PARTIES:	RICHARD BRUCE CARLSON
	AND
	GILLIAN RUTH HAYWARD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	JA1 OF 1996
DELIVERED:	26 April 1996
HEARING DATES:	19 and 23 April
JUDGMENT OF:	Kearney J

REPRESENTATION:

Counsel:

Applicant:	J.B. Waters
Respondent:	M.G. Fox

Solicitors:

Applicant:	Waters James McCormack
Respondent:	Office of Director of Public Prosecutions

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

IN THE MATTER of the Justices Act

AND IN THE MATTER of an appeal against a sentence imposed by the Court of Summary Jurisdiction at Darwin

No. JA1 of 1996

BETWEEN

RICHARD BRUCE CARLSON
Appellant

AND:

GILLIAN RUTH HAYWARD
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 26 April 1996)

The appeal

This is an appeal from a sentence imposed by the Court of Summary Jurisdiction at Darwin on 3 November 1995. The appellant pleaded guilty that day to a charge that on 2 November 1995 he had trespassed unlawfully on enclosed premises, namely Fort Hill wharf at Darwin. That is an offence under s5 of the Trespass Act; it carries a maximum penalty of a fine of $2000, or imprisonment for 6 months. The wharf clearly falls within the extended definition of "enclosed premises" in the Act.

The appellant was one of 3 persons charged with the alleged offence. He was fined $2000; his 2 co-defendants were each fined $500. His appeal lodged on 13 November was argued before me on 19 April 1996. I allowed the appeal on 23 April, for reasons to be later stated. Mr Waters of counsel for the appellant then sought costs on the indemnity basis. I rule on that today and also set out the reasons for allowing the appeal.

The proceedings in the Court below

(1) *The facts admitted by the appellant*

At about 6am on 2 November the 3 defendants arrived at the Fort Hill wharf. They came by sea, in an inflatable boat. Their purpose was to protest against the loading of uranium on a ship. They secured their boat and climbed up a ladder to the decking of the wharf. Thence they climbed the container loading crane, and secured themselves to the top of its raised arm. They had no permission to enter on

the wharf or to climb the crane. When the Police arrived it is clear that the Police required them to come down. The other 2 co-defendants promptly descended from the crane arm by a rope. The appellant did not descend, but chained himself to the top of the arm. After negotiations with the Police, which are said to have taken "a lengthy period", the appellant abseiled from the crane arm to a Police boat. When asked for a reason for his behaviour he said:

> "To expose the hypocrisy of the Keating Government."

The co-defendants offered similar explanations for their conduct. Clearly, they were all there for the same purpose. The "hypocrisy" alleged was the sale of uranium overseas by the Australian Government.

(2) The submissions

On hearing the facts, the learned Magistrate accepted the pleas of guilty.

None of the 3 co-defendants had any prior convictions. One, aged 30, had worked for the organisation known as Greenpeace for the last 6 years. Another, aged 31, had worked for Greenpeace for the last 2 years. The appellant was the youngest of the 3; he was aged 24. He had attained university level in his studies, and had worked for the previous 6 years for conservation groups. For the last 3 years he had worked for Greenpeace. All 3

co-defendants were physically fit, and experienced climbers; one of them was an instructor in rock climbing.

Their counsel, Mr Schneider, submitted that in acting as they had, they were not endangering themselves or anybody else. He sought the imposition of a fine. He explained that all 3 had been flown to Darwin by Greenpeace, and their equipment (valued at some thousands of dollars) largely belonged to that organisation.

(3) *His Worship's judgment*

His Worship proceeded to sentence immediately. He said, as far as is relevant:

> "I take into account that [the defendants have] pleaded guilty and they're entitled to … the leniency that people who plead 'guilty' get, as distinct from people who plead 'not guilty'. I take into account the fact that they come before the court as people who have not been in trouble for trespass before; so they're first offenders. They haven't had the benefit of a prior court warning.
>
> I take into account the fact that they all have small incomes, though it would appear that they can live quite well, and have a capacity to pay a fine. I also take into account the fact that [though] they trespassed … they didn't trespass to steal; but [their purpose was] what is to many a socially and environmentally useful purpose. I say nothing more about that, except to say that this is not a trespass for the purposes of stealing, as the courts often see.
>
> In relation to [the appellant] there is one added factor. He'll be dealt with differently from [his co-defendants], because it's a factor in [their] case that, when they were approached by police, they descended quickly. [The appellant] remained, chained himself, and there was a lengthy, though unspecified, period of time before he abseiled to a waiting police boat.

> *My concern with [the appellant] is that he needlessly tied up police resources.* He could have adopted the approach taken by [his co-defendants] and left immediately; he did not.
>
> *I think it's a factor to take into account that police were involved with him, when they could've been … attending to other duties. … I think it's a factor that I can take into account, that he was taking up police resources compared to the other two.*" (emphasis mine)

His Worship then proceeded to impose fines as indicated on p2.

The appeal

(1) *The grounds of appeal*

On 13 November the appellant appealed against the severity of the fine of $2000 imposed on him, on the basis that it was manifestly excessive in the circumstances. Four grounds were relied on in support:

(1) that his Worship had erred in finding that the appellant had caused a further use of police resources than had his 2 co-defendants;

(2) that there was an unjustified disparity between the fine of $2000 imposed on the appellant and the fines of $500 imposed on each of his co-defendants;

(3) that his Worship had not taken proper account of the appellant's personal circumstances, principally that this was his first offence; and

(4) that his Worship had not taken proper account of the fact that the appellant had pleaded guilty.

The submissions

The appeal was argued before me on 19 April 1996. No argument was put on ground (4).

As to ground (1) Mr Waters submitted that the "facts admitted" set out at pp2-3 were not as is there recounted. He submitted that there was nothing put to the Court on 3 November to suggest that the appellant had behaved in any way differently to his co-defendants. In support of that argument and by consent, two precis of facts relied on by the prosecutor on 3 November in presenting the cases against the appellant and one of his co-defendants were handed up. They were of course very similar. However, they differ in relation to the respective responses of the co-defendant on the one hand, and the appellant on the other, when the Police arrived on the scene, as is indicated at p3. There is a clear error in the precis of facts relating to the co-defendant in that, having already recounted that he descended by rope when the Police arrived, it goes on to state that which is stated in the precis of facts relating to the appellant, viz:

> "After negotiation with Police and a lengthy period the deft abseiled from the crane arm to a waiting Police boat. The deft was immediately arrested."

It seems that the prosecutor became aware of this error as he was stating the facts to the Court. In any event it is clear, I think, from a careful reading of the transcript, that the material which was in fact placed before his Worship as admitted facts, is that I have set out at pp2-3. Mr Schneider, then of counsel for the appellant, admitted the facts as stated in relation to the appellant to be correct. Accordingly, I reject Mr Waters' submission as factually inaccurate.

As to ground (2) on p5 Mr Waters submitted that the trespass on the wharf was clearly a joint enterprise by the 3 defendants; I accept that. He submitted that the Court should have been slow to distinguish between their respective culpability for the trespass charged. In support, he referred to *Lovelock v The Queen* (1978) 19 ALR 327. In that case the appellant and a co-accused received identical sentences, though their backgrounds were significantly different. The Federal Court held that the difference between them was such that the appellant's nonparole period should be reduced. Brennan J (as he then was) said at p331:

> "*Where offenders whose circumstances are comparable receive disparate sentences*, or where offenders whose circumstances are disparate receive comparable sentences, *that circumstance is not sufficient by itself to warrant interference by an appellant court with the sentence imposed on any of the offenders*. The court does not interfere with a sentence imposed on one offender merely because "a disparity has been created by another sentence

> which was fair to lenient, and even though, as a consequence, the appellant may be left with a sense of injustice or grievance" (per Walters J in *O'Malley v French* [1971] 2 SASR 110 at 114; and see *R v Steinberg* [1947] QWN 27). But if there be differentiating circumstances which favour the case of an appellant from the case of another offender who received a comparable sentence in respect of the same offence, the lack of disparity between the sentences bespeaks an error of some kind. According to the circumstances of the case, it may be inferred that insufficient weight has been given to the differentiating circumstances, and in such a case, the appellate court determines for itself the appropriate sentence which ought to be imposed upon the appellant, and intervenes by imposing that sentence (cf *R v Beaumont* [1955] SASR 110 at 117; *R v Coyle* [1969] 2 NSWR 83; *R v Irwin* [1966] Cr LR 514)." (emphasis mine)

The passage emphasized does not support Mr Waters' argument. In any event, in terms of this analysis, if the "facts admitted" at pp2-3 are examined, I consider it cannot be said that the "circumstances" of the offence committed by the appellant are "comparable" with those of his co-offenders. His trespass was longer, clearly more serious; there were "differentiating circumstances".

Apropos the earlier discussion (p6) as to the two differing precis of facts, I note that his Honour said at p333:

> "Precision in the presentation of the respective cases against two or more offenders is of importance when the sentencing judge may be required to distinguish between or among them in passing sentence for a particular offence. In cases of that kind, the sentencing judge is entitled to have the benefit of an analysis of the evidence relating to each offender. The duty of providing that analysis falls initially upon the Crown but it is a duty which must also be

> discharged by counsel for each accused. Where, as in the present case, the interests of one accused require that a distinction be made between his circumstances and those of his co-accused, those interests are best served, and the court is best assisted, by separate counsel representing the several accused."

I respectfully agree.

McGregor J said at p338:

> "More succinctly the subject [of disparity in sentencing] has been summarized in *R v Tiddy* [1969] SASR 575 at 577: "We were referred to several cases where the principles to be applied in sentencing co-defendants were discussed. Where other things are equal persons concerned in the same crime should receive the same punishment; and *where other things are not equal a due discrimination should be made*."" (emphasis mine)

As to ground (2), the question is whether his Worship's imposition of a penalty on the appellant which was four times the penalty on his co-defendants, was "a due discrimination" for the "things" in their offences which were "not equal". As Gibbs CJ said in *Lowe v The Queen* (1984) 154 CLR 606 at 609:

> "It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal and … *the part which he* or she *played in the commission of the offence, [has] to be taken into account*." (emphasis mine)

Mr Waters also referred to the general principles applicable to sentencing persons jointly charged with an offence, set out in *R v Tiddy* (supra) at 577-9. He

submitted that to impose a fine on the appellant which was 4 times the amount imposed on his co-offenders amounted to a manifest disparity in sentencing, such as to lead him to have a justifiable sense of grievance or injustice; see *R v Tiddy* (supra) at p579 and *Lowe v The Queen* (supra). However, I think that this was a case where "things" were "not equal" as between the appellant and his co-offenders, as regards the actual commission of their trespasses; a "due discrimination" in sentencing was warranted, so as to take proper account of the appellant's greater persistence in his offence. The question is whether a fine 4 times greater than that imposed on the co-offenders was a "due discrimination".

Mr Waters, noting that the fine imposed on the appellant was the maximum fine provided for by s5 of the Act, submitted that the circumstances of the appellant's trespass were not such as to draw his case within the category of a "worst case" trespass under s5. I accept that, but I note that a "worst case" trespass would attract a sentence of the order of the maximum punishment of 6 months imprisonment provided for in s5.

As to ground (3) on p5 Mr Waters submitted that his Worship had given insufficient weight to the fact that the appellant had never committed *any* offence at all before, in saying (p4) that the defendants -

> "… come before the court as people who have not been in trouble *for trespass* before."
> (emphasis mine)

I do not accept that his Worship failed to give full credit to the appellant as a first offender. He went on (p5) to describe the offenders as:

> "… they're first offenders. They haven't had the benefit of a prior court warning."

Mr Fox of counsel for the respondent reminded me of the well-known general approach to be adopted on an appeal against the exercise of the discretionary sentencing power, as set out in *Cranssen v The King* (1936) 55 CLR 509 at 519-520; and to the particular approach to such an appeal under s163(1) of the Justices Act, as set out in *Mason v Pryce* (1988) 34 A Crim R 1 at 7. As to the alleged unjustified disparity between the $2000 fine and the $500 fines imposed on the co-offenders, he referred to *Bann v Frew* (1982) 69 FLR 354. In that case Nader J held that the following guidelines as to disparity in sentencing emerge from the authorities:

> "A sentence that is otherwise beyond legitimate challenge will be interfered with on the ground of disparity with another particular sentence only if:
>
> (a) the disparity is so gross as in itself to manifest an injustice;
>
> (b) generally speaking, the other sentence is not so inadequate as to be seen to be manifestly wrong;

(c) the involvement and circumstances of the two offenders is such as to indicate equal or similar degrees of criminality;

(d) the prosecution has not by its conduct prevented the person with the lesser sentence from receiving a proper sentence."

I consider that none of the considerations (b)-(d) apply here, but that leaves for consideration both (a) and the question whether the fine of $2000 "is otherwise beyond legitimate challenge".

Conclusions

It is, I think, clear that in taking into account the "added factor" referred to - the appellant's "lengthy" delay in obeying the Police direction to come down, with the inference that he tied up Police resources more than had his co-offenders - his Worship strayed into error. That is because s7(1) of the Act deals specifically with that situation. It provides that a trespasser who, after being directed to leave the place by a member of the Police Force, fails or refuses to do so forthwith, commits an offence which carries a maximum fine of $2000. Section 7(1) constitutes a separate offence with which the appellant was never charged.

It is fundamental that his Worship could not properly take into account as an aggravating feature of the appellant's conduct in the offence charged under s5, facts which constituted an offence under s7(1) for which the

appellant had never been charged; see for example, *Lovegrove v The Queen* [1961] Tas. S.R. 106 per Burbury CJ at 107, *Burton* (1941) 28 Cr. App. R. 89 at 90, *R v Harris* (1917) 40 D.L.R. 684, and *R v Hansen* [1961] NSWR 929 at 931. There is no justification for increasing the penalty on the s5 offence because the offender is regarded as having committed an (uncharged) subsequent offence under s7. To do so, amounts to an error in the approach to sentencing for the s5 offence.

This error lay at the root of the imposition of a penalty 4 times the amount of the penalty imposed on each of the co-defendants. The fact that the appellant remained on the crane for a "lengthy period" - a fact proper to be taken into account - cannot, without more, warrant such a disparity in the fines. I note that it was not suggested by the prosecution that the appellant had "needlessly tied up Police resources" more so than had his co-defendants. No such allegation formed part of the facts placed before his Worship which the appellant admitted. Accordingly, it cannot be said in terms of s177(2)(f) of the Justices Act that "no substantial miscarriage of justice has actually occurred", as a result of the sentencing error. The appeal must be allowed and the fine of $2000 quashed and set aside, and the appellant now re-sentenced.

In re-sentencing, I bear in mind the penalties imposed on the appellant's co-defendants. The admitted

facts are that his trespass on the premises was longer than theirs. I bear in mind that this was his first offence, as it also was for each of the co-defendants. I also bear in mind that, like them, the appellant pleaded guilty. I note that his Worship rightly took into account the motive of all three for their trespass, describing it as directed at "what is to many a socially and environmentally useful purpose". They were not trespassing for the more usual purpose of stealing. Nevertheless, society has a right to require that protest against policies and actions of governments will be made only by lawful means. It is the duty of the courts to uphold the authority of the law in that regard; the law exists to protect all persons.

In all the circumstances I consider that the difference in the appellant's culpability as compared with that of his co-offenders warrants the imposition of a fine of $750. The orders on the appeal are as follows:

(1) The appeal is allowed;

(2) The fine of $2000 and the victim levy of $20 are quashed and set aside;

(3) In lieu of that penalty a fine of $750 is imposed with a victim levy of $20; and

(4) The appellant is given 28 days to pay. In default of payment he is to be imprisoned for 16 days.

In the event that the appeal was successful Mr Waters had sought an order that the appellant be awarded his costs of the appeal, pursuant to s177(2)(e) of the Justices Act.

The award of costs in summary proceedings is discussed generally in *Latoudis v Casey* (1990) 170 CLR 534; for this jurisdiction in particular, see *Tenthy v Curtis* (1988) 55 NTR 1. The ordinary approach in this jurisdiction on an appeal against a sentence imposed by a Court of Summary Jurisdiction is that the loser of the appeal pays the costs; see *Ambrose v Sandford Pty Ltd* (1989) 42 A Crim R 324 at 341. There are no considerations which would make it unjust in this case to apply that approach. Accordingly, the successful appellant should have his costs. I made that order on 23 April, together with orders (1)-(4) on p14.

Mr Waters then submitted that the costs be paid on the indemnity basis provided for in r63.29. He referred to *Colgate Palmolive Co. v Cussons Pty Ltd* (1993) 118 ALR 248, a patents case, where Sheppard J discussed the principles relating to the award of indemnity costs. He also referred to the discussion in *Rouse v Shepherd [No.2]* (1994) 35 NSWLR 277, a claim for damages under the Compensation to Relatives Act 1897 (NSW); and to the discussion by Kirby P (as he then was) in *Milosevic v GIO of NSW* (1993) 31 NSWLR 323 at 327-8.

It is unnecessary for me to discuss these authorities, in the context of this appeal. I do not think, in gaming terms, that this appeal fell into the category of a "lay down misere", such that its success should have been conceded at the outset. While the basis of an award of costs is discretionary, I see no reason in the present appeal for the costs of the appellant to be allowed on other than the standard basis referred to in r63.28. I so order.

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