DK v Dixon [2004] NTSC 62

PARTIES:	DK
	v
	DIXON, Garnet Alan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	20416208, 20419146, 20417128 & 20415382 (JA 22, 23, 24 & 25 of 2004)
DELIVERED:	19 November 2004
HEARING DATES:	11 November 2004
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Appellant:	G. Smith
Respondent:	R. Noble

Solicitors:

Appellant:	NT Legal Aid Commission
Respondent:	Director of Public Prosecutions

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

DK v Dixon [2004] NTSC 62
No. 20416208, 20419146, 20417128 & 20415382
(JA 22, 23, 24 & 25 of 2004)

BETWEEN:

DK
Appellant

AND:

DIXON, Garnet Alan
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 19 November 2004)

[1] This is an appeal against sentence from the Juvenile Court, pursuant to s 58 of the Juvenile Justice Act.

[2] The appellant, a 14 year old male, pleaded guilty to 29 offences which were committed between 25 March 2004 and 1 July 2004. There were 12 offences of unlawful entry, 12 of stealing mostly associated with the unlawful entries, 2 of assault police, 1 of obtaining property by deception, 1 of unlawful damage and 1 of disorderly behaviour in a police station.

[3] Nineteen of the offences occurred after the juvenile had been arrested by police and released on 16 April 2004 and 15 offences were committed whilst

the appellant was on bail. The learned Magistrate imposed penalties totalling seven months detention, suspended after he had served three months on conditions including supervision.

[4] The notices of appeal set out 10 grounds. Grounds 2 and 4 were formally abandoned at the hearing of the appeal. The appellant sought to add a further ground (Ground 11). The remaining 9 grounds were pressed, although a number of them overlapped.

[5] Before dealing with the grounds of appeal it is necessary to briefly outline the facts which were not in dispute.

[6] On Thursday 25 March 2004, the appellant with another juvenile BC went to a house at Willshire Street. He informed BC and another friend he was going to break into the house. He walked along the street and entered the yard of No 2 Willshire Street. He went to the rear of the house, removed louvres from a toilet window and then entered the house. In the main bedroom he located a safe in a cupboard. He obtained a knife from the kitchen draw and removed a screwdriver from the laundry area of the house. He returned to the main bedroom where he used the screwdriver and the knife to prise open the safe. He took $3,000 in cash from the safe and left the house through the same window. He then returned to BC's house where he showed his friends the stolen cash. Over the following week the appellant and his friends spent the stolen money on internet time, two mobile phones at $300 each, mobile phone credit, food, alcohol, cigarettes and four ounces of cannabis (which

they paid roughly $1,540 for). The appellant and his friends jointly consumed all of the property. The appellant later gave a mobile phone that he had purchased to another friend to pawn at a local second hand dealer shop and one of his other friends retained the other mobile phone. On 12 July 2004 he attended the police station of his own accord and took part in a record of interview during which he made admissions as to his involvement.

[7] During the record of interview, he was asked what he had done with the stolen money. He said, "I don't remember the two weeks after that. I was stoned everyday, basically 24 hours a day and pissed."

[8] On the evening of Thursday 1 April 2004, the appellant was walking around Alice Springs after having consumed alcoholic drinks. He was in company with BC and some other friends. They became thirsty and decided to go to Anzac Hill High School to get a drink of water from the tap. They climbed the fence and entered the yard, heading towards the canteen area. They decided to get a drink from a Coke vending machine, but were unsuccessful. They then talked about getting food and drinks from inside the school canteen and all agreed to gain access to the canteen to steal food. They went to the main hall and gained access to the locked and secured building by pushing in a Perspex window over the door frame and climbing inside. They went to the canteen, forced open a roller door and gained access to the canteen proper. That caused $250 worth of damage. They then took some drinks, some iced coffee, a box of lollies and numerous packets of chips

worth, in all, $125. The stolen property was placed in a cardboard box. They then left the canteen and went to the school oval where they consumed all of the property. After that they left the area. Fingerprints found at the crime scene matched those of the appellant. On 12 July 2004, he attended at the police station of his own accord and took part in a record of interview and made full admissions.

[9] On Friday 16 April 2004, the appellant attended at the Hideaway Backpackers at 6 Kahlick Street on his rollerblades. He removed his rollerblades then went up to a flat on the first floor above the office. He gained entry by opening an unlocked door and walked inside. Once inside he went through the personal belongings of two of the occupants and removed a five Euro note and also a ten dollar Singapore note from the cupboards. He was located by the occupants whilst still in the flat and detained until the arrival of the police. Upon the police arriving, he was searched and property was located in his pocket. He was then placed in the back of a police van. In transit to the Watch House, he began kicking and punching and rocking the cage. At one stage he succeeded in breaking off a weld and half the roof lifted off. The police stopped and one of the police got out and spoke to him. He spat twice at the officers, narrowly missing them and calling them,"You fucking pig cunts". Damage to the vehicle was $50. He was then transferred to another vehicle and conveyed to the Watch House where he was placed in the cells. He proceeded to spit all over the cell door and cameras and also kicked and punched out at the cell screaming out. Throughout his time in

custody his actions were monitored and recorded on camera. At 11:20 pm he took off his jeans and wrapped them around his neck. Police entered the cell, placed him on the ground in a stabilising position and his jeans were removed. Police were exiting the cell when the appellant spat a great wad of sputum at Sergeant Cornford, striking him in the face and the right eye and the spital also struck Constable Ganley on the right side of his cheek. The appellant was later given the opportunity of a record of interview which was declined by his father. He was released into the care of his father and told that he would be summonsed.

[10] Between 9:00 am and 12:30 pm on Tuesday 4 May 2004, the appellant and BC were walking around the East Side with the intention of finding a house where no-one was home so they could break into it. They found a residence at No 4 Goyder Street. The appellant entered the yard, found a Phillips head screwdriver in the shed and used it to tap on the bathroom window until it shattered. He removed the broken glass and climbed into the dwelling. He went into the master bedroom and removed cash and coin tins from a dresser worth some $280, also a black Kodak digital camera worth $999 and a memory card worth $120.

[11] He left the house with the cash and the camera and showed the property to BC who was waiting in an alley outside. They then used the stolen cash to buy an ounce of cannabis, which they smoked in company with another friend.

[12] The appellant's fingerprints were found at the scene. On 12 July 2004, he attended the police station of his own accord and took part in record of interview making full admissions.

[13] On Wednesday 12 May 2004 the appellant was in attendance at Anzac High. At an unknown time during the day he entered classroom 23 where he located a black camera bag next to the teacher's desk. He opened the bag and removed a Nikon Cool Pix digital camera, battery charger and associated connecting leads including a computer and video lead and two memory sticks, in all worth $700. He then left the school premises. Later that day, with an acquaintance CS, he attended at Cash Connections store in Bath Street in an attempt to exchange the camera for cash. He was advised that he was unable to do so because he was not over the age of 18. A short time later he re-attended with a second acquaintance, NS, who was over 18 and who traded the camera and accessories for $100.

[14] On Tuesday 1 June 2004, in company with his mother, he attended the police station and was offered a record of interview but declined.

[15] On 12 June 2004, the appellant was walking around Willshire Street. He decided to unlawfully enter the dwelling at No 9. He entered the yard and walked to the rear of the house, using a stick to rip open the fly screen to the toilet window. This caused $30 worth of damage. He entered the house and stole a mobile phone and two cans of beer worth, altogether, $83. Once again his fingerprints were found at the scene by police. On 12 July 2004 he

attended the police station of his own accord and took part in a record of interview. During the interview he denied the unlawful entry, although he admitted to going to the premises with the intent to unlawfully enter, and he admitted ripping open the flyscreen and touching the louvres. However, he stated that he changed his mind as a friend of his lived at that residence. Later on in the evening, police attended at the appellant's residence and conducted a search. During the search they located the mobile phone in a bedside cupboard. The appellant admitted stealing the mobile phone on a prior occasion when lawfully on the premises.

[16] Between 12:00 pm and 1:00 pm on Tuesday 22 June 2004, the appellant, in the company of BC, JK and WH, were driving around in WH's vehicle looking for a house to burgle. The car stopped at No 6 Cypress Crescent on the Eastside. The appellant and JK went to the rear of the yard. The appellant used a screwdriver to smash the toilet window causing $85.60 worth of damage. They entered the house via the window and stole a 1.25 litre bottle of Bacardi rum and 1.25 litre bottle of gin. They also took $60 in notes. The total value of property stolen amounted to $150.

[17] The proceeds were shared between all four of the participants.

[18] The appellant took part in a record of interview on 12 July 2004 and admitted his involvement.

[19] Following the burglary at 6 Cypress Crescent, the appellant together with BC, JK and WH, went to No 5 Cassia Court (Eastside). The appellant and

BC got out and went to the rear of the yard. BC used a screwdriver to force open a side window, resulting in $150 worth of damage to the window. BC and the appellant entered the house via the window. Once inside they searched the bedrooms and stole an 18 carat gold necklace worth $1,200 and two 9 carat gold earrings worth $300. In another part of the house they stole two packets of Longbeach cigarettes and a packet of Marlboro cigarettes worth $30 and a number of stainless steel men's watches worth $160. The total value of the property stolen was $1,690.

[20] They were then picked up by WH and the property was divided between them. The appellant kept one of the watches. On 12 July 2004, the appellant attended the police station of his own accord and took part in a record of interview in which he made full admissions. Later in the evening of 12 July, police attended his residence and during the course of the search the appellant handed police the stolen watch. Later police located two watches and the gold necklace in the possession of the co-offenders.

[21] Between 12:00 pm and 1:00 pm on Wednesday 23 June 2004, the appellant, in company with BC and WH, went to the rear of the premises at No 11 Coolibah Crescent. The appellant stood by whilst BC smashed a main bedroom window at the rear of the house causing $85 worth of damage. They gained entry and searched the house, locating and stealing two cameras, a Gameboy Advance, a Gameboy light attachment, seven Gameboy Advance games, a pair of binoculars, a portable Sony CD player and a

Doobie Brothers CD, together with $150 in cash and $20 US. The total value of the goods stolen was $2,262.

[22] The property was divided between them all. There is some dispute as to what the appellant kept. The appellant admitted to having kept the money. On 12 July 2004 when he attended the police station of his own accord, he handed over to them the Canon EOS camera, the Ricoh AF camera, a Gameboy Advance, the Gameboy light attachment, a two Gameboy games. He made full admissions as to his own involvement. Police later recovered a Gameboy Advance game from one of the co-offenders.

[23] On Wednesday 23 June 2004, in company with BC and WH, he drove around Eastside looking for a house to break into. One was located 112 Burke Street. The car was stopped in an alley behind the residence. BC gained entry to the dwelling through the toilet window, then opened the back door allowing the appellant and WH to enter. They searched the rooms of the house locating and stealing a Minolta camera, an Olympus trip camera, a children's money box containing $30 in cash and a clay money box containing $20 in cash. The total value of these items was $350. The property was divided between them. On this occasion the appellant kept the Minolta camera.

[24] On 12 July 2004 he went to the police station of his own accord and handed over the camera. He took part in a record of interview and made full

admissions. Later the appellant recovered the Olympus camera from a co-offender and brought it to the police station.

[25] On Wednesday 23 June 2004 the appellant, in company with BC and WH, then entered 114 Bourke Street, stopping the vehicle in the alley behind. They attempted to gain entry by ripping the flywire screen from the door, but only succeeded in damaging the screen. The value of the damage was $25. The appellant gained entry to the dwelling through a side window and BC and WH were let in. Inside they stole a 700ml bottle of Johnny Walker Black Label containing $50 worth of scotch and an imitation Rolex watch worth $50. The appellant kept the Rolex which he gave to a friend at a later date. On 12 July he took part in a record of interview in which he made admissions. He also told police as to the identity of the supplier of cannabis, who was the same person to whom he had given the Rolex watch. The watch had been given to his supplier in payment of some cannabis on a previous occasion.

[26] On the 30 June 2004, the appellant entered a property at 85 Lackman Terrace, Braitling using a screwdriver and a butter knife to force open a bedroom window causing the glass to break. After entering the master bedroom and opening a cupboard, he removed $450 in cash and then left the dwelling. He used the cash to buy an ounce of cannabis which he smoked in the company of others. On 12 July 2004 he attended at the police station of his own accord and made full admissions.

[27] On Thursday 1 July 2004, between 12:50 and 2:00 pm, the appellant entered a residential property occupied by a Ms Susan Glynn. The appellant was able to locate a spare key to the backdoor in a hubcap on a window sill adjacent to the door. He unlocked the door and entered the premises. He made his way to the master bedroom and picked up a tin containing coins of various denominations. At around 2:00 pm Ms Glynn's daughter returned home to find the appellant adjacent to the laundry doorway with the tin of coins in his hands. He was challenged at this time. He placed the tin of coins on the laundry sink and walked out the back door towards the gate. He was then detained by Ms Glynn's daughter who escorted him to another address where police were notified. On their arrival, he was arrested and taken to the Watch House. He declined to speak when offered a record of interview. He was charged and bailed.

[28] I note that Count 2 on file number 20417128 (the obtaining property by deception charge) does not appear to have been dealt with by the learned Magistrate although it would appear that the appellant did in fact plead guilty to that charge. The facts were not put before the Court by the prosecutor.

[29] The appellant who was 14 years of age at the time of the offending had no prior convictions.

[30] The total value of the property stolen was some $10,774 and in addition there was damage to the value of $675.60.

[31] All in all, property to the value of $3,217 was recovered, leaving an amount outstanding of $7,557 of either property stolen, damaged, not paid or returned.

[32] The Juvenile Court had the advantage of having obtained a pre-sentence report. It is apparent from the report that the appellant has had long-standing difficulties at school over a period extending from 1995 to 2003. The appellant has had difficulties controlling his temper and as a result has had counselling, psychological assistance, been placed on anti-depressant medication and has participated in case conferences. He has, nevertheless, damaged property at the school, assaulted teachers and been suspended on two occasions. A psychologist who visited the school advised that the appellant had a learning difficulty, but was not unintelligent, was very emotional, has a disengagement with his father and as a result there is emotional instability, but if a relationship was developed with him he responded well.

[33] The report was not favourable concerning the appellant's parental background. It appears that his parents are separated. There are a number of step-brothers and a step-sister with whom he has had minimal contact. The author of the report observed:

> The following information was volunteered during interviews. The offender along with his father and one of his stepfathers (sic) all advised the offender that he (sic) was a result of a "one-night stand or ships passing in the night." The writer could not understood (sic) why this information was offered to her, however it provides insight as to the offender's feelings as to his status within the family.

[34] The report indicated a background of cannabis addiction by both of his parents and there was an unsubstantiated allegation that his father's house (with whom the appellant was then living) was "not fit for a pig to live in". His mother indicated to the writer of the report that the appellant was not welcome to live with her as he has been a problem since he was young. His mother is a school teacher. She indicated to the writer that she was about to go overseas on a holiday and was in a hurry.

[35] The author of the report thought that the appellant, if returned to live with his father without intense counselling, was at significant risk of re-offending and escalation of his offending behaviour could be a major concern.

[36] The writer observed:

> The writer is also very concerned in regards to his emotional frame of mind given his apparent upbringing, which smoking cannabis and indulging in alcohol appears to be the "norm" in his upbringing. The offender's current residence appears to be unstable at times and his mother is not prepared to have (DK) back at home.

[37] The learned Magistrate in his sentencing remarks observed that the appellant comes from a very deprived background as set out in the pre-sentence report. His Worship said:

> I'm asked to impose a non-custodial sentence so that he will return to that background. It's been my experience, particularly of late, that children sent to Don Dale actually do significantly better in Don Dale than if left to their devices in a non-custodial setting. Don Dale does at least set parameters and offers an alternative way of living. It is sometimes said that sending a child into custody is the equivalent of sending them to a finishing school for crime, but that's not been my recent experience, at least with Don Dale. … One is always

> reluctant to give a first offender a sentence of detention. A chance to prove themselves is usually preferable. Here, however, the defendant was given that chance twice, but continued to offend even while the material for the pre-sentence report was being gathered. It was part of the defendant's submissions that he'd ceased offending or has changed in the last two to three weeks. This is assertion only and no evidence, for example from teachers, has been offered to support it. Only time will tell. … I understand that rehabilitation of a juvenile is of paramount importance in sentencing, but a custodial sentence is not necessarily inimicable to that rehabilitation. Don Dale is after all a rehabilitative institution. Deterrence, particularly individual deterrence, directed specifically at the offender may well have a rehabilitative effect by giving the offender a glimpse of what he can expect should his offending continue.

[38] His Worship then proceeded to impose the partially suspended sentence of detention to which I have referred earlier.

Grounds 3 and 5 of the Appeal

[39] It is convenient to deal with these grounds together. Ground 3 asserts that the learned Magistrate erred in that he failed to give sufficient weight to the appellant's prospects of rehabilitation. Ground 5 asserts that the learned Magistrate erred in that he failed to give sufficient, or any, weight to the assistance given by the appellant to the investigating police.

[40] Dealing with Ground 5 first, the argument of Mr Smith for the appellant was that the appellant provided significant assistance to the police in relation to the offences on file number 20416208. In relation to all 20 counts on that file he made full and complete admissions to the police. In relation to Counts 3, 4, 6, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, he provided the police with the names of his co-offenders. Those co-offenders had not been

dealt with at the time of sentence by the learned Magistrate, but there were still proceedings pending against them.

[41] The appellant assisted the police by providing information as to those who had received stolen goods from him. In relation to some counts in addition to naming the person who received the stolen watch, the appellant provided information to the police as to that person's drug dealing activities. In relation to some of the counts, the appellant attended on police and gave to them property which was the proceeds of the offences. Some of these items were recovered by the appellant from his co-offenders. The appellant appears to have done all he possibly could to arrange for the property that had been taken to be returned.

[42] The learned Magistrate made no mention in his sentencing remarks of the assistance that the appellant provided to the police.

[43] In relation to Ground 3, it was put that the learned Magistrate erred by effectively dismissing the appellant's prospects of rehabilitation outside of the Don Dale Centre. It was put that the facts illustrated a complete change of heart by the appellant. Whereas, initially, he had on two occasions refused to make any admissions, he eventually went to the police of his own volition and made full admissions as well as brought with him some of the goods he had stolen. Not only did he name his co-offenders, but he also had gone to some trouble to approach his co-offenders and request that they give him property to enable him to return that to the police as well.

[44] Clearly this was significant evidence of a change of attitude. Moreover it was put that the appellant had resumed going to school and that he had been able to stay off cannabis for about a month.

[45] It is clear that the appellant's offending was committed mostly while he was under the influence of cannabis or alcohol. The material before the learned Magistrate indicated that he had been introduced to cannabis at the beginning of 2003 by one of his school friends. Not surprisingly, with a child of his background, he liked the escapism of it and from that day on he became a regular user. He was not only smoking marijuana, he was also smoking cigarettes and drinking alcohol. Having regard to his troubled background, it is not surprising that he would have eventually become involved in offending of this kind. The offending was to obtain money or goods to enable him to obtain cannabis, alcohol or cigarettes.

[46] Counsel for the appellant had advised the learned Magistrate that since the appellant had resumed living with his father initially the relationship, for the first two months, had not been good, but thereafter it had stabilised.

[47] So far as the situation regarding the living arrangements at home is concerned, there was no dispute raised by counsel for the appellant before the learned Magistrate as to the nature of the living accommodation provided by his father. So far as the relationship with the mother was concerned, the mother was in court at the time and disputed the contents of

the report insofar as they related to her. The learned Magistrate read out the relevant passage, which was as follows:

> I only attended the court because [H] had no one else to be present with him, he is not welcome to live with me, I am in a hurry and need to get back to school as I am a school teacher. [H] has been a problem since he was young, he has had support services right throughout his life, now I need to go now, as my partner and myself are going overseas for a month and I have a lot going on.

[48] The mother said to the learned Magistrate she loved her son, she had been totally misquoted and she said that she was a very caring mother. Counsel for the appellant asked his Worship if his Worship would like the mother called to give evidence. His Worship said that he was not presenting the appellant's case and could not advise the appellant's counsel as to what to do. In the end result the mother was not called. However, s 50(1) of the Juvenile Justice Act provides:

> "Where matter contained in a report referred to in s 49 is disputed by a juvenile against whom proceedings are taken or a parent or guardian of the juvenile, the court shall not take that matter into account in its disposition unless it has decided that it is correct beyond reasonable doubt."

[49] I think it is clear that the learned Magistrate did underestimate the assistance which the appellant had given to the police and the appellant's change of attitude. I think also that the learned Magistrate may well have wrongly assumed that there were no proper alternative living arrangements for the appellant. Even if the father's house was "not fit for pig to live in"

(whatever that may mean), it does not necessarily follow that it was inappropriate for the appellant to be living with his father.

[50] In *P (a minor) v Hill* (1992) 110 FLR 42 at 47-48, I referred to a number of the leading authorities concerning the approach to be adopted by a juvenile court. I said:

> In *M v Waldron* (1998) 90 FLR 355 at 360, Kearney J said:
>
> > "Mr Dowd referred me to the leading case of *Hallam v O'Dea* (1979) 22 SASR 133, which makes it clear that the principles on which a Juvenile Court should select the most appropriate penalty are fundamentally different from those applied in a Court of Summary Jurisdiction. As was pointed out in *R v Homer* (1976) 13 SASR 377 at 382-383: '… in the case of a juvenile … the Court is trying to find out what is the best means of turning this delinquent juvenile into a responsible law-abiding adult and that has really got nothing to do with the seriousness of the crime … and no useful comparison can be made between an order made under a non-punitive system and a sentence imposed on an adult.'
> >
> > In its difficult task of deciding upon the appropriate disposition I consider that the Juvenile Court should always bear in mind the need to preserve and strengthen the juvenile's relationship with his family (and that it is generally desirable that he remain in his own home) as well as the need to bring home to him a clear understanding that he is required to observe the law. He should be kept in the community wherever that is practicable, if the need to protect the community from him does not require his removal from it."
>
> His Honour also observed (at 360) "that only in a bad case could a court properly conclude that a 15 year old … has 'come to the end of the road' so far as non-custodial penalties are concerned". A fortiori in the case of a 13 year old. 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 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 are 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.

[51] With great respect to the learned Magistrate, it appears to me that his Worship failed to give adequate attention to these principles in a number of respects. First it seems to me that he failed to appreciate that on the facts before him there was material upon which he ought to have taken a more liberal view of the appellant's prospects of rehabilitation and ought to have given him significant credit for his plea and for the assistance to the authorities. Further, the learned Magistrate, in my opinion, erred in his conclusion that there was really no other course open other than a sentence of actual detention. Although the offences were serious, they were not so serious when committed by a 14 year old as a first offender as to warrant immediate detention unless no other course was reasonably open in order to protect the community. Given that the appellant had shown a change of attitude that was plainly was not the case here.

[52] Counsel for the Crown, Mr Noble, referred me to *Ris v Wills* (1966) Tas.SR 92. In that case Burbury CJ was dealing with a young offender, 18 years of age, with no prior convictions who committed six separate criminal transactions over a period of a few days. The Magistrate dealing with the

matter imposed jail sentences of an overall period of nine months followed by two years of probation. On appeal the court held that the imposition of the jail sentence instead of conditional discharge was within the exercise of proper judicial discretion. Burbury CJ said at 95-96:

> Before parting with this case I desire to make it perfectly clear to youths who may be disposed to take part in breaking and entering "sprees" that it by no means follows that they will not be sent to gaol because they are first offenders. Discharge under a bond, subject to disciplinary supervision of a probation officer, is a privilege and not a right. It is a privilege which will only be granted in appropriate cases and it is a privilege which the courts are becoming less inclined to grant in view of the prevalence of cases of breaking and entering by youths. The present case is an example which ought to serve as a warning.

[53] I do not think that case is good law and it should not be followed in this jurisdiction. It is quite wrong to describe a suspended sentence as a privilege. As Walters J said in *Wood v Samuels* (1974) 8 SASR 465 at 468 in an oft quoted passage:

> Speaking for myself, I would think that a suspended sentence is imposed only when by eliminating all other alternatives, the Court thinks the case is one for imprisonment, and, though it be a case for imprisonment, an immediate custodial sentence is not required in the circumstances of the particular case.

[54] In any event *Ris v Wills* is not a case concerning juveniles. The offender in that case was 18 years of age.

[55] The appeal will be allowed and the sentence imposed quashed.

[56] I will hear submissions as to what sentence should be imposed in lieu thereof.