PARTIES:	L.P.R.
	AND
	GLEN WILLIAM O'BRIEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 46 of 1995
DELIVERED:	15 March 1996
HEARING DATES:	30 January 1996
JUDGMENT OF:	Kearney J

REPRESENTATION:

Counsel:

Appellant:	J. E. Hebron
Respondent:	T. Austin

Solicitors:

Appellant:	De Silva Hebron
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification: B
Judgment ID Number: kea96003
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kea96003

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

IN THE MATTER OF the Juvenile Justice Act

AND IN THE MATTER OF an appeal against a decision of the Juvenile Court at Darwin

No.JA 46 of 1995

BETWEEN

L.P.R.
Appellant

AND:

GLEN WILLIAM O'BRIEN
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 15 March 1996)

The appeal

This is an appeal against the conviction and sentence of the appellant by the Juvenile Court at Darwin on 24 October 1995. The appeal was argued on 30 January 1996; for reasons to be later stated, I allowed the appeal, quashed the conviction, and substituted a finding that the appellant was

guilty of the offence charged without proceeding to conviction.

The hearing in the Juvenile Court

The appellant pleaded guilty on 24 October 1995 to a charge of possession of a dangerous drug, namely some 1.3 grams of cannabis, contrary to s9(1) of the Misuse of Drugs Act (NT) ("the Act"), in the aggravating circumstance that the offence was committed in a public place, contrary to s9(2)(f)(i) of that Act. Upon this plea, the learned Magistrate convicted the appellant and sentenced him to perform 48 hours of unpaid community service. He has since performed that service.

The facts of this matter, a stated before his Worship, were as follows. On the morning of 4 September 1995, the appellant was at his school. He was at that time 14 years of age, and in Year 9. In his possession, in a tobacco tin secreted in his school bag, he had a small quantity of cannabis leaf matter. During recess he approached two other students, who made it known to him that they had a quantity of cannabis in their possession. One of them then gave a small quantity of cannabis to the appellant; in the result his tobacco tin was now about one-third full of cannabis - a total weight of 1.3 grams.

During the afternoon the appellant was called to the office of the school principal. He agreed to the principal's request that his schoolbag be checked; the tobacco tin containing the cannabis was located. Police were called and interviewed the appellant about the cannabis. He made full

admissions in the interview. Subsequently, the appellant and the other two students were charged with possession of cannabis. The student who gave some cannabis to the appellant was also charged with the more serious offence of supplying a dangerous drug, contrary to s5(1) of the Act.

For his part in this affair, the appellant was immediately suspended from school for a period of some 3½ weeks. He and his mother were then called to the school and he was given an option - leave voluntarily or be expelled. His mother chose the former course; the appellant is now attending another school.

Counsel for the appellant outlined his personal circumstances and history before his Worship. The appellant was an active sportsman, ranked No.1 in the Northern Territory in the sport of BMX racing for 5 years; he reached Australian and World rankings of No.2 and No.4 respectively. He is involved in basketball; he works out at the Police and Citizens Youth Centre three days a week. Counsel said that the appellant was considering a future career in the Police Force, being attracted by the prospect of becoming a detective.

The submissions on appeal

Three grounds of appeal were relied on. The first two were:

(1) the sentence was manifestly excessive;

(2) his Worship misapplied the principles of sentencing with regard to juvenile offenders,

and failed to give any or due weight to the proper application of those principles.

It is convenient to deal with these grounds together.

Well established principles applicable to the sentencing of juvenile offenders were stated in this jurisdiction by Maurice J in *Simmonds v Hill* (1986) 38 NTR 31 at p33, viz:

> "In the Juvenile Court the retributive aspect of sentencing is, at best, of secondary importance. Even lower in the scale, if, indeed, it has any place at all, is deterring others. The overwhelming concern is the young offender's development as a law-abiding citizen. The court should be at pains to ensure that its sentences do not alienate its young clients. Particularly is this so in the case of a first offender. Here there is a real risk that an incentive to good behaviour has been removed, namely the desirability of a clean record in what for young people just leaving school is a very difficult labour market indeed. ...
>
> Before imposing a particular sentence on a juvenile, a court must ask itself whether it is necessary to go beyond the lesser options. Section 53 [of the Juvenile Justice Act (NT)] offers discharge without conviction, either immediately or following adjournment, as the first option. Admonition and where appropriate, counselling, would normally accompany such an approach. In the Juvenile Court it should be an option much more readily adopted than in the Court of Summary Jurisdiction. It should not be reserved for special or unusual cases."

The circumstances of this case and of the appellant were such as to indicate, in my opinion, that there was no need to go beyond one of what Maurice J termed "the lesser options"; that is, discharge without proceeding to conviction. The appellant was a 14 year old first offender. Following this incident he made real efforts to reform. He voluntarily attended Amity House and underwent counselling in

regard to his cannabis use. He has started at a new school and is now studying harder than previously. He is considering the Police Force as a possible career. His propensity for reform was expressly recognised by the learned Magistrate in sentencing, when he said:

> "You have exhibited all the usual dicia [sic, indicia] that you're sorry for what you did and a willingness to seek advice to assist in rehabilitation ..."

It is clear however that the Magistrate did not regard this as the end of the matter, for he later stated:

> "... some statement has to be made concerning this, and the courts will not condone this [behaviour] in the school yards."

Clearly his Worship was at this point turning his mind to the need for the disposition to embrace an element of general deterrence.

Whilst deterrence - both general and specific - is not an irrelevant consideration - see, for example *S (A Child)* (1992) 60 A Crim R 121 - I consider that in the circumstances of this case his Worship gave the need for general deterrence too much weight. To that extent his discretion miscarried. In the result the sentence imposed was manifestly excessive. Accordingly, I find both of the first two grounds of appeal made out.

Whilst this is sufficient to dispose of the appeal, it is desirable to say something about the third ground of appeal relied on by the appellant: an alleged unjustifiable disparity between the sentence imposed upon the appellant and those imposed upon his co-offenders D. and F.

D. and F. were also charged with possession of cannabis in a public place, the quantities in question being somewhat greater - some 20 plus grams. D. was also charged with the more serious offence of supplying cannabis to the appellant. These two offenders appeared before a differently constituted Juvenile Court on 7 November 1995. They pleaded guilty and were each fined $300 on the charge of possession of cannabis, without proceeding to conviction. In addition, D. was fined $200 on the charge of supplying cannabis, also without proceeding to conviction.

Unjustifiable disparity in sentencing is a ground of appeal; see *Lowe v The Queen* (1984) 154 CLR 606. At p610, Gibbs CJ explained why:

> "[T]he reason why the court interferes in such a case is that it considers that the disparity is such as to give rise to a justifiable sense of grievance, or in other words to give the appearance that justice has not been done."

To establish such a ground, it must be shown first that the disparity itself is manifestly excessive, and second, that there is no significant difference in the conduct and antecedents of the offenders, such as to warrant a disparity in sentencing. See *Lowe v The Queen (supra) at* p624, per Dawson J.

The disparity on which the appellant relies is the recording of a conviction against him. In *Saylor v Svikart* (unreported, Supreme Court (Martin CJ) 18 May 1994), this factor alone was held to amount to a "marked discrepancy"

sufficient to ground an appeal. Adopting that approach in this case I consider that the recording of a conviction against the appellant, but not against his as-culpable co-offenders, constitutes a manifest and unjustifiable disparity in sentencing which should be corrected. I would uphold the third ground of appeal.

On this basis the order made on 30 January was as follows. The appeal allowed. The conviction quashed. No order made, in the circumstances, in relation to the order to perform 48 hours of community service, since it has already been performed. In lieu of the conviction by the court below, there be a finding that the charge is proved, with no conviction to be recorded.

These are the reasons for that decision.