Hales v Adams [2005] NTSC 86

PARTIES:	HALES, Peter
	v
	ADAMS, Neal Richard
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 27/05 (20424414)
DELIVERED:	30 December 2005
HEARING DATE:	14 September 2005
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

MAGISTRATES – CROWN APPEAL AGAINST SENTENCE

Manifestly inadequate - Section 8(1) Sentencing Act – discretion not to record conviction –Consumer Affairs and Fair Trading Act, Part 10 - Motor Vehicle Dealers

R v Allison (1987) 49 NTR 38; *Cobiac v Liddy* (1968) 119 CLR 257; *The Queen v GJ* [2005] NTCCA 20; *The Queen v McInerney* (1986) 42 SASR 111; *R v Morton* (2000) 11 NTLR 97; *Toohey v Peach* [2003] NTCA 17, applied

Glover v Zouroudis (1990) 54 SASR 200; *Hemming v Lukin* (1996) 67 SASR 248; *Hemming v Neave* (1989) 51 SASR 427; *Piva v Brinkworth* (1992) 59 SASR 92, *Walker v Eves* (1976) 13 SASR 249, considered

RG Fox and A Freiberg, Sentencing State and Federal Law in Victoria 2nd Ed, referred to

Section 129(1), s 141(6), s 157(1), s 160(1) and s 175 Consumer Affairs and Fair Trading Act; s 8(3) and s 8(1) Sentencing Act

REPRESENTATION:

Counsel:

Appellant:	M Johnson
Respondent:	P Elliott

Solicitors:

Appellant:	Solicitor for the Northern Territory
Respondent:	De Silva Hebron

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

Hales v Adams [2005] NTSC 86
No. JA 27/05 (20424414)

BETWEEN:

PETER HALES
Appellant

AND:

NEAL RICHARD ADAMS
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 30 December 2005)

Introduction

[1] On 26 May 2005 the respondent was charged in a substituted complaint with five offences contrary to Pt 10 of the Consumer Affairs and Fair Trading Act (the Act). The charges related to the respondent's conduct of a motor vehicle dealer business between January 2003 and January 2004. The charges were as follows:

1. Contrary to s 129(1) of the Act, between 8 January 2003 and January 2004 in the course of business as a motor vehicle dealer, the respondent completed 20 deals in which he either bought or sold motor vehicles otherwise than at the place of business specified in

his motor vehicle dealer's licence. The maximum penalty for this offence is a fine of $55,000.

2. Contrary to s 141(6) of the Act, between 15 September 2003 and 23 September 2003, the respondent made a false and/or misleading statement on the 'Prescribed Annual Return by a Licensed Dealer who is a Natural Person'. The respondent declared that he was currently not trading. He knew the statement to be false and/or misleading. The maximum penalty for this offence is a fine of $11,000.

3. Contrary to s 157(1) of the Act, between 8 January 2003 and November 2003 the respondent failed to maintain a dealings register. The maximum penalty for this offence is a fine of $22,000.

4. Contrary to s 160(1) of the Act, between 8 January 2003 and January 2004 the respondent sold 11 motor vehicles otherwise than in writing on the prescribed form. He failed to use the prescribed contract of sale. The maximum penalty for this offence is a fine of $55,000.

5. Contrary to s 175 of the Act, between 7 January 2003 and January 2004 the respondent published 16 advertisements relating to his business as a motor vehicle dealer without the advertisement specifying his licence number. The maximum penalty for this offence is a fine of $2,200.

[2] The respondent pleaded guilty to the charges and the Court of Summary jurisdiction, without proceeding to convict the respondent, ordered him to pay a fine of $1,500 and imposed a victim levy of $200. The fine was an aggregate fine.

[3] The offences against s 157(1) and s 160(1) of the Act are regulatory offences: s 183 of the Act.

[4] The Crown has appealed the penalty imposed by the Court of Summary Jurisdiction. It does so pursuant to s 163 Justices Act. The Crown argues that the Court of Summary Jurisdiction erred in two respects. First, the Court of Summary Jurisdiction wrongly exercised its discretion under s 8(1) of the Sentencing Act in not recording convictions for any of the offences with which the respondent was charged. Secondly, the penalty imposed on the respondent was manifestly inadequate.

[5] In my opinion the Crown's contentions are correct and the appeal should be allowed.

The principles applicable to Crown appeals

[6] The principles applicable to Crown appeals were recently restated by his Honour Mildren J in *The Queen v GJ* [2005] NTCCA 20 at par [6] – [8] as follows:

> "It is well established that even where no specific error is able to be pointed to, a Court of Criminal Appeal may reach the conclusion that the sentencing judge erred having regard to the manifest inadequacy of the sentence imposed in all of the circumstances. In House v The

King (1936) 55 CLR 499 at 505, Dixon, Evatt and McTiernan JJ said: "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

It must be emphasised that this is an appeal from a discretionary judgment and that this Court will not interfere merely because it believes that the sentence is less than what the individual judges constituting this Court would have themselves imposed had they been sitting at first instance. If specific error cannot be demonstrated the sentence must not only be inadequate, it must be manifestly so. None of these principles are in doubt, but it is worth reiterating the limits upon the proper role and function of Crown appeals. In R v Osenkowski (1982) 30 SASR 212 at 212-213, King CJ said:

"It is important that prosecution appeals should be not be allowed to circumscribe unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform. The proper role for prosecution appeals, in my view, is (1) to enable the courts to establish and maintain adequate standards of punishment for crime, (2) to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and (3) occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience."

Consumer Affairs and Fair Trading Act, Part 10 – Motor Vehicle Dealers

[7] The objects of Pt 10 of the Act are to provide a licensing system for motor vehicle dealers and make provision generally with respect to dealings in

motor vehicles. The purpose of these arrangements is to protect consumers and regulate the trade in motor vehicles, particularly second hand motor vehicles, which is an area of the trade that is susceptible to misleading and dishonest dealing and to dealing in stolen goods. Motor vehicles are expensive and, in many respects, essential goods. Consumers can sustain significant damage as a result of unfair or dishonest dealing.

[8] Under the arrangements established by Pt 10 of the Act, motor vehicle dealers are required to be licensed and to transact their business from the place of business specified in the licence: s 128 and s 129. Where the applicant for a licence is an individual the application for a licence must be refused if it appears to the Commissioner of Consumer Affairs that the applicant is insufficiently resourced to carry on the proposed business: s 136(1)(d). The reason for this provision is to ensure that motor vehicle dealers have the capacity to perform the obligations imposed on them by the Act. Motor vehicle dealers are required to keep a record of all dealings (including acquisitions, consignments, disposals and demolitions) in the form of a dealings register, which remains the property of the Commissioner of Consumer Affairs: s 157(1) and s 157(3), and to file annual returns in the prescribed form containing prescribed information: s 141. The prescribed information includes notifying the Commissioner of Consumer Affairs of the motor vehicle dealer's principal place of business and whether there has been a change in the principal place of business in the past 12 months: r 6, form 8 Consumer Affairs and Fair Trading (Motor Vehicle Dealers)

Regulations. A contract to sell a second-hand motor vehicle must be made in writing in the prescribed form: s 160. The reason for a prescribed contract of sale for second hand motor vehicles is to ensure that the second hand motor vehicle that is being sold is accurately identified as to make and model; is roadworthy: s 165; and is subject to the obligation to repair contained in s 168 of the Act unless the conditions and warranties are expressly excluded with the full knowledge, understanding and agreement of the purchaser. Motor vehicle dealers are prohibited from selling vehicles without a vehicle identification number: s 163. They are also prohibited from selling motor vehicles that are registered interstate: s 164.

[9] The purpose of requiring that a motor vehicle dealership be carried on at the place of business specified in the licence is to ensure that the premises are of a proper standard for the purposes of carrying on the business of a motor vehicle dealer, that there is adequate provision for the storage of records and documents, that there are adequate areas for display of the motor vehicles and that there are adequate facilities to enable the dealer to comply with the obligations imposed by the Act and the regulations.

[10] The Act imposes various obligations on motor vehicle dealers for the benefit of consumers. Unless a motor vehicle is sold under a contract of sale in the prescribed form that expressly excludes the condition, it is a condition of the sale of a motor vehicle by a dealer that the vehicle is of a standard fit to meet the requirements of the Motor Vehicles Act with respect to registration. Subject to certain exclusions, where a dealer sells a second

hand motor vehicle to a purchaser and the sale occurs less than 10 years after the date of manufacture of the vehicle and the vehicle has been driven for less than 160,000 kilometres, the dealer has an obligation to repair the motor vehicle if a defect appears before the vehicle has been driven by the purchaser for a further 5000 kilometres.

[11] Parliament regards breaches of Pt 10 of the Act very seriously. Significant maximum fines have been stipulated for various breaches of the provisions of Pt 10. It seems that Parliament thought that dealing in motor vehicles contrary to the provisions of Pt 10 of the Act should in appropriate circumstances be unprofitable.

Section 8(1) of the Sentencing Act

[12] Subsection 7(e) of the Sentencing Act provides where a court finds a person guilty of an offence it may with or without recording a conviction order an offender to pay fine.

[13] Section 8(1) of the Sentencing Act provides as follows:

> In deciding whether or not to record a conviction, a court shall have regard to the circumstances of the case including –
>
> (a) the character, antecedents, age, health or mental condition of the offender;
>
> (b) the extent, if any, to which the offence is of a trivial nature; or
>
> (c) the extent, if any, to which the offence was committed under extenuating circumstances.

[14] Before exercising the discretion granted by s 8(1) of the Sentencing Act it is well established that, "the magistrate must be of the opinion that the exercise of the power is expedient because of the presence and effect of one or more of the stated conditions namely character, antecedents, age health or mental condition. One of these by itself, or several of them taken together, must provide a sufficient ground for a reasonable man to hold that it would be expedient to extend the leniency which the statute permits": *Cobiac v Liddy* (1968) 119 CLR 257 at 275-276 per Windeyer J.

[15] The relevant principles pertaining to the exercise of the discretion were considered by the Northern Territory Court of Criminal Appeal in *R v Allison* (1987) 49 NTR 38. Rice J stated that:

> "The Act [s392(1) Criminal Code] speaks of the Court exercising the power it confers 'having regard' to the matters it states. I read that as meaning more than merely noticing that one or more of them exists. Its, or there, existence must, it seems to me, reasonably support the exercise of the discretion the statute gives. They are not mere pegs on which to hang leniency dictated by some extraneous and idiosyncratic consideration." at 43.

[16] Further consideration was given to s 8(1) of the Sentencing Act by the Court of Appeal in *Toohey v Peach* [2003] NTCA 17. The Court of Appeal stated:

> [11] The primary focus of attention in considering whether or not to record a conviction is upon all the circumstances of the case, the enumerated factors being some of them (cf Cobiac v Liddy (1969) 119 CLR 257). The result of declining to record a conviction and dismissing a complaint is to free the offender of the immediate legal consequences of his having committed the offence (per Windeyer J in Cobiac v Liddy, supra at 274). Before considering the exercise of the discretion, there must be found some mitigating aspect arising from

> the circumstances of the case, whether by reference to one or more of the factors enumerated in s 8(1) or otherwise. The opening words of s 12(2) of the Penalties and Sentences Act 1992 (Qld) are drafted in a similar way to s 8(1) of the Territory Act, albeit the enumerated matters are in a different form. In R v Brown, ex parte Attorney-General [1994] 2 Qd R 182 Macrossan CJ held at p 185:
>
> "Where the recording of a conviction is not compelled by the sentencing legislation, all relevant circumstances must be taken into account by the sentencing court. The opening words of s 12(2) of the Act say so and then there follow certain specified matters which are not exhaustive of all relevant circumstances. In my opinion nothing justifies granting a general predominance to one of those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than another, may have claim to greater weight."
>
> [12] With respect, we are of the opinion that the same approach applies to s 8(1) of the Sentencing Act.

[17] The question of weight to be given to the recording of a conviction in the exercise of the sentencing discretion is a recurrent consideration for the Court of Summary Jurisdiction. A conviction is a formal and solemn act marking the court's and society's disapproval of an offender's wrongdoing: *The Queen v McInerney* (1986) 42 SASR 111 at 124. It is a component of the sentence and is to be given weight in determining whether or not the sentence is proportionate to the offence. The more serious or blatant an offence, the less proportionate it is for the Court of Summary Jurisdiction to decline to record a conviction. Mature age offenders who have led previously blameless lives may benefit from an exercise of the discretion not to record a conviction. The discretion may also be exercised in an offender's favour where the offender has no previous convictions, or where the offending related to ill health or where it would, in itself, be a

significant additional penalty for a first offender. On the other hand, the recording of a conviction may be necessary where the offender is of mature age and deterrence is being given weight, especially in relation to breaches of regulatory or social legislation. A useful summary of these considerations may be found in RG Fox and A Freiberg, Sentencing State and Federal Law in Victoria 2nd Ed, at 190 - 193.

[18] There are a number of decisions of the Supreme Court of South Australia to the effect that provisions such as s 8(1) have a restricted application to regulatory and social legislation: *Walker v Eves* (1976) 13 SASR 249 at 250; *Hemming v Neave* (1989) 51 SASR 427 at 428-29; *Piva v Brinkworth* (1992) 59 SASR 92 at 96; *Hemming v Lukin* (1996) 67 SASR 248. The deterrent aspect of punishment is paramount when an offender is being sentenced for breaches of regulatory legislation. In the circumstances there must be good reason for refusing to record a conviction. It should at least be demonstrated that there was a real effort to ensure that the law was complied with: *Hemming v Lukin* (supra) at 251; cf *Glover v Zouroudis* (1990) 54 SASR 200.

[19] This is not a case where the recording of a conviction, of itself, leads to a significant additional penalty. The recording of a conviction does not result in an immediate revocation of the respondent's licence. It merely gives the Commissioner for Consumer Affairs a basis for considering whether the

appellant's licence should be revoked: s 136(1)(f), s 136(3)(d), s 145 and s 146 the Act.

The Facts

[20] The respondent is 50 years of age. The respondent runs a small bar in Darwin. He earns about $50,000 per annum. He is married. His wife is a deputy principal of a school. She earns about $70,000 per annum. The respondent and his wife have mortgage commitments of $1000 per month. They have a six year old child who is dependent on them. The respondent also pays child support for his 15 year old daughter of an earlier relationship. The respondent does not have a criminal history.

[21] The respondent owned and operated a motor vehicle dealer business, known as Metro Used Cars, in Darwin at 1 Duke Street Stuart Park. In order to conduct the business the respondent held a motor vehicle dealers licence, LMVD 264. In October 2002 the respondent stopped operating his motor vehicle dealership at 1 Duke Street, Stuart Park. He sold the property to Sapphire Lake Pty Ltd which trades as Darwin Honda.

[22] In January 2003 the respondent started operating his dealership business at 16 Stuart Highway, Stuart Park. On 28 March 2003 the respondent applied for a variation of his motor vehicle dealer's licence as he wished to change the address of his place of business from 1 Duke Street, Stuart Park to 16 Stuart Highway, Stuart Park. The respondent owned the land at 16 Stuart Highway, Stuart Park. The application for variation of the respondent's

motor vehicle dealer's licence was not accompanied by the required fee of $100. As a result the respondent was contacted on 23 March and told that the required fee had not been received and that it would be necessary for him to pay the fee before any variation of his licence could be granted. The respondent did not pay the fee and the application for variation of his motor vehicle dealer's licence was never approved. A variation of the respondent's motor vehicle dealer's licence could only be approved if the required payment was received by the Office of the Commissioner for Consumer Affairs: s 152 of the Act.

[23] The sale of the respondent's Duke Street property and his failure to obtain the approval for a variation of his motor vehicle dealer's licence meant that the respondent ceased to have an approved place of business from which he could conduct a motor vehicle dealer's business. Nonetheless between January 2003 and January 2004 the respondent completed 20 deals in which he purchased or sold motor vehicles. He did so from an unapproved place of business and in contravention of s 129(1) of the Act.

[24] Between 15 September 2003 and 23 September 2003 the respondent made a false and/or misleading statement in the prescribed Annual Return by a Licensed Dealer who is a Natural Person which he was required to lodge with the Commissioner of Consumer Affairs. In the return the respondent wrongly declared that he was not currently trading. The respondent knew that his declaration was either false and/or misleading. The making of the declaration meant that the respondent breached s 141(6) of the Act.

[25] While continuing to trade in motor vehicles between 8 January 2003 and January 2004 the respondent failed to maintain or complete a dealings register. His original dealings register had been dumped when he ceased operating his business from the premises at 1 Duke Street, Stuart Park. As a result of failing to maintain or complete a dealings register the respondent breached s 157(1) of the Act.

[26] Between 8 January 2004 and the end of January 2004 the respondent failed to use the prescribed written contract of sale for the sale of 11 motor vehicles. No reason was offered as to why he failed to comply with the requirement to use the prescribed form. The respondent's failure meant that he breached s 160(1) of the Act.

[27] Between January 2003 and November 2003 the respondent placed 16 advertisements in the Northern Territory News newspaper. He did so in order to sell motor vehicles. When doing so the respondent failed to include his motor vehicle dealers licence number in the advertisement as is required by s 175 of the Act.

[28] On 5 February 2004 the respondent participated in a record of interview. During the record of interview the respondent admitted to the breaches of the Act referred to above. The respondent's explanation for his conduct was that he was in severe financial difficulty at the time.

[29] Counsel who appeared for the respondent in the Court of Summary Jurisdiction stated from the bar table that the respondent had made $10,000

after expenses from the motor vehicle dealing which is the subject of this appeal.

[30] The offending is serious. It was committed by an experienced motor vehicle dealer in blatant disregard of the provisions of the Act. The respondent knew that in order to deal from the place of business at 16 Stuart Highway, Stuart Park, he required a variation of his licence. He applied for a variation of his licence. The respondent was told that he could not obtain the variation without paying the prescribed fee of $100. Rather than pay the fee the respondent simply conducted the motor vehicle dealer business at the place at 16 Stuart Highway, Stuart Park. Prior to doing so he dumped the dealings register which was the property of the Commissioner of Consumer Affairs. He subsequently completed an annual return in which he stated that he had ceased to trade thus avoiding informing the Commissioner of Consumer Affairs of the change of his place of business. The offending involved the sale and purchase of a number of motor vehicles over an extended period of time. There was no effort to comply with the law. There was no excuse for the respondent's illegal conduct. The explanation that the respondent gave to police that the offending occurred because he was in financial difficulty is hard to accept. The respondent could have complied with the provisions of Pt 10 of the Act with the expenditure of a very small amount of money. In any event financial difficulty may of itself be a ground for the revocation of a motor vehicle dealer licence: s 136(1)(d), s 145(a) and s 146(b).

The sentencing remarks in the Court of Summary Jurisdiction

[31] The learned presiding magistrate was informed that the research of the counsels who appeared before him as to what was an appropriate penalty had been fruitless. Neither counsel was able to point to any sentencing remarks of the Court of Summary Jurisdiction that dealt with breaches of Pt 10 of the Act. It was said that there had been very few prosecutions under the Act. As a result reference was ultimately made to decisions of the Queensland Commercial and Consumer Tribunal.

[32] In his sentencing remarks the presiding magistrate stated:

> In relation to the matters before the court.
>
> I'm first of all given an indication of appropriate penalty by a matter which proceeded before a Commercial and Consumer Tribunal in Queensland which seems to be the tribunal charged with the prosecution of matters such as those that you face in the court today. I observe that in relation to the matters which are in the report handed to me, there are very marked similarities with what is charged against you. Because of that venue or jurisdiction, those people were not exposed to a conviction, that was not possible. That is not a matter which ultimately, I can take into account in terms of s 8, but it's certainly a matter that exercises my mind.
>
> In relation to the second matter. I see that the Queensland magistrates court did convict the defendant before the court which seems to have been some form of corporation. In the event, in both those matters the penalty in the first matter was $1500, the second one thousand dollars. Obviously from what I said before lunch and from what you've heard subsequently, there is little guidance to the court as to what to do.
>
> As I also indicated. I had spoken to another magistrate, who as a private practitioner, was involved in a matter of similar ilk in South Australia and in all the circumstances given the guidance that I have obtained both from counsel and from my brother Luppino, I have decided that the appropriate penalty is to fine you the sum of $1500. That is an aggregate penalty. That penalty has been discounted by

between 35 and 40 per cent which is an appropriate discount to extend according to amongst other guiding principles, the New South Wales Court of Appeal guideline for people who plead guilty such as yourself.

The next issue is the request by your counsel not to proceed to convict you. I shall not convict you, but I am obliged because of what the Chief Justice has said and what I referred to, to spend a short time on that aspect of the matter.

In 1969 a 75 year old man was apprehended, charged in the magistrates court in South Australia. He – at that time it was possible to do this – he was neither convicted nor disqualified from driving. The prosecution appealed to the High Court. The prosecution failed to have the matter overturned. The High Court said that the exercise of a discretion was a matter for the magistrate acting judicially, providing he didn't hang his decision on a convenient peg: Cobiac v Liddy. I am otherwise required to observe the circumstances which are set out in s 8 of the Sentencing Act.

First of all I have had regard to the circumstances of the case. I do not uphold your counsel's request that I find there are extenuating circumstances, but I do find that the circumstances of the case were such that what you did was driven by need and not by greed and I accept that the net gain from the transactions was as, I think your counsel elicited from you, something in the order of $10,000.

I would have though that it's open to me, absent any express evidence of good character, not to rely on what I know of you because of my social acquaintance with you and from what I hear of others in relation to that social sphere, but I would have thought I can rely on the fact that you're 50 years old and you've never come before the court for anything at all, as an indication that you are, as I believe you are, a person of impeccable character.

You also have a clean record. That is another matter which on its own would enable me to avoid convicting you. You are 50 years of age and you have not come before the court in respect of any matter touching on criminal law.

I find that I have the power to avoid convicting you for those reasons and I do not convict you. I think that I haven't pronounced the victim levy which is a statutory impost of $200 dollars.

[33] There was no evidence of positive good character and no basis for the conclusion that the respondent was a person of impeccable character. The

presiding magistrate paid little if any regard to the objective seriousness of the offending, to the nature of the legislation which had been breached by the respondent or the maximum penalties that had been specified by Parliament.

Conclusion

[34] In my opinion the Court of Summary Jurisdiction erred in not recording a conviction. There was a failure to have proper regard to all of the circumstances of the offending. The Act that was breached by the respondent was regulatory legislation. There is a significant public interest in ensuring that the Act is complied with. The breaches of the Act were serious. There were numerous breaches of the Act over a lengthy period of time. The fact that the respondent continued to trade in motor vehicles because of need was not an explanation for the breaches of the Act that he committed. There was no serious attempt to comply with the Act. Apart from the lodging of the application to vary the respondent's licence without the required fee, there was no positive effort made by the respondent to ensure that the Act was complied with. Indeed it is a fair inference that some of the offences were committed by the respondent in order to hide the fact that he had not obtained the appropriate variation of his licence and that he was not complying with the Act. In the circumstances deterrence was the paramount sentencing consideration and the respondent should have been convicted of each of the five charges. The respondent's age and previous

good record do not reasonably support the exercise of the discretion granted by s 7(e) and s 8(1) of the Sentencing Act in favour of the respondent. His age and experience meant that the respondent fully understood the obligations that the Act imposed on him. The obligations were not onerous. In the circumstances the sentence imposed by the Court of Summary Jurisdiction was not proportionate to the respondent's offending. The learned magistrate impermissibly allowed himself to be influenced by personal experiences and opinions. There was no proper basis for the leniency accorded to the applicant by not recording a conviction.

[35] As to the second ground of appeal, the appellant does not rely upon any specific demonstrated error. The appellant simply asserts that the sentence imposed was manifestly inadequate. This is not a case where it is shown that the sentence imposed is out of line with what is commonly accepted. It is not a disparity case. It is a case in which the appellant asserts that the inadequacy of the sentence is manifest. I agree. The aggregate fine was less than three per cent of the maximum fine specified by s 129(1) and s 160(1) of the Act. It was 15 per cent of the net profit that the respondent made from dealing in a manner contrary to the provisions of Pt 10 of the Act. All of the relevant considerations affecting the sentence in this particular case point to inadequacy of penalty. There was a miscarriage of the sentencing discretion.

[36] But for the conduct of the appellant in the Court of Summary Jurisdiction I would have set aside the fine imposed by the Court of Summary Jurisdiction

and imposed penalties consisting of a fine of $500 for the breach of s 175 of the Act and an aggregate fine of $10,000 for the other offences committed by the respondent. I would have discounted these fines by 25 per cent to reflect the respondent's pleas of guilty. However, the presiding magistrate did not receive all of the assistance to which he was entitled from counsel who appeared on behalf of the appellant in the Court of Summary Jurisdiction. Counsel who appeared for the appellant in the Court of Summary Jurisdiction provided the Court of Summary Jurisdiction with the decisions of the Queensland Commercial and Consumer Tribunal and did not contend that the fines imposed in those cases were inadequate in the circumstances of this case. The appellant has effectively changed his position. In the circumstances I do not propose to set aside the fine imposed by the Court of Summary Jurisdiction. The Supreme Court has a residual discretion in the case of a crown appeal not to interfere with the sentence imposed even though the sentence imposed is inadequate: *R v Morton* (2000) 11 NTLR 97 at [11] – [12].

Orders

[37] I make the following orders:

1. The appeal is allowed.

2. I set aside the decision of the Court of Summary Jurisdiction not to record convictions for each of the five counts charged against the respondent.

3. I convict the respondent of each of the five counts charged in the substituted complaint dated 26 May 2005 and I direct accordingly that each conviction is recorded against the respondent.

[38] I will hear the parties as to the costs of the appeal.