King v Goble [2001] NTSC 47

PARTIES:	BENJAMIN LYLE KING
	v
	BRYAN MICHAEL GOBLE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction
FILE NO:	JA25/2001 20018120
DELIVERED:	19 June 2001, Alice Springs
HEARING DATES:	17 May 2001
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL – APPEAL AGAINST SENTENCE

Appeal from the Court of Summary Jurisdiction – appeal against sentence – consideration of "exceptional circumstances" – in accordance with s 78A of the Sentencing Act 1995 (NT)

Sentencing Act 1995 (NT), s 78A, s 78A(6B), s 78A(6C), s 78A(6C)(a) and s 78A(6C)(d)

Criminal Code Act 1983 (NT), s 251(1)

Woods v The Queen (1994) 14 WAR 341; *Neal v The Queen* (1982) 149 CLR 305 at 341; *Stephenson v Trenerry* [2000] NTSC 92, considered

Curnow v Pryce (1999) 131 NTR 1, agreed with

Crafter v Schubert [1934] SASR 84, distinguished

R v Torres Unreported, SC(NT) 19 August 1999, adopted

Walden v Hensler (1987) 163 CLR 561; *Eupene v Hales* [2000] NTCA 9; *R v Blair-West* [1982] Qd R 597, cited

REPRESENTATION:

Counsel:

Appellant:	M Preston
Respondent:	C Roberts

Solicitors:

Appellant:	Murray JL Preston
Respondent:	Office of the Director of Public Prosecutions

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

King v Goble [2001] NTSC 47
No. JA25/2001 20018120

BETWEEN:

BENJAMIN LYLE KING
Appellant

AND:

BRYAN MICHAEL GOBLE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 19 June 2001)

[1] This is an appeal against sentence of a mandatory 14 days imprisonment imposed by the Court of Summary Jurisdiction in Alice Springs on 6 February 2001.

[2] The appeal involves a consideration of "exceptional circumstances" in accordance with s 78A of the Sentencing Act 1995 (NT).

[3] On 6 February 2001, the appellant entered a plea of guilty to a charge that on 10 November 2000 at Tennant Creek in the Northern Territory of Australia:

1. Unlawfully damaged property, namely, Room 31 Bluestone Motor Inn, to the value of $200.00 being the property of Bluestone Motor Inn. Contrary to Section 251(1) of the Criminal Code 1983 (NT).

[4] A second charge of behave in a disorderly manner in a police station was withdrawn.

[5] The prosecutor read the alleged facts which were admitted by Mr Preston, counsel for the defendant, at the time the matter was before the Court of Summary Jurisdiction.

[6] The agreed facts were as follows:

> "On Friday 10 November 2000 the defendant had been drinking with colleagues at the Tennant Creek Memorial Club during the evening. The defendant obtained a lift back to the Bluestone Motor Inn where he was staying with the club – sorry, Your Worship, he obtained a lift with the club curtesy bus back to the Bluestone Motor Inn at about 11pm. On arrival at the Bluestone the defendant went to the room he was staying in, being room 31, when he realised his room key and wallet was missing.
>
> The defendant became upset to the point of hysteria. The defendant's colleague tried to calm him down. The defendant ran to the front of the Bluestone, yelling and swearing loudly. His actions were observed by the manager of the Bluestone. The defendant then ran back towards room 31, jumped at the door, both kicking and punching at the door at the same time. The defendant then punched at the door several more times, causing a hole to be made, until finally the door broke open. The defendant went inside the room and slammed the door closed. Police were called and attended.
>
> On arrival police saw two male persons who appeared to be fighting in room 31. Both persons were pulled apart and separated. After speaking with the manager and colleagues of the defendant police arrested the defendant for criminal damage. He was placed in the cage. He continued to yell hysterically: 'You fucking cunts. Some cunts stole my wallet. Find me fucking wallet.' Due to the

noise and language coming from the defendant police moved the van on to the main street, away from other residents at the Bluestone.

Police located the defendant's wallet and key, which had been found in the curtesy bus. Police tried to explain this to the defendant but he refused to listen, continually swearing and yelling at the police, telling them to 'get fucked, you cunts.' He was conveyed to the police station. He later took part in a record of interview where he admitted the offence, stated he could not remember due to his intoxication. …."

[7] In his reasons for sentence, his Worship summarised these facts as follows (t/p 5):

> "In this case the defendant went berserk at his motel. He mistakenly thought someone had stolen his wallet and motel key, whereas he had drunkenly dropped them in the booze bus. He damaged or destroyed the door of his motel room. The damage amounted to $200. …"

[8] The offence of unlawfully damage property carries a minimum 14 day imprisonment. It is a property offence for the purpose of s 78A of the Sentencing Act. Counsel for the appellant submitted to the learned stipendiary magistrate that exceptional circumstances existed which authorised the imposition of a lesser penalty under s 78A(6B) and s 78A(6C) of the Sentencing Act. Section 78A(6C) provides as follows:

> "(6C) 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,

the onus of proving the existence of the matters referred to in paragraphs (a), (b), (c) and (d) being on the offender."

[9] In a consideration of these criteria, his Worship stated (t/p 5):

"I have no problem with the second and third of the above. No mitigating circumstances other than extreme intoxication can explain this offence. So the circumstances required to generate that part of the escape clause simply do not exist. I have some doubts about the fifth part of the escape clause.

I am told that even after the police told the defendant that they had recovered his wallet and car key is – and motel key – he continued to carry on like a pork chop and it was only later, during a record of interview, that he began to co-operate. The major stumbling block for the defendant's invocation of the escape clause, however, is that the offence cannot be called trivial in nature nor can it be said, looking at the matter globally, that exceptional circumstances exist.

Indeed the defendant's actions were typical of the type of behaviour prohibited by section 251 of the Code. 'Trivial and exceptional are interconnected. A typical instance of trivial events is where the contravention is unintentional or due to inadvertence. Where it is deliberate it is, generally speaking, not trivial;' *Crafter v Schubert* [1934] SASR 84 at 86.

Exceptional circumstances can only exist where the offence is not a typical example of a breach of the section.

This case is neither trivial in nature not exceptional. The defendant will be sentenced to 14 days imprisonment."

[10] The grounds of appeal as set out in the notice of appeal are as follows:

1. Sentence was manifestly wrong.

2. Sentence was contrary to law.

3. Made a finding that there were not exceptional circumstances within the meaning of s 78A Sentencing Act.

[11] The appellant is a young man, 21 years of age. He is an apprentice electrician with the Power and Water Authority. His employer is Group Training Northern Territory. The appellant has no prior convictions.

[12] A report dated 30 January 2001, prepared by consultant psychologist Mr Kevin Hayes, was placed before the learned stipendiary magistrate. Copy of this report is Exhibit 1 on the appeal. The report omitting formal parts states as follows:

> "I am writing this letter on behalf of Mr Ben King who is to face charges in your court on 6 February 2001.
>
> Mr King came to see me at the instigation of his supervisor, Mr Anthony Carr, from Group Training Northern Territory.
>
> He presented as a well-mannered young man and talked willingly about the 'troubles' that have brought him before you. It would seem that this kind of behaviour is out of character for him and he is deeply remorseful and ashamed about what happened.
>
> Mr King's record of employment is good and he has shown initiative in staying employed so that he may complete his apprenticeship. Currently he is in Stage 3 of an Electrical Trades apprenticeship.
>
> Mr King comes from a broken home and has lived with his Father since the age of nine. He appears to be well adjusted given the difficulty of his background. He does not, at this stage, exhibit symptoms of an addiction to alcohol and I believe that this event was a 'one-off' occurrence.
>
> I am willing to answer any further questions."

[13] His Worship apparently accepted the submission made to him that the appellant had made restitution to the owners of the property for the damage he had caused.

[14] His Worship expressed some reservation as to whether s 78A(6C)(d) was complied with. However, the agreed facts are that the appellant did make full admissions in a record of interview conducted by the police. He subsequently entered a plea of guilty. It was also submitted and not disputed that the following day he apologised to the owners of the property he had damaged. I consider he has discharged the onus upon him and established that he cooperated with law enforcement authorities in the investigation of the offence.

[15] I consider the report of consultant psychologist Kevin Hayes, together with Mr Kings's good employment record and no prior convictions, supports a finding that the commission of this offence was an aberration from the appellant's usual behaviour.

[16] I consider the learned stipendiary magistrate fell into error in failing to have regard to this as a mitigating circumstance.

[17] In *Woods v The Queen* (1994) 14 WAR 341 at 350 – 351:

> "When emotional stress is put forward in mitigation, the court must be persuaded that the offending is connected to the emotional condition in a way that to some sensible degree lessens the offender's culpability or the criminality of his/her behaviour, or makes retribution less imperative, or positively indicates that the offending is out of character and therefore may not be repeated, so as to perhaps lead to the conclusion that there is no need, in the particular case, to place emphasis on personal deterrence or so as perhaps to lead to the conclusion that the case is not one in which it is appropriate to emphasise general deterrence."

[18] In *Neal v The Queen* (1982) 149 CLR 305 Murphy J at 341:

> "Premeditated and deliberate acts will be treated more severely by the courts than those committed in moments of passion where the offender has acted impulsively."

[19] I consider his Worship failed to attach a proper consideration to the mitigating circumstances. The relevant mitigating circumstances were the appellant's youth, his lack of prior convictions, his consistent work record, the lack of any planning or premeditation in the commission of the offence and that he acted impulsively when he became angry in the belief his wallet had been stolen. These facts, together with the report from consultant psychologist Mr Kevin Hayes, support a conclusion that this was an aberration from his usual behaviour and that was the finding his Worship should have made.

[20] His Worship found the offence was not trivial in nature. His reasons for this finding are set out in paragraph 9 of these reasons for judgment. I note that intoxication is specifically excluded in s 78A(6C) as a mitigating circumstance. I consider the learned stipendiary magistrate was in error in his analysis of what is meant by trivial and that the rigid test he applied is not correct. For the purpose of s 78A(6C)(a) an offence is not precluded from being trivial in nature because it is deliberate.

[21] In *Curnow v Pryce* (1999) 131 NTR 1 at 5, Mildren J referred to the Minister's Second Reading Speech and the example that was given of what was in mind in determining whether there were exceptional circumstances. I set out this extract from the Second Reading Speech:

> "… 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."

[22] Mildren J then went on to state: "It is immediately apparent from the example given by the minister that an offence may be trivial, notwithstanding that the offence was deliberate. …" With respect I agree.

[23] Mildren J then referred to the decision of *Crafter v Schubert* [1934] SASR 84 being the authority on which the learned stipendiary magistrate relied in the case which is the subject of this appeal. His Honour distinguished *Crafter v Schubert* on the basis that authority was dealing with a regulatory offence which required no mental element whereas 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 provision of s 32 of the Code relating to the mental element to be proved, applies. His Honour stated at p 5:

> "In my opinion, *Crafter v Schubert* and cases which follow it, are distinguishable and should not be applied."

With respect I agree with his Honour's analysis of *Crafter v Schubert* and with his reasons for distinguishing that authority from property offences under the Northern Territory Criminal Code. I consider in the appeal before this Court that the learned stipendiary magistrate fell into error by relying on the decision of *Crafter v Schubert*.

[24] I consider the learned stipendiary magistrate also fell into error when he stated "Exceptional circumstances can only exist where the offence is not a typical example of a breach of the section". I adopt with respect the statement of Mildren J in *Curnow v Pryce* (supra) at 6:

> "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'."

[25] The matter of *Stephensen v Trenerry* [2000] NTSC 92, involved a consideration of the provisions of s 78A(6C) in particular whether the appellant was otherwise of good character. The facts in that matter are very similar to the facts in this appeal. In the matter of *Stephensen v Trenerry* the appellant had been involved in an argument. She was "asked to leave a hotel upon the ground that she was intoxicated. Immediately after leaving the premises she turned and kicked the glass door, through which she had passed, onto the footpath. That caused the glass to break leaving it shattered, but within the frame. It had to be replaced."

[26] In the case of *Stephensen v Trenerry* as in the appeal before this Court the defendant was affected by alcohol at the time of the commission of the

offence. In *Stephensen v Trenerry* the learned stipendiary magistrate at first instance held the offence was trivial in nature. This conclusion was not challenged on the appeal. In both *Stephensen v Trenerry* and the matter the subject of this appeal, the defendant was affected by alcohol at the time of the commission of the offence. This in itself is not a mitigating factor but neither does intoxication preclude a consideration of other matters that may lead to a conclusion that the commission of the offence was an aberration from the offender's usual behaviour.

[27] I adopt with respect the approach of Bailey J to this issue in *R v Torres* unreported SC (NT) 19 August 1999 at p 37:

> "It is not necessary to attempt to define trivial in nature in any detail, for present purposes. Indeed, if it is possible at all to provide any more than the broadest guidelines for interpreting that phrase. I agree, with respect, with the approach of Brennan and Dawson JJ, that an assessment of whether something is trivial can be made only in the light of particular circumstances."

See also *Walden v Hensler* (1987) 163 CLR 561, Brennan J at 577, Dawson J at 595; *Eupene v Hales* [2000] NTCA9 and *R v Blair-West* [1982] Qd R 597.

[28] I find the learned stipendiary magistrate was in error in his finding that the offence was not trivial in nature.

[29] In all the circumstances of this case, I consider the offence was trivial in nature and that the appellant has satisfied the provisions of s 78A(6C) and that there are exceptional circumstances such as to avoid the provisions of s 78A of the Sentencing Act.

[30] I allow the appeal against sentence. I will hear from the parties as to the appropriate consequential orders.

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