PARTIES:	DAVIS, Nathan Charles Harvey
	v
	HAYWARD, Gillian Ruth
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA EXERCISING TERRITORY JURISDICTION
FILE NO:	No. JA64 of 1996
DELIVERED:	Darwin, 5 February 1997
HEARING DATES:	23 October 1996
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Appeal and New Trial - Appeal - General principals - Interference with discretion of court below - Justices appeal - Appeal against sentence - Firearm offences - Whether error in failing to exercise discretion not to record conviction - Mitigating circumstances arising from matters referred to in s8(1) Sentencing Act - Insufficient attention given to circumstances of offender and extenuating circumstances of offence.

Criminal Law and Procedure - Jurisdiction, practice and procedure - Judgment and punishment - Appeal against sentence - Firearm offences - Whether error in failing to exercise discretion not to record conviction - Insufficient attention given to circumstances of offender and extenuating circumstances of offence.

Magistrates - Appeals from and control over Magistrates - Sentencing - Firearm offences - Whether error in failure to exercise discretion not to record conviction - Insufficient attention given to circumstances of offender and extenuating circumstances of offence.

Firearms Act 1995 (NT), ss51,64(1) and 87

Sentencing Act 1995 (NT), ss7,8 and 18
The Territory Parks and Wildlife Conservation By-laws, By-law 14(1)(a)(i) & (iv)

Cobiac v Liddy (1969) 119 CLR 257, 276, referred to.

REPRESENTATION:

Counsel:

Appellant:	Mr D R Davies
Respondent:	Mr J W A Birch

Solicitors:

Appellant:	Close and Carter
Respondent:	DPP

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

No. JA64 of 1996

BETWEEN:

NATHAN CHARLES HARVEY DAVIS
Appellant

AND:

GILLIAN RUTH HAYWARD
Respondent

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 5 February 1997)

This is an appeal against sentence, the principal area of interest being as to whether or not, in the circumstances of the case, the learned Stipendiary Magistrate erred in failing to exercise his discretion so as not to record a conviction in respect of various offences.

On 5 June 1996 the appellant pleaded guilty to, and was convicted on 8 August 1996, of the following offences which all occurred on 22 January 1996:

1. That he discharged a firearm in a public place, namely, Casuarina Lions Park knowing the said place to be a public place, contrary to s64(1) of the *Firearms Act* 1995 (NT). The maximum penalty for that offence is $5,000 or 12 months imprisonment.

2. That he carried a firearm, namely, a .22 calibre Margolin pistol, in a park, namely, Casuarina Lions Park, without having first obtained a permit to do so, contrary to By-law 14(1)(a)(i) of *The Territory Parks and Wildlife Conservation By-laws* 1993 (NT) for which the maximum penalty is $1,000.

3. That he carried ammunition, namely, a .22 calibre bullet in a park, namely, Casuarina Lions Park, without having first obtained a permit to do so, contrary to By-law 14(1)(a)(iv) of the *Territory Parks and Wildlife Conservation By-laws*. Again, the maximum penalty is $1,000.

4. That he possessed an unregistered class C firearm, namely, a .22 calibre Margolin pistol, contrary to s51 of the *Firearms Act* where the penalty is $2,000 or six months imprisonment.

In the result, his Worship recorded a conviction in respect of each of the offences, imposed an aggregate fine of $1,000 (s18 *Sentencing Act* 1995 (NT)) and allowed three months to pay. His Worship clearly accepted, as was the

case, that these offences were founded on the same facts, or that they formed or were part of a series of offences of the same or a similar character, being the jurisdictional foundation for the imposition of an aggregate fine. The facts, admitted by counsel for the appellant before his Worship, were that on the day in question he had left a note to the effect that he was about to take his own life. He went to the beach at the park and was located there after a shot had been heard. The pistol was found next to him, the bullet was in his right upper leg. Although referred to in submissions before his Worship, the note was not placed in evidence, but by consent, was received in this Court. It was addressed to a friend whom the appellant said he had chosen to deliver a few messages to "the people I care most about in the world", and he sets out thereunder particular messages to his parents, siblings and friends by name. Towards the conclusion of the note the appellant had written "Goodbye My Family / My Friends".

Counsel for the appellant upon the hearing informed the Court that his client was 20 years old, and had been a full time university student, devoting himself almost entirely to his studies over the previous three or four years. From what was said, and from the evidence produced, it appears that the appellant was an outstanding student, completing his studies in late 1995, obtaining a degree of Bachelor of Computer Science and winning two university prizes in the process. He had been advised to apply for a Rhodes Scholarship, and was to be interviewed in respect of that in July 1996. His counsel spoke of stress, and submitted that the balance of his mind at the time of the offence was imbalanced. Although his Worship was apparently

sceptical that study had caused the stress, given that the university exams had been completed in November and that the appellant had finished a fortnight's post graduate work in Canberra shortly before the incident, he had thereafter been working with others at the university during the vacation on research into computer software development. But there appears to have been another or additional precipitating event, that is, an argument which the appellant had with his father on the night before committing the offences. It seems that Mr Davis Senior was a disciplinarian and gave him "a severe ticking off" when the appellant came home on that evening, having been drinking, smoking and later than it was expected that he would return. The appellant had no prior convictions, and it was submitted that if a conviction were recorded, it might adversely affect his prospects of obtaining the Rhodes Scholarship. It was put that it was extremely unlikely that he would offend again, and that he did not pose a danger to the community. It was said that he and his father had reconciled after the event, the father realising that he had possibly been over strict, particularly bearing in mind his son's age. His Worship adverted to the fact that people of the age of 20 or thereabouts "who cut loose and fight with their parents don't take firearms and shoot themselves", a recognition that such an event was not prevalent. His Worship went on to raise the issue that if the appellant had become imbalanced, whether he would be likely to become imbalanced again, and if so, likely to direct his attention to himself or to others. As a consequence his Worship ordered a Pre-Sentence Report including a psychiatric or psychological assessment, and adjourned the matter for further consideration.

That report was provided and was largely confirmatory of what the appellant had had to say through his counsel by way of submission concerning his personal circumstances. It was also revealed that at the age of 17 he had been given a "near new car". The appellant had not accepted the police invitation to tell them about the incident, but during the course of the preparation of the pre-sentence report, he was polite and fully cooperative, and according to the author, accepted responsibility for his situation. His sole intention when he went to the beach was to commit suicide by shooting himself. He had sat for a couple of hours deep within mangroves with his back against a solid object to ensure he would not cause harm to others. A community corrections officer observed that at the then age of 21 the appellant had "excelled in various areas of his life, notably planning his career and demonstrating his positiveness towards his future". Dr Kyaw, a specialist psychiatrist provided his assessment. He first saw the appellant on the day after the event and he did not then show any psychotic systems or major depressive features. It was said that his mental state was normal in hospital, that he felt sorry for his behaviour and was looking forward to continuing his studies at university. In the psychiatrist's view, the appellant was a bright young man, anxious and shy, but also having some tendency to become depressed under stress:

> "On the day of offence he had been upset and became depressed after a bad argument with his father. He easily got hold of the pistol from his friend, and impulsively shot himself. But he quickly recognised his mistake and felt remorse. He had no history of conduct disorder or anti-social behaviour. He does not has (sic - have a) history of mental illness. On the day after the incident and re-assessment after six months, Nathan

> does not have any major mental disorder. But it was obvious that on the day of (the) offence Nathan suffered from Adjustment Reaction with stress systems after a conflict with his father.
>
> PSYCHIATRIC OPINION
>
> It is my opinion that Nathan is not always suicidal and dangerous to himself. But it is possible that in future under severe stress Nathan could develop dysphoric and depressed mood, and he could have developed suicidal thoughts in such situation. It is also my opinion that Nathan is not a dangerous person to others and the community at large. I believe that the convicted offence was an unexpected and unfortunate episode in his life, which is unlikely to be repeated in future."

Armed with that information, his Worship enquired of counsel for the appellant, immediately upon resumption of the hearing, as to the appellant's capacity to pay a fine. He made it clear that that was a provisional view as to the outcome of the proceedings. Counsel informed the Court that the appellant had the capacity to pay either from borrowed money or from working part time, but that he then had no income apart from a student allowance which was later disclosed as being $3,500 a year. His Worship mentioned the motor car which could be sold, (its description and value was never established). Counsel thought that he had a capacity to borrow money on a credit card, but it would obviously depend on how large the fine was. His Worship said that the report, with one exception, revealed that the appellant was not a danger to himself or the community, but drew attention to the possibility, adverted to in the psychiatrist's report, of the appellant's developing suicidal thoughts should he suffer severe stress.

Counsel again asked his Worship to consider not recording a conviction, but to place him on a bond, drawing attention to his age, lack of prior convictions, positive good character and the circumstances of the offence. His Worship responded that "This is too serious, discharging a firearm and obtaining a firearm that's not licensed." There was some discussion about whether the pistol was discharged accidentally or deliberately into the appellant's leg, but that issue is not resolved. (Section 87 of the *Firearms Act* provides that an offence under s64(1) and s51 are regulatory offences, and thus the appellant's intention or foresight of the possible consequences of his conduct are irrelevant). His Worship proceeded forthwith to consider the appropriate sentence. He noted the submission that he should not impose a conviction, but said that he did not have sufficient information to know whether or not that might interfere with the appellant's ability to obtain a Rhodes Scholarship, nor whether such a conviction might induce some stress in the appellant. In the course of rejecting that submission, he said that the impression he had gained from the reports was that the appellant had had a good hard think about his situation:

> "… he's got a positive life to look forward to, he's got some goals and plans. He's considered all those goals and plans, I would imagine, in the context of these court proceedings. These court proceedings have, to my mind, from what I've gathered on reading the report, by no means defeated or upset him. I just can't accept that a conviction might induce in him some stress so that he acts inappropriately."

He adverted again to what Dr Kyaw had said as to the possibility of the appellant developing suicidal thoughts under severe stress, and said that no doubt during the course of his life the appellant would experience stress. In further consideration of the submission that convictions not be recorded, his Worship said:

> "I consider this matter to be serious. It's serious because the community disapproves of the indiscriminate use of firearms. It's serious because he engineered a situation where he took from somebody a firearm for the purpose of taking his own life. I feel in this case a conviction or convictions should be recorded, they should be recorded because the situation is serious. I cannot accept that the recording of convictions would set him back in his life. I think the appropriate thing to do in this case is to impose a fine which will be an aggregate fine pursuant to section 18 of the Sentencing Act. I think the appropriate thing to do is simply to impose a fine for a variety of reasons: first of all, to deter others from taking up firearms, not necessarily for the purposes of hurting themselves but simply using firearms or carry firearms indiscriminately. And secondly to hopefully remind the defendant he's done the wrong thing, he's going to be fined for it, don't do it again. Allow the fine to serve as the reminder; if convicted."

Throughout his submissions to his Worship, counsel for the appellant before him referred only to s13 of the *Sentencing Act* and did not take his Worship specifically to those provisions which go on the exercise of discretion to avoid the recording of a conviction. Nor did his Worship refer to them for the purposes of framing his remarks prior to sentence. That is not to say that neither counsel nor his Worship were not conscious of what was provided by the law in that regard, but it would have been helpful, I think, had specific

attention been directed to s8 of the *Sentencing Act* and an examination made of the provisions otherwise contained therein directing the matters to which the Court shall have regard in deciding whether or not to record a conviction. It may have assisted to have closely identified the issues which called for consideration.

The Notice of Appeal raises three grounds, as follows:

"1. The Learned Magistrate erred in law in recording a conviction at all in the circumstances of the particular Appellant and the sentencing guidlines (sic) contained in Section 9 of the Sentencing Act. The learned Magistrate erred in that he failed to consider sentencing alternatives of less severity than a conviction such as the release on a bond without a conviction, and failed to consider sentencing alternatives less severe than a fine such as an unconditional discharge following a conviction or release following conviction upon the giving of some suitable security.

2. Imposed a particular penalty namely a fine of $1000 was:-

   (i) manifestly excessive;

   (ii) failed to properly consider the financial circumstances of the Appellant namely that he was a student in receipt of an income of $3500 per annum and the nature and burden it would impose upon the Appellant as was required by law and Section 17(1)(a) of the Sentencing Act.

3. The learned Magistrate erred in law when he failed to consider properly or at all Sections 5, 6, 8(1) and 9(c), (d) and (e) of the Sentencing Act in relation to whether or not to release the appellant on a bond without recording a conviction pursuant to Section 11."

I accept that the following errors are apparent from what his Worship had to say in the approach he took to the matter. Firstly, it was inappropriate to regard the use of the pistol as being indiscriminate. The appellant had one objective in mind and had clearly made a distinction between what he proposed to do and what might otherwise be done by the discharge of a firearm within the park. Secondly, it was highly inappropriate to justify the sentence imposed on the grounds of general and personal deterrence, especially where the general deterrence was directed at the indiscriminate use of firearms. It was not appropriate, to my mind, for his Worship to place so much weight upon the possibility of the appellant developing suicidal tendency should he suffer severe stress. The overwhelming nature of the report from the psychiatrist pointed to the appellant having suffered a mental disturbance on the day of the event. It is clear from the report, which was uncontested, that the appellant did not then or at the time of sentencing pose a danger to others; what occurred was an aberration and unlikely to be repeated. It was appropriate to properly take into account the appellant's mental condition, but had his Worship done so, he would not have given so much weight to the question of general deterrence, the appellant not being an appropriate medium for making an example to others. The possibility of some future suicidal tendency so much relied upon by his Worship was not such as to properly give rise to the need for personal deterrence having any significant part to play in the sentencing process. Those errors, having been disclosed, it is appropriate

that this Court consider for itself the appropriate disposition; it is not a matter of substituting my discretion for that of his Worship.

All of the relevant circumstances of the offence and the offender tend in favour of mitigation of penalty. The nature of the offence has been described. There was no victim. Undoubtedly the appellant was largely to blame for the offences, but given the circumstances, the degree of blame is reduced significantly. He suffered damage to himself, namely the bullet wound to his leg. In every respect he was a person of good character and of exceptional intellectual capacity, and he was at the time of the offence but 20 years of age. No information was available to that Court or this as to the prevalence of any of the offending behaviour charged, and it might be taken that it would be rare indeed for offences to have been committed in these circumstances. The appellant did not render any assistance to law enforcement agencies, but pleaded guilty, though not much weight might be given to that given the facts of the case. The offences were all part of the one transaction. He took but one bullet into the park. As to the discharge of the firearm, the appellant had removed himself away from the areas where members of the public might be expected to be and taken steps which he believed would protect others.

Where a Court finds a person guilty of an offence, it may make one or more of a variety of orders provided for in s7 of the *Sentencing Act*. They include without recording a conviction, the dismissal of a charge, the release

of the offender, the payment of a fine and the making of a community service order. It is provided in s8 that in deciding whether or not to record a conviction the Court shall have regard to the circumstances of the case, including one or the other of:

> ”(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.”

The primary focus of attention upon considering whether or not to record a conviction is upon the circumstances of the case, the enumerated factors being some of them. In this matter it might be thought that those set out in (a) and (c) are of utmost significance. The result of declining to record a conviction and dismissing a complaint is to free the offender of the immediate legal consequences of his having committed the offence (per Windeyer J. in *Cobiac v Liddy* (1969) 119 CLR 257 at 274). Before considering the exercise of the discretion there must first be found some mitigating aspect arising from the matters referred to in s8(1). Here, it is easy to identify those matters, they being the character, antecedents, age and mental condition of the offender at the time of the offence, and the extenuating circumstances under which the offences were committed. The pistol and bullet were taken into the park with an express intention which had nothing to do with the status of the area as a

park, nor with prospective damage to features of the park and wildlife, and indeed people in it to which no doubt the By-laws were directed. Any one of the matters referred to in subs(1) of s8 or any combination of them together may provide a sufficient ground for the exercise of the discretion per Windeyer J. at p276. His Honour was there addressing features in relation to a provision not dissimilar to this, although significantly more restrictive.

Although counsel before his Worship limited his remarks as to the potential effect of the conviction being recorded to the appellant's prospects of obtaining a Rhodes Scholarship, it must nevertheless be acknowledged that convictions for criminal offences do have a very real potential for jeopardising the convicted person in his or her advancement in life. Furthermore, it may give rise to the appellant being called upon to explain to a prospective employer or others the circumstances in which he came to have been charged and convicted. This was a case which, in my view, cried out for the exercise of the learned Magistrate's discretion in favour of the appellant. The purpose of making an order under s10 to dismiss a charge without recording a conviction, would well meet the purposes of such an order as outlined in other provisions of the Act, such as s9(c) by allowing for circumstances in which it was inappropriate to record a conviction, and (e) to allow for the existence of other extenuating or exceptional circumstances that justify the Court showing mercy to an offender. It should be noted that counsel for the respondent had no submissions to make on the appeal.

In my view his Worship erred in the way he approached the sentencing of this 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 the extenuating circumstances in which the offences were committed. The sentence imposed by the Court of Summary Jurisdiction is quashed. I consider the appropriate order to be that without recording a conviction, the charges be dismissed.

In the circumstances, it is unnecessary to consider the issues raised by the grounds of appeal relating to the imposition of the fine of $1,000.
