Curnow v Pryce [1999] NTSC 116

PARTIES:	TERRY ERNEST CURNOW v LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	MILDREN J

CATCHWORDS:

Appeal - criminal law - mandatory minimum sentence - amendments to relax the harshness and rigidity of mandatory sentencing regime for first offender.
Appeal - criminal law - meaning of "trivial" - the words of the section must be considered in the context of the Act as a whole as one connected and combined statement of the will of the legislature - history of provisions and those affected by amendment should be considered - courts should construe legislation promoting the purpose or object underlying the Act.
Appeal - criminal law - remedial legislative provisions should not be watered down by strict interpretation of what is "trivial in nature" - courts left open with full range of options - courts allowed have regard to extrinsic material (second reading speech) if provision's meaning is ambiguous or obscure
Appeal - criminal law - offence may be trivial notwithstanding was deliberate - the disqualifying factor for triviality occurs when the

sentencer considers that the objective circumstance of the offence warrants a sentence of imprisonment, albeit suspended

LEGISLATION

1. *Sentencing Act:* s78A(6C)(a); s78A(1); s78A(6B); s13
2. *Criminal Code:* s251(1); s392 (repealed); s392(1).
3. *Interpretation Act:* s62A, s62B.

CASES

1. *Bailey v Laczko* (1978) 20 ALR 658, distinguished.
2. *Brebner v Hersey* (1963) SASR 1, distinguished.
3. *Crafter v Schubert* (1943) SALR 84, distinguished.
4. *Sweeney v Fitzhardinge and Others* (1906) 4 CLR 716, applied.
5. *Waugh v Kippen and Another* (1986) 64 ALR 195, applied.
6. *Trenerry v Bradley* (1997) 6 NTLR 175, followed.
7. *Walden v Hensler* (1987) 163 CLR 561, distinguished.
8. *Veen v The Queen (No 2)* (1988) 164 CLR 465, applied.

REPRESENTATION:

Counsel:

Appellant:	K Budrikis
Respondent:	J Birch

Solicitors:

Appellant:	Povey Stirk
Respondent:	Director of Public Prosecutions (Alice Springs)

Judgment category classification:	A
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS
No. 9905936

[1999] NTSC 116

BETWEEN:

TERRY ERNEST CURNOW
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 29 October 1999)

Mildren J

[1] This is an appeal against sentence which involves for the first time consideration by this Court of the meaning to be given to the expression "the offence was trivial in nature" in s78A(6C)(a) of the *Sentencing Act*, as recently amended by the Legislative Assembly.

[2] The appellant pleaded guilty to a charge of a single count of unlawfully damaging property, namely a door, to the value of $300, contrary to s251(1) of the *Criminal Code*.

[3] The facts as accepted by the learned Magistrate were as follows. On 13 March 1999 the appellant and his partner went to a function together. The

appellant left the function early, and went home. His partner stayed and partied on well into the next morning. She then slept until later in the day before returning home. When she arrived home, she told the appellant that she had spent the day in another man's bed, and indicated where this was. The appellant became upset, confused and worried. He went to a flat where he believed the "other man" lived, and knocked on the door. An occupant came to the door. What happened then is not clear. The appellant picked up a pipe and took out his anger on the door, which was then apparently closed. The door was of light weight construction. The appellant hit the door on six occasions, creating holes and dents in it. He then left the area.

[4] The learned Magistrate found that the appellant had made full restitution for the damage caused to the door; that the appellant was otherwise of good character, and that there were mitigating circumstances which significantly reduced the extent to which the appellant was to blame for the commission of the offence and demonstrated that the commission of the offence was an aberration from the appellant's usual behaviour; and that the appellant had co-operated with the police. It was submitted to her Worship by counsel for the appellant that the offence was also trivial in nature, and that therefore the Court was not required to impose a mandatory minimum sentence of fourteen days' imprisonment. That submission was based upon s78A(1) of the *Sentencing Act*, which, subject to s78A(6B) requires a court to impose a mandatory minimum sentence of fourteen days imprisonment for a first

offender who commits a property offence, as defined. It is not in contest that the offence of unlawfully damaging property is such an offence.

[5] S78A(6B) of the *Sentencing Act* provides:

> A court is not required to make an order under subsection (1) if exceptional circumstances for not doing so exist and may instead impose any other sentence or make any other order authorised by this or any other Act.

[6] S78A(6C) of the *Sentencing Act* provides:

> For the purposes of subsection (6B), exceptional circumstances will only exist if the offender is before the court to be sentenced in respect of a single property offence, the offender has not on any previous day been dealt with by a court under subsection (6B) and the court is satisfied of all of the following:
>
> (a) that the offence was trivial in nature;
>
> (b) that the offender has made, or has made reasonable efforts to make, full restitution;
>
> (c) that the offender is otherwise of good character and that there were mitigating circumstances (which it is noted do not include intoxication due to alcohol or the use of illegal drugs) that significantly reduce the extent to which the offender is to blame for the commission of the offence and demonstrate that the commission of the offence was an aberration from the offender's usual behaviour;
>
> (d) that the offender co-operated with law enforcement agencies in the investigation of the offence,
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> the onus of proving the existence of the matters referred to in paragraphs (a), (b), (c) and (d) being on the offender.

[7] Subsections 78A(6B) and (6C) were introduced as part of a series of amendments which came into force on 4 July 1999. Prior to then, if a person committed a "property offence" for the first time, the courts had no alternative but to impose a sentence of actual imprisonment of at least fourteen days, which could not be ameliorated in any way, even if the offence was trivial or trifling. Since mandatory sentencing was first introduced for property offences, a number of persons have been sentenced to imprisonment for what would undoubtedly have been regarded as trivial offences, and those cases have attracted a lot of attention in the media. Undoubtedly, ss78A(6B) and (6C) are remedial in nature, and designed to relax the harshness and rigidity of the previous law.

[8] As the appellant had established paragraphs (b), (c) and (d) of ss78A(6C), the only remaining question was whether the offence was trivial in nature. This the learned Magistrate answered in the negative. The appellant's amended grounds of appeal are that her Worship erred in law in finding that the offence was not trivial, and that she misdirected herself as to the meaning of "trivial".

[9] Her Worship considered a number of authorities which discuss the meaning to be given to the word "trivial", as it appears in the context of various Acts, and concluded that (1) the maximum penalty is no guide as to whether or not an offence is trivial, (2) an offence cannot be trivial if it is a typical one of its kind, (3) because of the extent of the damage to the door, but primarily because of the number of blows struck, the offence was not a "trivial offence

of its kind". Her Worship does not specifically say so, but it must be inferred that she considered the offence to be a typical one of its kind. In arriving at her conclusion, her Worship relied principally on *Bailey v Laczko* (1978) 20 ALR 658 and *Brebner v Hersey* (1963) SASR 1. Counsel for the appellant, Miss Budrikis, submitted that these authorities were of little value as they were dealing with a statutory power given to a Court of Summary Jurisdiction not to proceed to a conviction at all, whereas the present provision merely empowers the court not to impose a mandatory minimum sentence of fourteen days' actual imprisonment. Miss Budrikis submitted that the expression "trivial in nature" in ss78A(6C) had to be interpreted in the context of the *Sentencing Act*, and in the light of the remedial nature of the provision. Accordingly, the submission was that the provision should be given a beneficial and liberal interpretation, rather than a narrow one.

[10] Counsel of the respondent, Mr Birch, submitted that a typical example of a trivial or trifling offence is where the contravention was unintentional or due to inadvertence, but that an offence is not trivial if there has been a deliberate contravention of the statute, relying on *Crafter v Schubert* (1934) SALR 84 at 86, approved by Forster CJ in *Bailey v Laczko, supra,* at 661. It was submitted that in the facts of this case, the conduct was deliberate. Mr Birch also submitted that in determining whether an offence was trivial, the Court could have regard to the nature of the offence itself; the actual conduct constituting the offence; the actual circumstances in which the offence was committed; and any mitigating circumstances which may reduce

the gravity of the offence. Mr Birch submitted that because the offending was deliberate, and because the offence was a typical one of its kind, because of the extent of the damage caused to the door and the number of times the door was struck by the pipe, the offence was not trivial in nature.

[11] In my opinion, in determining the meaning to be given to the words of s78A(6C)(a), the principal task is to consider the words in the context of the Act as a whole. The basic rule is that when an Act is amended by a later Act, the two are to be regarded as one connected and combined statement of the will of the legislature: *Sweeney v Fitzhardinge and Others* (1906) 4 CLR 716 at 735 per Isaacs, J. It is also appropriate to consider the history of the mandatory sentencing provisions, as well as the provisions effected by the amending Act, to ascertain the purpose of the subsection. S62A of the *Interpretation Act* requires the Court to prefer a construction which promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) to a construction which does not so promote its purpose or object. Care must be taken when considering authorities which discuss the meaning to be attributed to a similar word or words appearing in a totally different Act to that which is being considered, as it is likely that the word or words will have been interpreted in a different statutory context and for a different purpose. Such authorities are unlikely to prove useful unless the statutory provisions are *in para materia*.

[12] I have already commented briefly upon the history of s78A of the *Sentencing Act* (para [7], *supra*). The purpose of ss78A(6B) and (6C) was,

as I have said, to relax the harshness and rigidity of the previous mandatory sentencing regime. These provisions, being remedial, should be given a liberal interpretation and one which promotes their underlying objective, notwithstanding that the provisions appear in amongst a raft of amendments, some of which introduce mandatory minimum sentences for sexual offences, and could hardly be classified as remedial. In *Waugh v Kippen and Another* (1986) 64 ALR 195, the High Court approached a similar problem by examining the dominant purpose of the Act, Gibbs CJ, Mason, Wilson and Dawson JJ observing at 201, that "the legislature cannot speak with a forked tongue". The overall objectives of the *Sentencing Act* are to be found in s5(1), and in particular, "to punish the offender to an extent or in a way that is just in all the circumstances". In *Trenerry v Bradley* (1997) 6 NTLR 175 at 187, I said of the mandatory sentencing provisions:

> Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.

As the overall objective of the *Sentencing Act* is to provide just sentences, the effect of the ameliorating effect of s78A(6B) and (6C) should not be watered down by a strict interpretation of what is "trivial in nature".

[13] This approach is supported by a number of other considerations. First, ss78A(6B), when it applies, permits the sentencing court, in the

circumstances where it applies, "to impose any other sentence or make any other order authorised by this or any other Act". In other words, the legislature has left open the full range of options which is less severe than fourteen days actual imprisonment. This may be contrasted with provisions such as were formerly to be found in the *Criminal Code*, s392 (since repealed), which provided that the court could, if the offence was of a trivial nature, discharge an offender absolutely without recording a conviction. Secondly, the court is now permitted by s62B of the *Interpretation Act* to have regard to extrinsic material (such as the Minister's second reading speech), if the meaning of a provision is ambiguous or obscure. In his second reading speech, the responsible Minister gave an example of what was in mind in determining whether there were exceptional circumstances:

> ...this provision in no way detracts from the integrity of the mandatory minimum sentencing regime, but it recognises that there may be a very narrow and clearly defined category of cases *where the community does not think that a gaol sentence is appropriate. The ability to raise exceptional circumstances is only available to adult first offenders found guilty of a single minor or trivial property offence...*
>
> For example, imagine a young man, a good student or apprentice with a bright future who has never been in trouble in his life. One day he discovers that his partner has just walked out on him. *In a fit of uncharacteristic frustration and despair he hits and breaks a window of a car parked in the street.* A young man, immediately sorry for what he has done, knocks on doors until he finds the owner of the car, apologises and undertakes to pay for the damage. If prosecuted this young man maybe able to establish exceptional circumstances (emphasis mine).

[14] It is immediately apparent from the example given by the Minister that an offence may be trivial, notwithstanding that the offence was deliberate. Further, the Minister uses the expression "minor or trivial", and indicates that the type of case is one where the community does not think a gaol sentence is warranted.

[15] As to the submission that an offence is not trivial if it was deliberate, the authorities upon which Mr Birch relied are not concerned with provisions *in para materia* with ss78A(6B) and (6C). *Crafter v Schubert, supra,* dealt with s17 of the *Licensing Act 1932 (S.A)* which enabled a certificate to be given if the offence committed by a licensee was of a trifling nature. The offences created by that Act were largely what in this jurisdiction would be called regulatory offences; ie. they required no proof of any mental element. Similarly, *Bailey v Laczko, supra,* involved an offence against s14 of the *Fisheries Ordinance (1949) N.T.* which required no mental element. On the other hand, all of the property offences which are subject to the mandatory minimum sentencing are classified by the *Criminal Code* as either crimes or simple offences to which the provisions of s31 of the Code, relating to the mental element to be proved, applies. In my opinion, *Crafter v Schubert, supra,* and cases which follow it, are distinguishable and should not be applied.

[16] *Brebner v Hersey, supra,* considered a provision in s48(2) of the *Road Traffic Act 1934-1959 (S.A.)* which permitted the courts to impose a lesser sentence than the mandatory minimum fine and period of disqualification for

an offence against s48(1) of the Act if the offence was "trifling". S48(1) was also a regulatory offence. The Full Court said, at 11, that:

> To be trivial an offence must be a trivial example of the forbidden act...each case must be dealt with on its own facts, and it is sufficient to say that we think the present case, so far from being trivial, is a typical and substantial instance of an offence against the section.

I do not consider that this is a helpful observation in the context of the provisions I am called upon to construe, because, s48(2) of the *Traffic Act* (S.A.) empowered the court to reduce the sentence only if the offence was "trifling", the provision did not require any mental element, and, unlike s78A(6C), no other factors were to be considered.

[17] As a matter of logic, I do not see why an offence may not be fairly typical of its kind, and still be "trivial in nature". Ms Budrikis relied on the judgment of Dawson J in *Walden v Hensler* (1987) 163 CLR 561. In that case, the High Court was called upon to consider a power under s657A(1) of the *Criminal Code*(Qld.), (which was *in para materia* with s392(1) of the *Criminal Code* (N.T.) (now repealed), except that the Northern Territory provisions were expressed to be disjunctive). Dawson J said, at 595:

> The circumstances to which a court is to have regard before exercising the discretion under s657A are listed conjunctively and one of them is "the trivial nature of the offence". This appears to produce a curious result, namely, that it is essential that the offence be of a trivial nature for the section to be applicable, no matter how compelling the other circumstances may be. I am far from convinced that this was an intended result, it being a more likely intention that one of the circumstances to be taken into account was the *extent* to which the offence was of a trivial nature. Moreover, the section being of a beneficial nature, it should receive a liberal interpretation.

> However, it is sufficient to say that the offence to be considered in determining triviality is clearly the offence committed by the offender and not the offence in the abstract.

[18] There is a difficulty in adopting this approach to s78A(6C) given that the draftsman has said that the court must be "satisfied of all of the following", and then enumerates subparagraphs (a) to (d), of which subparagraph (a) refers to the offence as being "trivial in nature". I think the expression "the offence is trivial in nature" requires the court to focus on the objective circumstances of the offence.

[19] I note that the dictionary definition of "minor" (the word used by the Minister), include "lesser...in importance" (MacQuarie); "comparatively small or unimportant" (Oxford English Dictionary); whereas "trivial" is defined to include "of little importance" (MacQuarie); "of small account...trifling...unimportant" (Oxford English Dictionary). I think it would be difficult to characterise an offence, the objective circumstances of which justified a prison sentence, as either minor or trivial in nature.

[20] The fundamental principle of sentencing to be applied in every case, subject to any mandatory minimum fixed by the legislature, is the principle of proportionality in sentencing: see *Veen v The Queen* (No. 2) (1988) 164 CLR 465. Given the history and purpose of the provision, the fact that a full range of sentencing options are theoretically open, the fact that ss78A(6B) and (6C) are remedial provisions, and the other factors I have mentioned above, I consider that the intention of the legislature is that the courts are at

liberty to conclude, if subparagraphs (b), (c) and (d) are made out, that the offence is "trivial in nature" if the objective circumstances of the offence are such that a term of imprisonment would probably be unjust and disappropriate to the objective circumstances of the offence. Having regard to s40(3) of the *Sentencing Act*, an offence would not be trivial in nature if the objective circumstances probably warranted a sentence of imprisonment, albeit suspended. Applying that test to the instant offence, I consider that the conclusion should have been drawn by the learned Magistrate that the offence in this case was trivial in nature.

[21] The appeal is therefore allowed and the sentence of fourteen days imprisonment is set aside. The conviction will stand. In lieu of the sentence of imprisonment, the appellant is released pursuant to s13 of the *Sentencing Act* on his giving security in his own recognizance in the sum of $500 (a) to be of good behaviour for a period of twelve months and (b) to appear before the Court of Summary Jurisdiction if called upon to do so during the said period of twelve months. The appellant may enter into the bond at any time within the next fourteen days, at the Courthouse at Alice Springs, or at such other place as is satisfactory to the respondent. The period of twelve months is to be calculated to run from the date he enters into the bond. Should he neglect to do so within the time stipulated, the matter may be relisted before me and I will recall that order and impose some other penalty.
