SB v Andrew Heath [2017] NTSC 13

PARTIES:	SB v ANDREW HEATH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILES NOS:	LCA 35/2016 (21629649); LCA 36/2016 (21535170); LCA 37/2016 (21627065); LCA 38/2016 (21634596); LCA 39/2016 (21535169); LCA 40/2016 (21558817); LCA 41/2016 (21558819); LCA 42/2016 (21558814); LCA 43/2016 (21634598)
DELIVERED:	21 FEBRUARY 2017
HEARING DATE:	6 FEBRUARY 2017
JUDMENT OF:	MILDREN AJ
APPEAL FROM:	YOUTH JUSTICE COURT

CATCHWORDS:

CRIMINAL LAW -- APPEAL -- EXTENSION OF TIME -- Whether the Court should dispense with non-compliance of conditions precedent to right of appeal -- Appellant a youth age 15 -- Unaware of right of appeal -- Represented by counsel -- Not told of his right to appeal -- Whether ignorance of the law is no excuse -- Application refused.

CRIMINAL LAW -- APPEAL -- PRACTICE AND PROCEDURE -- Appeal against sentences -- Whether learned Judge erred in not ordering a pre-sentence report before sentencing the appellant to a period of detention -- whether learned Judge erred in not imposing a sentence disposition other than detention -- Whether learned Judge erred in proceeding to sentence the appellant in the absence of a responsible adult -- Appeal dismissed.

WORDS AND PHRASES -- Ignorance of the law is no excuse -- Whether applies to application to dispense with noncompliance of conditions precedent to right of appeal.

Alympic v Burgoyne [2003] NTSC 43 at [9], referred to.

BB v The Queen [2014] NTCCA 13 at [39], referred to.

Bowmaker, Limited v Tabor [1941] 2 KB 1 at 5, referred to.

Brown v Lyons [2017] NTSC 9, referred to.

David Securities Pty. Ltd. V Commonwealth Bank of Australia (1992) 175 CLR 353 at 402, followed.

EA v Rothe [2012] NTSC 97 at [68], referred to.

Federal Commissioner of Taxation v Arnhem Air Engineering Pty Ltd (1987) 90 FLR 140 at 142, followed.

Iannella v French (1968) 119 CLR 84, referred to.

Isles v Lyons [2016] NTSC 11, followed.

Jarvis v Jarvis [1947] SASR 12, referred to.

Kiriri Cotton Co. Ltd v Dewani [1960] AC 192 at 204, followed.

Lee v Llewellyn (1992) 108 FLR 328, referred to.

Nottle v Treneryy (1993) 89 NTR 7, referred to.

Olsen and Another v The Grain Sorghum Marketing Board, ex parte Olsen and Another [1962] Qd.R. 584 at 589-590, referred to.

Ostrowksi v Palmer (2004) 218 CLR 493 [1941] 2 KB at 5, referred to.

P (a Minor) v Hill (1992) 110 FLR 42 at 48, referred to.

Potter v Neave [1944] SASR at 21, referred to.

Wesley v The Queen [2014] NTCCA 17 at [26]-[33], referred to.

Wilfred v Rigby [2004] NTSC 31, referred to.

Wilson v Malagorski [2011] NTSC 27, referred to.

Yovanovic v Pryce (1985) 33 NTR 24, referred to.

Hale, Pleas of the Crown 1 PC 42, referred to.

Legislation

Local Court (Criminal Procedure) Act, ss 165, 171(2)
Youth Justice Act, ss 3(d), 3(e), ss 4(a), 4(e), 4(f), 4(g), 4(n), 4(q), s5, s449(b), s51, ss 63, 63(2), 63(4), ss 69(1), 69(2), 69(3), s 70(1), ss 71(1)(a), 71(1)(b), ss 81, 81(2), 81(3), 81(4), 81(6), s83(3), s84, s144(3), s145

Criminal Code, s38

Evidence Act, s49E

REPRESENTATION:

Counsel:

Appellant:	C. Ng
Respondent:	RK Micairan

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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

SB v Andrew Heath [2017] NTSC 13

Nos. LCA 35/2016 (21629649); LCA 36/2016 (21535170); LCA 37/2016 (21627065); LCA 38/2016 (21634596); LCA 39/2016 (21535169); LCA 40/2016 (21558817); LCA 41/2016 (21558819); LCA 42/2016 (21558814); LCA 43/2016 (21634598)

BETWEEN:

SB

Appellant

AND:

ANDREW HEATH

Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT
(Delivered 21 February 2017)

[1] These appeals are brought from the Youth Justice Court. On 12 February 2016 the appellant was sentenced in the Youth Justice Court to a 12 month good behaviour order in relation to 5 counts of aggravated unlawful entry, 4 counts of stealing and one count of trespass. On 18 March 2016 the appellant was dealt with for breaching the terms of the good behaviour order, in that he failed to

attend school as required. The original good behaviour order was confirmed and no other action was taken.

[2] Between 5 June 2016 and 7 June 2016 the appellant committed further offences resulting in 3 counts of aggravated unlawful entry, 3 counts of damage to property and 3 counts of stealing. On 8 June 2016, the appellant was apprehended in relation to these matters and remanded in custody. On 27 June 2016, he was granted bail to undertake the "Bushmob" program. At 8pm that night, the appellant absconded from the program.

[3] On 23, 24 and 26 July, whilst still at large and in breach of the conditions of his bail, the appellant committed further offences, namely 5 counts of unlawful entry, 5 counts of damage to property and 3 counts of stealing. He also committed 3 additional stealing offences from 3 separate businesses in Alice Springs on 26 July 2016.

[4] On 27 July 2016, the appellant was arrested and granted bail on the same day with residential and curfew conditions. That night he failed to return to the residence in time for the curfew.

[5] On 28 July 2016 the appellant was located by Police at another residence. Upon seeing the Police he ran away. He was arrested at the same residence 50 minutes later, hiding under a blanket. He was charged with breaching his bail.

[6] On 29 July, the appellant was again granted bail with conditions requiring him to reside at and participate in the "Bushmob" program. At 7 pm, he again

absconded. On 30 July, he was located by Police at another residence, and charged with another count of breach of bail.

[7] On 31 July, the appellant was again granted bail with residential and curfew conditions. On 3 August, in breach of his bail, the appellant was not at the required residence during the period of the curfew and was again arrested later that same day.

[8] The appellant appeared again on 8 August before the Youth Justice Court. Bail was refused. Pleas were entered in relation to all of the "fresh" matters as well as in relation to the matters the subject of the good behaviour bond. On 9 August, the learned Judge imposed a total sentence of 6 months detention backdated to commence from 8 July to take into account time already spent in custody. The period of detention was suspended immediately on conditions requiring supervision for an operative period of 14 months. It was also a condition that the appellant enter into the "Bushmob" program.

[9] The appellant has sought to appeal his sentences, except the sentences of detention relating to the re-sentence for the breach of the good behaviour order on the following grounds:

1. The learned Judge erred in not ordering a pre-sentence report before sentencing the appellant to a period of detention.

2. The learned Judge erred in not imposing a sentencing disposition other than detention.

3. The learned Judge erred in proceeding to sentence the appellant in the absence of a responsible adult.

4. The sentence imposed was manifestly excessive.

The appeal is out of time

[10] The statutory period within which an appeal must be lodged is 28 days from the date of the sentencing order.[1] The time for appealing therefore expired on 6 September 2016. The appeal was lodged on 21 October 2016. It is well established that the requirement to institute an appeal within the 28 day period is a condition precedent to the institution of an appeal.[2] The Supreme Court has a limited power to extend time under s. 171(2) of the *Local Court (Criminal Procedure) Act* (the Act), but it was not submitted that the circumstances of this case could be brought within that provision. The appellant's counsel sought to rely on s.165 of the Act, which enables this Court to dispense with the compliance of any condition precedent to the right of appeal "if, in its opinion, the appellant has done whatever is reasonably practicable to comply with this Act."

[11] The circumstances which led to the lateness of this appeal are explained, to some degree, by the affidavits of Carly Inglis, the present solicitor for the appellant, Daniel Thomas, who represented the appellant before the learned Judge at the sentencing hearing on 8 and 9 August 2016, and by the appellant. This information was supplemented during the hearing from material obtained from the Youth Court files in relation to further proceedings still pending before that Court.

[1] *Youth Justice Act,* s.144(3) read with *Local Court (Criminal Procedure) Act,* s.171(2).
[2] *Federal Commissioner of Taxation v Arnhem Air Engineering Pty Ltd* (1987) 90 FLR 140 at 142.

[12] The evidence before me amounts to this. On 9 August, when the learned Judge pronounced his sentences, Mr. Thomas was not anticipating that the appellant would be released immediately, and therefore arrangements had to be made for the appellant to be housed in emergency accommodation at the Alice Springs Youth Accommodation and Support Service (ASYASS). The appellant was told to go there and wait before going to "Bushmob". However, on 9 August the appellant absconded from ASYASS and he was not able to be located by CAALAS, Mr. Thomas' employer. Mr. Thomas did not consider whether the sentences were appealable and the appellant was not advised of his right to appeal. The appellant was arrested on 25 August 2015 for alleged further offending. He appeared again before the Youth Justice Court on that date, represented by Mr. Thomas. Bail was refused. He also appeared again before the Youth Justice Court on 29 August, 2 September and 12 September 2016, represented by another CAALAS lawyer, Lucia Pante. Ms. Pante has since left the Northern Territory and is apparently in Cambodia. No affidavit is available from her. No consideration was given to whether or not to appeal until 13 September 2016, when Ms. Pante wrote to her supervisor, Ms. Collins. According to the appellant, Ms. Pante visited him in the Detention Centre in early September and told him that "she wanted to appeal my last sentence" and "I told her that I wanted her to help me appeal the sentence." It is not clear whether these instructions were given before or after the 6th of September, but it would appear more likely that it happened after 13 September. Up until this time, there is no evidence that the appellant was dissatisfied with the sentences

imposed. On 11 October 2016 the Northern Territory Legal Aid Commission received documents under cover of a letter from CAALAS, which included an application from the appellant for a grant of legal aid to appeal his sentences.

[13] It is well established that where a lay appellant is in custody and instructs his solicitor to lodge an appeal on his behalf within the 28 day period, and the failure to do so is the fault of the solicitor, this is sufficient to prove that the appellant has done whatever was reasonably practical to comply with the Act.[3] Once this is proved, the Court has a discretion to excuse non-compliance. As a general rule, the discretion will be usually exercised favourably if the delay is not too long, and if the grounds of appeal are reasonably arguable.[4] Of course, failure by a solicitor to lodge the appeal within time is not the only kind of case which gives rise to the discretion. In *Jarvis v Jarvis*[5] the appellant had failed to serve the notice within the 28 day period. The respondent was in England, and the appellant posted the notice by air mail which should have arrived within 5 days, but in fact arrived a month later. The Court held that non-compliance with the condition precedent should be dispensed with. In *Potter v Neave*[6] Mayo J said:

> Whether everything reasonably practical has been essayed, must be tested by the circumstances of the intending appellant and his accessibility to means for completing and lodging the initial documents. 'Practical' may possibly be paraphrased in the context of s.165, as 'capable of being done or accomplished with the available resources whatever they may be.' I

[3] *Federal Commissioner of Taxation v Arnhem Air Engineering Pty Ltd* (1987) 90 FLR 140 at 150; *Wilfred v Rigby* [2004] NTSC 31; *Wilson v Malagorski* [2011] NTSC 27; *Nottle v Trenerry* (1993) 89 NTR 7; *Isles v Lyons* [2016] NTSC 11.
[4] *Isles v Lyons* [2016] NTSC 11.
[5] [1947] SASR 12
[6] [1944] SASR 19 at 21

> apprehend, it is unnecessary to show that compliance with the procedure laid down was quite impossible, but, be that so or not, it must at least be demonstrated as unreasonable to expect in the particular circumstances that exact compliance should be insisted upon.

[14] There is no specific evidence whether or not the appellant was aware that he had a right to appeal his sentences. I accept that he was not advised of his right at any time until probably after the 13th of September. The appellant's affidavit is strangely silent on this point. The appellant was only 15 at the time of sentence. He is an Aboriginal youth who has been raised since the age of 2 or 3 by his step-mother, AW, who lives at Harts Range, and is responsible for a number of adopted children. It appears that on occasions the appellant has also resided with his grandmother, BW, in Alice Springs. He has had little or no contact with his natural parents. Little is known about his education except that he had attended St. Joseph's, but I note that he was able to write a letter in simple English which was tendered before the learned Judge. The letter is unsophisticated, and full of spelling and grammatical mistakes, but nevertheless understandable. So far as his affidavit is concerned, I note that it was translated by an interpreter in Eastern Arrernte.

[15] Counsel for the respondent, Mr. Micairan, submitted to me that I should not draw the inference that the appellant did not know of his right to appeal because of the frequent contact he had had with the criminal justice system. But there is nothing before me to indicate that he had ever exercised his right of appeal previously. In all the circumstances I consider that it is highly unlikely that the appellant would have been aware of his right to appeal, and I so find.

[16] Mr. Ng's submission was that, because the appellant did not know that he had a right to appeal, there is nothing reasonably practical that he could have done about instituting an appeal. The principle that ignorance of the law does not excuse, expressed in the Latin maxim *ignorantia juris non excusat,* applies, with some exceptions, to criminal offences.[7] It was held in *Bowmaker, Limited v Tabor*[8] to apply to contracts, and it has often been said to apply to the general law, but not to private rights.[9] According to Hale[10] writing in 1680 :

> …every person of the age of discretion is bound to know the law , and is presumed so to do; ignorantia eorum quae quis scire tenetur non excusat."

The reference to "the age of discretion" is probably a reference to the common law rule that a child under the age of 14 was *doli incapax*, ie. the Crown was required to prove beyond reasonable doubt that such a child had knowledge of the wrongfulness of the crime with which he or she is charged.[11]

[17] In *Kiriri Cotton Co. Ltd. v Dewani*[12], the appellant had granted to the respondent a sub-lease of a flat and asked for and received a premium of Shs.10,000, contrary to s.3(2) of the *Uganda Rent Restrictions Ordinance, 1949.* Neither party thought that they were doing anything illegal. The ordinance made no provision for the recovery of illegal premiums. The respondent, after going into occupation of the flat, brought an action for the return of the premium. The

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[7] *Iannella v French* (1968) 119 CLR 84; *Ostrowksi v Palmer* (2004) 218 CLR 493.
[8] [1941] 2 KB 1 at 5
[9] See for example, *Olsen and Another v The Grain Sorghum Marketing Board, ex parte Olsen and Another* [1962] Qd.R. 584 at 589-590.
[10] 1 P.C. 42
[11] See now, *Criminal Code (NT)*, s. 38.
[12] [1960] AC 192

Privy Council held that the money was recoverable. In the course of delivering the speech of their Lordships, Lord Denning said:[13]

> It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter.

[18] To similar effect is the judgment of Dawson J in *David Securities Pty. Ltd. v Commonwealth Bank of Australia*[14]*:*

> Not only is it often possible to classify a mistake of law as a mistake of fact and vice versa, but the original justification for the denial of a remedy in cases of mistake of law was that "[e]very man must be taken to be cognizant of the law." That is a presumption which has no foundation in truth. The true principle is that ignorance of the law is no excuse, that is to say, a person cannot escape the consequences of breaking the law by pleading ignorance of it. A person seeking to recover money paid under a mistake of law is not seeking to escape from the law, but to avail himself of it.

[19] It is well established that there is no difference between ignorance of the law and a mistake of law. In my opinion, the maxim has no application to the circumstances of a person who is ignorant of his or her right to appeal, nor for that matter, unaware of the time limit fixed by s.172 of the Act. Whether or not the Court is permitted to dispense with the condition precedent must be determined by whether or not as a matter of fact the appellant can bring himself within s.165 of the Act.

[20] In *Alympic v Burgoyne*[15] Martin CJ said, in relation to an appellant who had thought about appealing during the 28 day period but had concluded not so do

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[13] At 204
[14] (1992) 175 CLR 353 at 402
[15] [2003] NTSC 43 at [9].

so, that "his lack of knowledge or mistake on that issue and consequent failure to act cannot be a ground for showing that he did what was reasonably practical for him to do. It explains why he did nothing. It does not show that he did something to enable him to rely on s.165." However, in that case the applicant had made a conscious decision not to appeal.

[21] On the other hand in *Lee v Llewellyn*[16] the appellant had appealed his conviction in time. After his appeal was dismissed, he lodged an appeal against his sentence. By this time his appeal against sentence was many months out of time. He explained his failure to appeal in time because he thought that the sentence imposed was of no effect until his conviction had been "approved" by this Court. The learned Judge accepted that he genuinely held this belief, which was quite wrong, but, if his belief had been right, his appeal against sentence would have been instituted in time. The appellant had never had the benefit of legal advice. In those circumstances, his Honour dispensed with the time limit imposed by the Act. His Honour did not expressly refer to whether or not ignorance of, or a mistaken belief in respect of the appellant's legal rights would offer an excuse, but that seems to have been the basis upon which he acted.

[22] I think it might be asking too much of an appellant, especially an unrepresented child appellant, to turn his mind to whether or not he should appeal if in fact , through no fault of his own, he was totally ignorant of his legal rights. I accept Mr. Ng's proposition that, in those circumstances, although he had done nothing, there was nothing reasonably practical that he personally could have done. But,

[16] (1992) 108 FLR 328

the circumstances of this case are not so simple. First, in this case, the appellant was not unrepresented. There is nothing to show that his counsel, Mr. Thomas, had any concerns about the sentences. On the contrary, he was surprised that the appellant was immediately released. It implies that the reason he did not turn his mind to the question of an appeal is because he was satisfied with the result, and that even if he had had turned his mind to whether or not the sentences should be appealed, it is unlikely that he would have advised the appellant of his right of appeal. After all, the sentences actually imposed were not prima facie excessive, and indeed largely conformed with the appellant's wish, expressed through Mr. Thomas to the Court, that he be released as soon as possible to enable him to enter the "Bushmob" program. An appeal against sentence imposed by the Youth Justice Court operates as a stay of execution or of proceedings under a finding of guilt, conviction, or adjudication appealed against.[17] This would hardly have been in keeping with the expressed wish of the appellant to enter the program. Secondly, there is no evidence that the appellant himself was at any time during the 28 day period, dissatisfied with his sentences. Thirdly, the appellant had, by absconding, placed himself in the position, not only of being in breach of the conditions of his suspended sentence, but also depriving himself of the opportunity, should it have arisen, of receiving advice as to his rights and of giving instructions to appeal. After he was arrested on 25 August, he was again represented by Mr. Thomas, and on three subsequent occasions by a lawyer from CAALAS, all within the 28 day period, yet no consideration was given to an

[17] *Youth Justice Act,* s.145

appeal. It was only well after the time to appeal had lapsed that Ms. Pante told the appellant, that *she* wanted to appeal, and obtained the appellant's instructions. I draw the inference that the decision to appeal was not generated by any actual dissatisfaction with the sentences imposed, but because the appellant was facing further charges. In my opinion there was something that the appellant could have practically done if he had wanted to appeal. If he had been dissatisfied with the sentences imposed, he could have asked Mr. Thomas for his advice. He could have also asked Ms. Pante after his arrest and had at least three opportunities to do so before the time limit expired. If his lawyers had thought that the sentences were appealable, they had at least four opportunities to discuss that with the appellant. Nothing was done, and in my opinion the appellant has not shown that he is entitled to the benefit of relief under s. 165 of the Act.

The grounds of appeal

[23] In case I am wrong and it is necessary for this matter to go further, and in deference to the fulsome arguments I have received from both counsel as to the merits of any prospective appeal, I have decided to indicate my opinion on whether there is any substance to them.

Ground 1 - The learned Judge erred in failing to order a presentence report

[24] Under s.69 (1) of the *Youth Justice Act* (the YJ Act), the Court, if considering imposing a sentence of detention, must ensure that it is informed as to the circumstances of the youth. It is not in contention that this includes a sentence of detention that is wholly suspended. Although this is an assumption which may

be open to question, I will proceed on the basis that s.69 (2) required the learned Judge to order a pre-sentence report, unless, in terms of s. 69 (3), the Court was satisfied that it had the information necessary to determine an appropriate sentence and dispensed with the need for a report.[18]

[25] It is apparent from the transcript that the learned Judge did not specifically say that he considered that he had the information necessary to determine an appropriate sentence and that he therefore dispensed with the need for a report. In *Wesley v The Queen*[19] the Court of Criminal Appeal rejected a submission that the sentencing Judge had erred in not ordering a pre-sentence report in a case where a lengthy actual sentence of imprisonment was imposed on a youth, the Court observing that the learned Judge had before him adequate material to make a proper assessment of the appellant's prospects of rehabilitation. In *EA v Rothe*[20], another case where actual detention was ordered, Barr J said that there is no requirement for a magistrate to specify his or her reasons for exercising the discretion in s. 69(3) to dispense with the need for a pre-sentence report, and inferred from the amount of detailed information made available to the learned magistrate in the form of a s.51 report, assessments in relation to community work and supervision, and the learned magistrate's "detailed knowledge and understanding of the appellant's circumstances" that the Court below had reached the relevant degree of satisfaction in that case. That may be contrasted

[18] So far as I am aware, the question of whether or not s.69 applies to a case where the sentencer is considering a wholly suspended sentence of detention has never been considered by the Court. In *BB v The Queen* [2014] NTCCA 13 at [39] the Court of Criminal Appeal appears to have assumed that it applied. I made the same assumption in *Brown v Lyons* [2017] NTSC 9.
[19] [2014] NTCCA 17 at [26]-[33]
[20] [2012] NTSC 97 at [68]

with my own decision in *Brown v Lyons*[21] where I reached the conclusion that the learned Judge had failed to consider whether or not to order a pre-sentence report based upon a number of factors, including the fact the His Honour did not mention that he had considered whether or not to require one. However, although I said that Judges should indicate that they had considered that question, I did not say that the failure to do so would in every case constitute error.

[26] I am satisfied that the learned Judge did give proper consideration as to whether or not to order a pre-sentence report in this case. The matters which the Court below was required to have regard to when sentencing a youth are set out in s.81 of the YJ Act. Without going into unnecessary detail, suffice it to say that the learned sentencing Judge did have before him adequate information upon each of the criteria set out in s.81 (2) of the YJ Act. This was a case where counsel for the appellant had specifically requested the Court not to order a pre-sentence report because of the delay that that would have caused, and counsel's concern that any delay would have affected the appellant's ability to participate in the "Bushmob" program. His Honour did order a report under s.71(1)(a) to see if the appellant was suitable for supervision and a community work order assessment under s. 71(1)(b) which provided further information. His Honour also sought information about the disposition of the charges which related to the appellant's co-offenders. In relation to that, the Court was told that their matters were yet to be disposed of. In his sentencing remarks, His Honour urged the appellant not to

[21] [2017] NTSC 9

spoil his prospects of rehabilitation in the future by listening to the likes of three of his co-offenders, whom his Honour named, and who his Honour said were "notorious people for getting into trouble like this". I infer from this that his Honour took the view that the appellant was a follower, rather than a leader, and was influenced by his associates' propensity for criminal behaviour. It could not be argued that the sentences imposed were out of proportion to the seriousness of the offences (s.81 (3)) and it is clear from His Honour's sentencing remarks that his Honour's principal concern was the facilitation of the appellant's rehabilitation (s.81 (4)).

[27] Mr. Ng on behalf of the appellant pointed out that, if a pre-sentence report had been ordered, it is likely that the author of the report would have set out more information which would have been of assistance. Mr. Ng went through each of the criteria mentioned in s.70(1) of the YJ Act, and submitted that there was either no information about some of the criteria (eg, the appellant's educational background) or that such information as was provided was inadequate (eg the social history and background of the youth). This may be so, but the submission proceeds upon an assumption that such information was necessary to determine an appropriate sentence in this case. I am not satisfied that this is so. Although a report of this nature, assuming that it went into the detail suggested by Mr. Ng, might have been of some assistance, I am not persuaded that the information before the learned Judge was inadequate for sentencing purposes, particularly as the learned Judge was not considering a term of actual immediate detention. I would dismiss this ground of appeal.

Ground 3 - The learned Judge erred in proceeding to sentence in the absence of a responsible adult

[28] Before dealing with ground 2, it is convenient to deal with this ground. Section 63 of the YJ Act provides:

> (1) A responsible adult in respect of a youth must attend the Court and remain in attendance during proceedings against the youth for an offence.
>
> (2) Subsection (1) does not apply if the Court is satisfied that it would be unreasonable to require that attendance.
>
> (3) It a responsible adult fails without reasonable excuse to attend the Court, or remain in attendance during the proceedings, the Court may direct that a warrant or summons be issued to bring the responsible adult before the Court at that or a further hearing.
>
> (4) The Court may:
>
> (a) adjourn the proceedings to allow the responsible adult to be present; and
>
> (b) continue the hearing after the adjournment despite that the responsible adult is not present.

[29] Section 5 of the YJ Act defines "responsible adult" to mean, in respect of a youth,

> …a person who exercises parental responsibility for the youth, whether the responsibility is exercised in accordance with contemporary social practice, Aboriginal customary law and Aboriginal tradition or in any other way.

[30] Sub-section 4 (l) of the YJ Act, which deals with the general principles that must be taken into account in the administration of the Act, provides that "a responsible adult in respect of a youth should be encouraged to fulfil his or her responsibility for the care and supervision of the youth."

[31] As far as I am aware, s.63 has not previously been considered by this Court. The YJ Act refers to the responsible adult on numerous occasions throughout the Act.

The purposes of involving the responsible adult include, ensuring that youths are dealt with fairly by the Police, ensuring that the responsible adult is aware of the conduct alleged against the offender, ensuring that the Court has all the information needed to impose a just sentence in accordance with the principles set out in s.4 of the Act, ensuring that the responsible adult is aware of the contents of reports ordered by the Court, and ensuring that the responsible adult is aware of the Court's orders. Clearly the Act regards the involvement of responsible adults as a matter of great importance.

[32] The importance of the presence of a responsible adult is consistent with the central objects and principles of the YJA, which focus on the youth and rehabilitation of the child offender, rather than punishment.[22] Even to the extent that punishment is also a relevant purpose of the Act, the primary consideration is the protection of the community. Punishment is seen, not as an object in itself, but as a means to that end[23], although it also may serve to ensure that the youth is made to realise that his or her conduct will attract consequences with a view towards deterrence, both general and special. The involvement of a responsible adult in the process aims also to encourage appropriate supervision, care, guidance, and support after the imposition of the sentencing orders to maximise the youth's chances of rehabilitation, re-integration into the community[24] and

[22] See ss3(e), 49(b), 4(f), and 81(4) of the Act.
[23] See ss.3(d), 3(e), 4(a),4(e), 4(f), 4(n), 4(q),and 81(6) of the YJ Act.
[24] Ss.4(f) of the YJ Act.

"to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways."[25]

[33] In the present case, prior to the sentencing hearing on 8 August, counsel had obtained permission from another Judge, for AW as the responsible adult, to be present at the sentencing hearing by telephone. There is no record on the Court's file of a formal order having been made under s.49E of the *Evidence Act*. Had such an order been made, and had AW attended by telephone, that would have been sufficient compliance with s.63 (1) of the YJ Act: see *Evidence Act*, s.49E(5). At the commencement of the hearing, counsel for the appellant informed the learned Judge that arrangements had been made for AW to be present by telephone and that she was standing by at the Harts Range School. Counsel for the appellant advised the learned Judge that it was difficult for AW to get to the Court in Alice Springs, that she worked at the school and had done so for 18 years, she looks after a number of adopted children who also live there, and although she is not the biological mother of the appellant, she has looked after him since he was around 2 or 3 years of age. The learned Judge would have been well aware that Harts Range is located 215 kilometres by road north west of Alice springs on the Plenty Highway. The learned Judge appears to have treated counsel's request as an application to him. It was dealt with very summarily, the learned Judge observing that she should be in Court personally, and that he could not see any value at all of having her present by telephone, "listening to whatever she can pick up in the proceedings before the Court." His

[25] Ss. 4 (n) of the YJ Act.

Honour then said that the matter was ready for a plea and that he was going to deal with it without a responsible adult being present.

[34] Section 49E of the *Evidence Act* conferred a discretionary power to allow AW to be present by telephone. As no formal order had been made previously, the learned Judge was not bound to accede to counsel's request, although if, as His Honour seems to have thought, that another Judge had informally approved of that course previously, as a matter of judicial comity it is somewhat surprising that he refused the application. So far as I can see, there was, however, no legal error by the learned Judge. As an experienced judicial officer of many years standing I expect that he would have been speaking from experience of previous cases. Clearly it would have been better for AW to have been present in person. If that had occurred, it may well be that the appellant would not have absconded shortly after he was sentenced, for example. Nevertheless, the course adopted by the learned Judge is one that I would not hope to encourage. Not enough is known about how difficult it might have been for AW to be physically present. Did she have financial or transport issues? Where could she have stayed in Alice Springs if she had to stay overnight? Could she get time off work? Was there any other person available to look after the other children? If the only practical way of having a responsible adult present was by telephone, it is my opinion that her presence would have been potentially of some value; better that she attend in that way rather than not at all. However, none of these matters were pressed or canvassed by counsel for the appellant at the time. Nor was an adjournment of the hearing sought to enable her to be present, vide ss63(4) of the Act. The

course adopted by counsel for the appellant left the learned Judge no alternative but to proceed in AW's absence, pursuant to s. 63(2) of the Act. Counsel was understandably anxious to have the matter dealt with urgently, because, as he told the Court, "we're in a bit of a race against time with [SB] because we're trying to get him engaged in the Youth Bootcamp that's due to start within the next couple of days… and they're due to start within this week," and before that could happen, there was an assessment procedure which had to be completed. In all the circumstances, I would dismiss this ground of appeal.

Ground 2 - The learned Judge erred in not imposing another sentencing disposition other than detention

[35] It was submitted that his Honour did not have due regard to other sentencing options available to him, such as a Griffith remand and community work order. It is difficult to understand this submission, as the orders made by the learned Judge included obtaining an assessment for suitability for a community work order, and suitability for supervision. A Griffiths remand was not contemplated, but no submission was made that it should be. The conditions of the order suspending the sentences required the appellant to undergo supervision, and to enter the Apmere Mwerre Sentenced Youth Boot Camp program.

[36] The appellant's main complaint seems to be that the learned Judge ought not to have imposed a sentence of detention, albeit that it was fully suspended. Reference was made to *P (a Minor) v Hill*[26] where I said (in the context of a 13

[26] (1992) 110 FLR 42 at 48

year old boy sentenced to 9 months and 21 days detention which was only partially suspended for a series of property crimes:

> The approach of the courts when dealing with juveniles must be cautious, patient and caring, with the interests of the juvenile foremost in mind. Of course, there are some offences which warrant an immediate custodial sentence notwithstanding that the offender is a juvenile and notwithstanding, even, that the juvenile has no prior convictions. But these are for extremely serious crimes, usually, but not always, crimes of violence where it is right that the need to punish and deter is given particular emphasis: see *R v Williams* (1992) 109 FLR 1 at 7. I do not say, of course, that in the case of a persistent offender, where the crimes are not in the extremely serious category, that it is not appropriate to order detention or imprisonment. But even in such cases, detention or imprisonment should only be used as a last resort, where all other options and inappropriate and the need for deterrence and to protect the community must be given special prominence: see, eg, *Yovanovic v Pryce* (1985) 33 NTR 24.

[37] It is important not to take these remarks out of context. There is a considerable difference between a sentence of actual detention and a sentence of detention which is wholly suspended on conditions, including supervision. When one looks at the graduating scale of sentencing options available under s. 83 of the YJ Act, there are five sentencing options, of varying seriousness, which involve detention; a wholly suspended sentence; a partly suspended sentence; a sentence suspended on entering an alternative detention order; a periodic detention order and a term of actual detention or imprisonment. Each of these options may or may not also carry with them a formal conviction. The most serious punishment available is imprisonment, which cannot be ordered if the youth is less than 15 years old.[27] There is nothing in *P (a Minor) v Hill* to suggest that it would be wrong to impose a suspended sentence of detention in a case where the offender

[27] YJ Act, s83(3).

had been given many opportunities in the past designed to enhance his rehabilitation. In fact, the contrary is the case: see p51 of the judgment. In a case such as this, where the appellant was a repeat offender who had been given many previous opportunities, including two previous opportunities to enter the "Bushmob" program whilst on bail, where the appellant had breached the original good behaviour bond, where he had persistently breached his bail conditions, and where he had committed over 40 separate offences over a period of less than a year, all of which were committed in breach of court orders , and many of which were committed whilst on bail, it is hardly surprising that his Honour felt compelled to consider fully suspended sentences of detention, without recording a conviction. Mr. Ng abandoned any contention that the sentences imposed were manifestly excessive, and in my opinion any such an argument could not have been sustained. In my opinion this ground is not made out.

Orders

[38] The application to dispense with the failure to comply with the requirements of s.172 of the Act is dismissed. The appeal is otherwise dismissed.