Howett v Burgoyne [2001] NTSC 60

PARTIES:	HOWETT, Paul
	v
	BURGOYNE, Robert Roland
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 47 of 2001
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JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL

Justices – appeal against sentence – stealing – whether offence is trivial in nature – *Justices Act* 1928 (NT)

Sentencing Act 1995 (NT), s 78A(6C)

Gorey v Winzar (2001) NTSC 21, considered
Curnow v Pryce (1999) 131 NTR 1, referred to
R v Bird (1988) 56 NTR 17, followed

REPRESENTATION:

Counsel:

Appellant:	G Georgiou
Respondent:	G McMaster

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

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

Howett v Burgoyne [2001] NTSC 60
No. JA 47 of 2001

BETWEEN:

PAUL HOWETT
Appellant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 25 July 2001)

[1] Appeal against sentence of imprisonment for 14 days pursuant to s 78A of the Sentencing Act 1995 (NT). The appellant was convicted and sentenced by the Court of Summary Jurisdiction sitting at Alice Springs on 24 April 2001 for the offence of stealing, a property offence. The sole ground of the appeal is that the learned Magistrate erred when he found that the offence was not trivial in nature (s 78A(6C)(a) of the Act).

[2] The admitted facts going to the offences are that:

The appellant was employed as an assistant manager and console operator for the BP Service Station in Alice Springs. Part of the duties of

employment was to take payment from customers for fuel and goods and to count the takings and deposit the monies into an office safe for banking.

On 24 February 2001 the appellant was performing those duties, his shift commenced at 8am and concluded at midday. The standard procedure when a customer made a purchase was for the appellant to pass the goods in front of a bar code scanner that would recognise the proposed sale on the computer. After accepting payment for the goods the appellant would enter the amount of cash tendered by the customer on a computer which would then display the amount of change. If the customer did not have sufficient money to pay for the goods, the defendant would void the sale by his computer terminal. If the goods were not passed in front of the scanner, or not passed correctly, the computer would not register the transaction. Due to discrepancies in a stock take at the service station an audit was conducted. Between 9.08am and 11.14am the appellant accepted cash payments for ten transactions without scanning the goods, the total value of those transactions was $52.60. The appellant placed the money in the till and dispensed change to the customer without registering the sale on the computer.

Between 9.30am and 11.46am the appellant voided ten sales after passing the goods over the scanner which registered the sale on the computer. He accepted cash payment from a customer and placed it in the till. He then dispensed change from the till. After the transaction was completed, he

voided the sale, the total amounting to $72.60. The appellant's actions were recorded on surveillance video tapes.

[3] On Tuesday 6 March the appellant was spoken to by police and he admitted to having taken $15. When asked why he took the money he said: "Petrol for my car. I've been having financial difficulties".

[4] The Court found that all of the exceptional circumstances provided for in s 78(6C) had been made out other than that the offence was trivial in nature. His Worship said:

> "The only thing where I have a problem is in regarding what the defendant [did] as trivial. The defendant was employed in a position of trust. He and his employer had a contract of employment whereby the defendant was supposed to look after the employer's property and make a profit for the employer by selling goods to the public. In return he received a wage. He abused that trust by stealing from his employer. The theft involved a deliberate choice to steal and could not be categorised as a spur of the moment decision. It involved a degree of forethought and planning. It took place over a period of time. Each time he performed a transaction of sale to a customer he had to choose whether or not the goods sold should be run over the scanner.
>
> At the end of his shift he still had the choice whether or not to misappropriate the money and he chose to misappropriate it. There is nothing trivial about that. Looked at objectively the offence is a serious breach of trust. Here the amount of money stolen is not large nor is it small. Theft from an employer or any theft involving a breach of trust where the amount of money is not small is serious and requires the court to at least consider the imposition of a condign sentence. This case is no exception, irrespective of the mandatory sentence regime."

[5] It is not suggested that his Worship erred in any of those remarks except in so far as he did not find that the offence was trivial in nature.

[6] Both parties made submissions with reference to what has fallen from Judges of this Court when confronted with argument as to the meaning of the words, "trivial in nature". Those authorities are well known and it is not necessary for me to review them again in the circumstances of this case. However, I should hark back to what I said in *Gorey v Winzar* (2001) NTSC 21 concerning the views of Justice Mildren expressed in *Curnow v Pryce* (1999) 131 NTR 1. I there expressed qualified agreement with his Honour that an offence could be considered trivial in nature:

> "If the objective circumstances of the offence are such that a term of imprisonment would probably be unjust and disproportionate to the objective circumstances of the offence."

My qualification was expressed:

> "I am unable to agree if by that his Honour meant an offence will *always* be trivial in nature if the just and proportional sentence was anything less than imprisonment, or be it suspended" (emphasis added).

What I intended to convey was that if the circumstances of the offence were such that imprisonment would be inappropriate, then the nature of the offence may be, but would not necessarily be properly regarded as trivial.

[7] My other remarks in *Gorey* were related to the facts to which the appellant had admitted so as to determine the nature of the offence before passing to consider whether it was trivial. Remarks made in the course of reasons for judgment upon this question in a particular case may not always be appropriate to any other case.

[8] The nature of the offence here is as set out above. Looking at the circumstances of the offence they show that an employee committed the offence by failing to properly record sales and voiding sales on a total of 20 occasions, and taking the employer's cash to himself. The offending took place over a period of over two hours and the total taken was $125.20, each unlawful transaction was a deliberate breach of trust, a factor considered to be an aggravating circumstance of the offence of stealing (*R v Bird* (1988) 56 NTR 17 at p 33).

[9] The objective circumstances of the offence carry it outside the ambit of what could properly be regarded as trivial.

[10] The appeal is dismissed.
