to that person becoming more of a threat to the community than achieving the primary objective. (*Nelson v Chute* (1994) 72 A Crim R 85 at 89);

(3) The primary goal to be achieved, pursuant to the Juvenile Justice Act, is to attempt to find the best means of turning a delinquent juvenile into a responsible law abiding adult (*ibid p90*);

(4) Detention should only be used as a last resort where all other options are inappropriate and the circumstances are such that the need for deterrence and to protect the community must be given special prominence (*ibid p90*). The problems associated with institutionalisation of juveniles of Aboriginal background need to be kept firmly in mind;

(5) No useful comparison can be made between the order under a non-punitive system such as that established by the Juvenile Justice Act and the sentence imposed on an adult. In the Juvenile Court the deterrent aspect of sentencing is, at best, of secondary importance. The overwhelming concern is the rehabilitation of a young offender as a law-abiding citizen. So it is, that, before imposing a particular sentence on a juvenile, the court must ask itself whether it is necessary to go beyond a lesser option. (*M v Waldron* (1988) 56 NTR 1 at 6); and

(6) In the case of young offenders, considerations of punishment and of general deterrence may, properly, largely be discarded in favour of individualised treatment of the offender directed to his rehabilitation.

[35] Mr Banbury declaimed that a perusal of the transcript of proceedings before the learned Deputy Chief Magistrate on 23 March 2004 indicated that he had not approached the sentencing exercise in the above way. Rather, he had subordinated the key aspect of rehabilitation to considerations of deterrence in a manner that reflected sentencing principles applicable to an adult, rather than a juvenile.

[36] Further, he suggested that what fell from the Deputy Chief Magistrate, indicated that, contrary to what was said in *R v Phung* (2003) 141 A Crim R 311 at 322, his Worship had, in reality, placed an onus on the respondent of establishing a probability of rehabilitation before that consideration could properly be taken into account.

[37] It was contended on behalf of the appellant that the learned Deputy Chief Magistrate had inappropriately failed to give due consideration and weight to the rehabilitative measures identified in the pre-sentence report that had been prepared. It was said that reference had been made in that report to a series of measures directed towards rehabilitation that would simply not be implemented by reason of the sentence imposed.

[38] Moreover, Mr Banbury emphasised that, at the time of the offending, the appellant was still 12 months away from obtaining adult status. His record prior to 11 March 2004 had been excellent and the possibility of his

rehabilitation had, he said, too readily been *"written off*" by the imposition of a sentence that, in its practical effect, could not accurately be described as *"a short sharp sentence*", as was submitted by the Crown. It was, in effect, put that his relocation to Don Dale in Darwin was likely to have a dramatic deleterious effect on him.

[39] Before proceeding to an examination of those contentions it is necessary to note some important practical issues that were identified by counsel in the course of argument.

[40] Mr Roberts, of counsel for the respondent, raised the issues as to whether the imposition of the two aggregate fines of $1000 were in accordance with the relevant statutory provisions, having particular regard to the provisions of s 53(c) of the Juvenile Justice Act; and as to whether, in any event it was possible to aggregate a charge of "*drink drive*" with a charge of "*drive disqualified*", conformably with the reasoning in *Hales v Gabe* [2000] NTSC 49.

[41] The decision of the former Chief Justice in the last mentioned case stands as clear authority for the proposition that it is not permissible to do so because, as he put it, although driving is a common denominator, the other facts are patently different. The offences are not the same or similar in character. One involves the driving of a motor vehicle whilst being in a particular physical condition and the other whilst not having a licence to do so. It follows that, on that basis alone, the learned Deputy Chief Magistrate was

not entitled, as a matter of law, to implement the sentencing strategy adopted.

[42] Additionally, I do not consider that s 34(1) of the Traffic Act required him to impose minimum fines of $1000 in respect of the relevant drive uninsured offences, as had been contended by the prosecutor. Section 53 of the Juvenile Justice Act empowers the juvenile court to fine a juvenile "*not more than the maximum penalty that may be imposed under the relevant law in relation to the offence or $500, which ever is a lesser amount*". That provision, according to it the ordinary meaning of the words used, plainly subordinates the provisions of the Traffic Act to the limitation imposed by s 53 in the case of a juvenile.

[43] It follows that the two fines imposed were in excess of the statutory maximum applicable to the appellant.

[44] There can be no doubt that the learned Deputy Chief Magistrate quite properly approached his overall sentencing task on an integrated basis. Because portion of his sentencing package was not in conformity with the relevant statutory provisions then the whole of that package requires reconsideration *ab initio*, due regard being had for the views expressed at first instance. I took counsel to be of the one mind that, in the circumstances, it was appropriate for me to finally deal with the situation, rather than remit the matters to the Juvenile Court. I agree that it is convenient to adopt that course.

[45] In doing so it is first desirable to review the reasoning of the learned Deputy Chief Magistrate in relation to the question of the imposition of a custodial sentence and then address the questions of pecuniary penalties, having particular regard to the totality principle.

[46] As to the impugned custodial sentence, Mr Roberts strongly denied the validity of the arguments advanced by Mr Banbury.

[47] At the outset, I must say that I agree with his submission that, properly construed, the sentencing remarks of the learned Deputy Chief Magistrate do not indicate that he inappropriately placed some onus on the appellant of establishing a probability of rehabilitation. Nor do I accept that he too lightly subordinated the questions of rehabilitation to considerations of deterrence in an impermissible manner.

[48] As I understand the authorities, considerations of deterrence - specifically personal deterrence - are by no means irrelevant to a juvenile offender. This is particularly so where persistent conduct of the offender is such that considerations of protection of the public must inevitably assume importance.

[49] That said, the first and most important aspect that must always be addressed is the need to formulate a sentencing strategy designed to best promote the rehabilitation of the offender in a manner that seeks to turn the person concerned into a responsible, law-abiding adult. In doing so, a custodial sentence must be regarded as a strategy of last resort.

[50] In his sentencing remarks the learned Deputy Chief Magistrate viewed the suggestion in the pre-sentence report that the appellant had displayed considerable remorse with considerable cynicism. In arriving at that conclusion he was by no means setting out to inappropriately place some onus on the appellant.

[51] Rather, he was simply pointing to certain features of the narrative facts that, in his view, tended to suggest that the optimism expressed by the writer of the report was based on what he regarded as being a somewhat dubious foundation.

[52] The points being made by the learned Deputy Chief Magistrate were that, despite being warned by Mr Birch SM of the likely serious outcome of any deliberate breach of the order of disqualification by the appellant, he nevertheless repeated his offending conduct on the very next day. This was followed by yet a further repetition not long thereafter, despite him having already been charged by the police in respect of his conduct on 12 March.

[53] What obviously impacted on the thinking of the learned Deputy Chief Magistrate were the combined facts that the offender was 17 years of age and well able to drive a motor vehicle; and that the third series of offences plainly displayed deliberate premeditation. The appellant knew full well that the vehicle was unregistered and uninsured and went to considerable pains to procure false plates and fix them to it. This was not the product of a sudden, spur of the moment, impulse.

[54] The aspect that weighed heavily on the mind of the Deputy Chief Magistrate was the deliberate course of contumacious conduct of the appellant and what was seen to be an imperative need to impress upon him that such conduct could not be permitted to continue - both in his own interest and that of the community.

[55] I entertain no doubt that the learned Deputy Chief Magistrate was correct in his assessment that, such was the inherent seriousness of the offending course of conduct, that a short custodial sentence was obviously called for.

[56] Where I do have a problem with his reasoning is that his sentencing strategy seems not to have given due weight to these aspects, considered in their totality -

(1) The appellant had not been in trouble with the law prior to the offences of 11 March 2004;

(2) His offending conduct had been triggered off and then fuelled by the distressing and traumatic experience that he had had in being, in effect, disowned by the persons whom he had always regarded as being his immediate family;

(3) That situation had given rise to obviously deep seated feelings of frustration and anger, the conduct of the appellant clearly being - at least in considerable measure - an outward manifestation of those emotions; and

(4) The final offending conduct was, seemingly, the direct product of a further rejection of the appellant by the person that he had always regarded as his sister.

[57] Those matters are by no means exculpatory of the conduct, but they do serve to demonstrate that here was a very young person who, at his stage of

maturity, was not able to cope with the problems with which he had been confronted.

[58] It must be remembered that the appellant had not previously had the benefit of a suspended custodial order and the supervision and support that would normally be associated with it. Had he had such a benefit in relation to the offending on 12 March, then a sentence of the type actually imposed would, in my opinion, have been well-nigh inevitable.

[59] However, in the circumstances, I consider that it was too much of a quantum leap to move directly to a regime of full actual service of a custodial sentence, even given the deliberate and contumacious nature of the final offending. Further, I must now take into account the fact that the appellant has already had the salutary experience of having been in custody for a period of 14 days prior to being bailed pending the hearing of this appeal.

[60] This being so the appeal must be allowed and the sentences appealed against set aside.

[61] Like the learned Deputy Chief Magistrate, I consider that a global approach needs to be adopted, due regard being had to the totality principle.

[62] On file 20409752 there will, in respect of count 1, be a sentence of two months' detention, suspended for 12 months on condition that the appellant be subject to the supervision of Community Corrections and obey all

reasonable directions of that service, including attendance at such anger management or other programs as may be appropriate.

[63] As to count 3 there will be a fine of $500 with a victims assistance levy of $60.

[64] As to the other counts there will be convictions without further penalty.

[65] On file 20406211 there will be a fine of $500 in respect of the offence of driving and uninsured vehicle with a victims assistance levy of $20. There will be convictions without further penalty in respect of the other offences.

[66] The period of licence disqualification imposed by the learned Deputy Chief Magistrate will be confirmed.

[67] I make the obvious point that, in practical terms, the custodial sentence imposed is the primary penalty for what was, in reality, an overall course of offending. Having regard to the totality principle it would, on any view, be inappropriate also to impose substantial fines, beyond those mandated by statute, in respect of the associated charges.

———————————————