PARTIES:	THE QUEEN
	v
	DAMIEN CHARLES MITCHELL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	TERRITORY JURISDICTION
FILE NO:	9616088
DELIVERED:	3 March 1997
HEARING DATES:	
JUDGMENT OF:	Bailey J

REPRESENTATION:

Counsel:

Appellant:	
Respondent:	

Solicitors:

Appellant:	Mr J Adams
Respondent:	Mr D Conidi

Judgment category classification:	C
Judgment ID Number:	BAI97008
Number of pages:	7

BAI97008

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

No. 9616088

BETWEEN:

THE QUEEN
Appellant

AND:

DAMIEN CHARLES MITCHELL
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 3 March 1997)

On 28 February 1997, Damien Charles Mitchell pleaded guilty before me to an indictment containing two counts – the first charged him with unlawful entry of a dwelling house at night with intent to steal and the second charged him with stealing a carton of beer, two packets of tobacco and an unknown amount of compact discs and cash, valued at approximately $1000 from that dwelling house.

The facts, to which the prisoner has admitted, are that on the morning of 6 June 1996, the prisoner was in the Tiwi area. Between the hours of midnight and 5.20 a.m. he decided to break into the house at 1 Beetaloo Street Tiwi. He went to the side of the house and tore off the flyscreen of the window leading to the lounge room with a butter knife. He then pushed open the louvres and entered the premises, where he moved to the

refrigerator and removed a carton of beer. He then took cash and coins from a shelf in the lounge room. The prisoner then took two packets of tobacco and a number of compact discs. He put these items and the cash into a bag before leaving the premises. On 27 July 1996, the police spoke to the prisoner who admitted the offences.

The total value of the property stolen was around $1,000 – none of which has been recovered.

The maximum sentence in respect of count number one is 20 years imprisonment in the light of the aggravating circumstances of entering a dwelling house at night with an intent to steal. The maximum sentence on count number two is seven years imprisonment.

Mr Adams for the Crown has emphasised the very prevalent nature of offences such as the present. He referred to statistics prepared by the police which indicate that in 1995 there were 3041 reported cases of unlawful entry with intent to commit a crime in buildings in the Darwin area (which does not include Palmerston). This figure covers all premises – domestic and commercial. The corresponding figure for 1996 is 2704 reported cases.

Mr Conidi for the prisoner does not dispute the accuracy of these figures.

The figures show that unlawful entry of premises with intent to commit crimes has been occurring in the Darwin area over the last two years at a rate close to eight per day.

Mr Adams asserts – and it cannot be seriously challenged – that there is general community concern regarding the frequency of unlawful entries. I can – and I do – take judicial notice of that widespread community concern.

Mr Adams submits that in the present case an actual sentence of imprisonment is appropriate, having regard to the maximum sentence on count one and the need for general deterrence in the case of unlawful entries.

Mr Adams notes that suspended sentences have been imposed for offences of the present nature – but also cited examples of partly suspended sentences in the case of unlawful entries of dwelling houses at night.

There is no generally recognised tariff for cases of aggravated unlawful entry. Reference to previous sentences is of very limited assistance given the need to consider the circumstances of the particular case and the particular offender.

The prisoner, who is of Aboriginal descent, has been in trouble with the law before. In May 1993, as a juvenile, he was convicted on two counts of unlawful entry of a dwelling house at night with intent to steal; two counts of stealing; aggravated criminal damage and receiving. He was released on 12 months probation. In January 1996 he was back before the courts for resisting and assaulting a police officer. He received a sentence of six weeks imprisonment, suspended for 12 months. The present offences were committed in the period of suspension. It is not known whether proceedings will be brought against the prisoner to activate the six week sentence. In this regard, I observe that I regard it is unfortunate that it is not possible to deal with this matter today. The S*entencing Act*, however, does not permit this and it is a matter for the relevant authorities whether they will bring proceedings in the Court of Summary Jurisdiction for breach of the suspended sentence.

Mr Conidi for the prisoner has said all that could be said on his behalf. He has stressed that the prisoner's previous offences of unlawful entry and stealing were committed when he was only 16 years old and that his more recent convictions are of an entirely different character.

Mr Conidi has stressed the prisoner's age. He is now 20, having been born on 21 May 1976 and in his submission, rehabilitation rather than general deterrence should be the main priority in the prisoner's case. Mr Conidi points to the numerous authorities that hold the community's best long term interests when dealing with young offenders is to have those offenders rehabilitated and become good citizens.

In addition to the prisoner's age, Mr Conidi submits that the prisoner is of low intellectual capacity. He did not attend mainstream school – his entire education was in the form of special schooling. The prisoner is illiterate and heavily dependent upon his mother in day-to-day life. The prisoner had a difficult childhood – his natural father died when he was nine months old and his mother remarried a violent alcoholic, which resulted in a disrupted and unsettled upbringing for the prisoner.

In relation to the present offences of which he has been convicted, Mr Conidi's instructions are that it was a spontaneous decision to break into a house after an evening drinking with friends. He submits a suspended sentence of imprisonment is appropriate in all the circumstances.

I declined Mr Conidi's invitation to obtain a pre-sentence report in the case of the prisoner. I have considered carefully all that has been put forward on behalf of the prisoner – including documents evidencing his low intellectual capacities. I accept that he is illiterate and has low intelligence and functional abilities. There is, however, no suggestion that he did not understand that what he did was wrong or that he requires psychiatric treatment.

In his favour, the prisoner has pleaded guilty at the earliest opportunity and has co-operated fully with the police. I accept this as a sign of remorse. I have sympathy for his troubled family background and the practical difficulties he faces in daily life as an illiterate of low intellectual abilities. However, notwithstanding such mitigating factors, the present offences – particularly that in count one – are very serious.

A court is always reluctant to send a young person to prison. It is an action of last resort. Rehabilitation considerations cannot be automatically excluded because of the need for general deterrence in the case of particular offences. With offences of unlawful entry of dwelling houses at night with intent to steal, the case for general deterrence is undeniable. But this does not mean that the circumstances of the particular offence or offender are to be ignored.

I accept that the present offence was not premeditated – like many such offences it was a spur of the moment decision taken after consuming alcohol. The prisoner is not a hardened criminal with a long list of previous convictions. However, such record as he has gives little room for comfort or confidence in his future. At the age of 16 he was given a chance to reform by being sentenced to probation. While he would appear to have complied with the order, the present offences suggest that the leniency he was granted had little or no long term beneficial effects.

His convictions in January 1996 were again met with a high degree of leniency with the imposition of a suspended sentence. While the present offences are of a different character, the prisoner again seems to have learnt nothing from the opportunity given to him. The fact that the present offences were committed during the operative period of suspension also demonstrates a disregard for release on conditions. The same disregard has also been displayed by the prisoner in relation to bail. He failed to appear in this court on 14 January 1997 to answer his bail. This was only four days after I had ordered forfeiture of $200 for an earlier failure to appear. Such actions do not give me any confidence that the prisoner would comply with conditions imposed on any form of non-custodial sentence.

I have considered carefully all the relevant criteria set out in section 5(2) of the *Sentencing Act* and all the sentencing options available under that act. While the present offence in count number one falls at the lower end of the scale for offences of unlawful entry, I consider the need for general deterrence in the form of actual imprisonment outweighs the potential benefits to the prisoner and to the community of a fully suspended sentence or other non-custodial sentencing options. I also consider there is a need for personal deterrence in the prisoner's case – to drive home to him that offences such as the present cannot and will not be tolerated.

Having regard to all the circumstances of the offence and the mitigating factors I have referred to, I sentence the prisoner on count one to 12 months imprisonment and on count two to three months imprisonment.

I order that the two sentences are to be served concurrently to each other.

I further order that pursuant to section 40 of the *Sentencing Act* that service of the sentence of 12 months imprisonment be suspended after the prisoner has served four months. In arriving at this figure I have taken into account section 58 of the *Sentencing Act* which requires me to bear in mind the abolition of remissions.

The order for the prisoner's release after four months is subject to the conditions that (1), the prisoner be of good behaviour and (2), the prisoner subject himself to the supervision of the director of correctional services, or his nominee.

These conditions will be for a period of 16 months. Further, pursuant to section 40(6) of the S*entencing Act* I fix a period of 16 months, as from today, during which the prisoner is not to commit another offence punishable by imprisonment.

I order that the sentence of imprisonment is to take effect from 25 February 1997, being the day the prisoner was remanded in custody. I impress upon the prisoner the importance of complying with the conditions of his release after four months. If the prisoner fails to comply with the conditions I have indicated over the next 16 months, then he will be brought back before me. The prisoner should understand that in such circumstances, section 43 of the *Sentencing Act* would require me to restore the balance of the sentence of imprisonment – or a part of it. I would have no option to do anything else unless I was of the view that it would be unjust to send the prisoner back to prison. There would need to be very good reasons not to activate a suspended sentence in such circumstances.

I further order that the prisoner make restitution to the owner of the stolen property in the sum of $1,000. The prisoner may do so by instalments – and I will hear counsel later as to the arrangements as to how much he can pay and when instalments are to begin. I direct the instalments be paid into court and when received, be paid out of court to the owner of the stolen property.

The prisoner should understand that the payment of instalments will be a serious matter. If the prisoner fails to comply in all respects with the arrangements for payment

of instalments, I sentence the prisoner to imprisonment for three months in default of any such payment by instalments. I direct that, in event of default, the prisoner appear at this court when called upon by a notice to do so, to show cause why that sentence of imprisonment should not be enforced.

I have considered what action I should take for the prisoner's failure to answer his bail on 14 February 1997. Having regard to the sentence of imprisonment that I have just imposed and the order for payment of restitution, I have decided not to forfeit any sum for the prisoner's breach.

I have noted earlier that I regard it as unfortunate that I am not in a position to deal with the prisoner's breach of the suspended sentence imposed upon him in January 1996. It will be clear, however, that in deciding upon an appropriate sentence for the present offences I have had regard to the fact of such breach – in particular as to whether the prisoner would be likely to comply with any conditions imposed in connection with a non-custodial sentence. It is not for me to suggest how the relevant authorities exercise their discretion to bring proceedings for breach of the suspended sentence, nor how a magistrate should exercise his discretion if such proceedings are brought. However, the authorities and any magistrate will, I am sure, wish to know that the prisoner's breach of the suspended order was a factor in my decision to impose a sentence of immediate imprisonment.