CITATION:	*Gorrirri v Nicholas & Anor* [2019] NTSC 5
PARTIES:	GORRIRRI, Jason v NICHOLAS, Sally and PETERKEN, Stephen
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 53 of 2018 (21731960) and LCA 54 of 2018 (21749514)
DELIVERED:	16 January 2019
HEARING DATES:	5 December 2018
JUDGMENT OF:	Hiley J

CATCHWORDS:

LOCAL COURT APPEAL – SENTENCING – Appeal against sentence – manifestly excessive – 18 year old first offender – conviction not appropriate – appeal allowed and appellant resentenced.

Denham v Hales [2003] NTSC 87; *Emitja v The Queen* [2016] NTCCA 4; 262 A Crim R 126; *Hales v Adams* [2005] NTSC 86; *Harding v Kendrick* [2013] NTSC 52; *Hesseen v Burgoyne* [2003] NTSC 47; *Laskie v Rigby* [2013] NTSC 39; *Lee v The Queen* [2016] NSWCCA 146; *Midjumbani v Moore* [2009] NTSC 27; 229 FLR 452; *Musgrave v Yarllagulla* [2006]

NTSC 17; *Noakes v The Queen* [2015] NTCCA; *Qadir v Rigby* [2012] NTSC 90; *R v JF* SCC 26102016; *R v KAG, KYG and MOK* SCC 21641537, 21641538 and 21641540; *R v Mills* [1998] 4 VR 235; *Yendall v Smith* [1953] VLR 369; *Yeomans v The Queen* [2011] VSCA 277; *Whitehurst v The Queen* [2011] NTCCA 11, referred to.

Criminal Code (NT) s 210, s 213, s 241
Sentencing Act (NT) s 8, s 78B

REPRESENTATION:

Counsel:

Appellant:	M Aust
Respondents:	D Dalrymple

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondents:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Hill901
Number of pages:	16

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

Gorrirri v Nicholas & Anor [2019] NTSC 5
No. LCA 53 of 2018 (21731960) and LCA 54 of 2018 (21749514)

BETWEEN:

JASON GORRIRRI
Appellant

AND:

SALLY NICHOLAS
First Respondent

AND:

STEPHEN PETERKEN
Second Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 16 January 2019)

Introduction

[1] The appellant has appealed against sentences imposed by the Local Court on 6 September 2018 for offending in June and October 2017.[1] He had pleaded guilty to and was convicted of:

(a) three charges concerning offences committed on 12 June 2017 – file 21731960 (the **June offences**);

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1 Respectively LCA 53 of 2018 (21731960) and LCA 54 of 2018 (21749514).

(b) three charges concerning offences committed on 10 October 2017 – file 21749514 (the **October offences**); and

(c) breach of bail on 31 January 2018.

[2] The June offences were:

(a) Causing damage to property, contrary to s 241(1) of the *Criminal Code* (NT);

(b) Aggravated unlawful entry with intent to steal, in company and at night time, contrary to s 213(1)(4) & (5) of the *Criminal Code*;

(c) Stealing, contrary to s 210 of the *Criminal Code*.

[3] The October offences were of the same kind:

(a) Causing damage to property, contrary to s 241(1) of the *Criminal Code*;

(b) Aggravated unlawful entry with intent to steal, in company and at night time, contrary to s 213(1)(4) & (5) of the *Criminal Code*;

(c) Stealing, contrary to s 210 of the *Criminal Code*.

[4] The Local Court sentenced the appellant as follows:

(a) for the June offences - 2 months imprisonment backdated to 28 August 2018, suspended forthwith with an operational period of 12 months;

(b) for the October offences - 2 months imprisonment also backdated to 28 August 2018, suspended forthwith with an operational period of 12 months;

(c) for the breach of bail - discharged with a $150 levy.

Grounds of Appeal

[5] Each notice of appeal contended that the sentence imposed on the relevant file was manifestly excessive, and that the total effective sentence across the two files was manifestly excessive.

[6] The appellant also sought and was given leave to add the following grounds of appeal, namely that the learned sentencing judge erred in:

(a) failing to provide sufficient reasons for sentence; and

(b) failing to consider whether the offences required the imposition of a conviction; or in the alternative, if his Honour did not fail to consider whether the offences required the imposition of a conviction, his Honour erred in failing to exercise a discretion not to record a conviction against the appellant.

[7] It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error is shown. The presumption is that there is no error. The appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it is shown that the sentencing judge was in error. The error may appear in what the sentencing judge said in the proceeding, or the sentence itself may be so excessive as to manifest such error. It must be shown that the sentence was clearly and not just arguably excessive.[2]

Proceedings on 6 September 2018

Facts and submissions

[8] The facts in relation to the offences committed on 12 June 2017 were as follows:

> The defendant in this matter is Jason Gorrirri. He's a 19-year-old male. The co-offender are youths. Sometime between 21:00 hours on the 12 June 2017 and 06:00 hours on the 13 June 2017, the defendant and the co-offenders attended 187 Milingimbi. This is the accommodation house used by the Department of Health, which is vacant.
>
> This night, the defendant and the co-offenders jumped the fence in the yard of Lot 187 and they approached the front closed security door. The defendant and the co-offenders used a pair of scissors – stolen scissors from another incident, to cut a hole in the security screen to reach through and unlock the door. The defendant and the co-offenders approached the main wooden door and used a black plastic bottle to open the door.

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2 *Whitehurst v The Queen* [2011] NTCCA 11 at [12]; *Noakes v The Queen* [2015] NTCCA 7 at [23]; *Emitja v The Queen* [2016] 262 A Crim R 126 at [39].

> The defendant and the co-offenders entered the building and located two grey spray cans and one black spray can. The defendant and the co-offenders also located multiple food items to eat. The defendant and the co-offenders left the location and went to a local oval to sniff the contents of the spray cans. The next night, some of the co-offenders started sniffing the spray cans again and were located by the local adults.
>
> The adults recorded it to police and police located two of the youths. Police enquiries ascertained the property of Lot 187 was unlawfully entered and the items that were stolen. The defendant and the co-offenders were taken to certain areas in town and made to surrender over the spray cans. The defendant showed police who he had jumped over the fence with – into the mechanics yard and collected the grey spray can, which was now empty.
>
> Other youths showed police the black spray can that was used and located on the roof of the sports hall. Another male involved in the sniffing of the contents, Clinton Dagamanu(?), showed police where the second spray can was located on the oval. The defendant was issued with a notice to appear.

[9] The facts in relation to the offences committed on 10 October 2017 were as follows:

> At 5 am on 10 October 2017 the defendant and several co-offenders, attended the Rulku Lodge, Milingimbi. One of the co-offenders utilised bolt cutters to cut a hole in the cyclone wire fencing surrounding the property. The defendant and co-offenders entered the unlocked kitchen building of the Rulku Lodge. The defendant stole food and drinks while another damaged vehicles in the location.
>
> The co-offenders rummaged through the vehicle and trailers looking for volatile substances to sniff. The co-offenders located a tin of paint, which the defendant, and the co-offender, later sniffed in the Milingimbi School area. The persons left location via a broken fence. On 19 October 2017, the defendant was arrested and conveyed to the Milingimbi Police Station. He was later charged, and bail considered. At no time did the defendant have permission to trespass on the Rulku Lodge, enter the kitchen and steal food items.

[10] Counsel for the defendant made the following submissions:

Your Honour, I wouldn't usually be making these submissions, but we submit that a term of imprisonment, even suspended, would not be appropriate disposition in this case. This is a 19-year-old with no priors. At the time of the offending he was 18. I'll be asking your Honour to convict – consider, without conviction, good behaviour bond or community work order.

This offending is youthful offending. It's been committed with youths. I understand the youths have been dealt with by way of diversion. It's offending that's been committed in furtherance of a very unfortunate paint sniffing and chroming addiction. Both of the offences, being that they are both substandard offences, have been committed in furtherance of that.

However, he instructs me that since that time – and this somewhat corroborated by the fact that he hasn't been in trouble since that time. He instructs me, that for the last nine months he's been with a partner, a young woman his age. She won't put up with any chroming. He hasn't been chroming. So, he's managed to kick that habit.

But, we submit that they are his youth, the circumstances of the offending, the fact that he doesn't have any prior incidents, that makes this very much at the low range. And, even a conviction would be a significant penalty for this young man. I should also note, your Honour, that he spent ten days in custody.

…

In relation to his personal circumstances, he's a 20-year old, grew up in Millingimbi, he's from the Gulwurra(?) clan. He's an initiated man who lives in Milingimbi with his mother and his Uncle, and his sisters and brothers also live at that house. They've been at school in Milingimbi until Year 9 and he's now doing CDP – or doing activities, through Centrelink. He's into fishing and hunting. And, he's been with his new partner for just under a year. And, he says he's been off chroming, he's been playing footy for the Milingimbi Eagles.

But, he was a sniffer from 13 to 19 years' old. That's obviously significantly affected him. We say, in the circumstances, your Honour, this is entirely characteristic of youthful offending with other young people, committing these offences and stealing things of low value, to engage in sniffing. Unless your Honour requires anything further?

[11] The sentencing judge then proceeded to sentence the defendant as follows:

> Yes, I do take into account his pleas of guilty and also his youth. But, the fact of the matter is we do not operate in this jurisdiction as the Youth Justice Courts advise, we're the only – just about the only principle of sentencing is to [sic] with the interest of the offending. This kind of offending is very prevalent in remote communities, usually burglaries of places, that are like the Health Department, Lodges, which are there for the benefit of the community
>
> As I've said, they're very prevalent. If it was only 12 June matter, I think a good behaviour bond would be sufficient. However, it happens again on the 10 October, and this kind of continued offending by way of burglaries, despite the property not being of much value and having to get it at night time. And, … own[ed] by the Aboriginal Corporation at one hand, and Health department in the other, is such that it must be a measure of announcement by way of expected deterrent sentence, in my view.
>
> However, doing the best I can to him, having regard to all of the principles and guidelines in the *Sentencing Act*, I think the following is appropriate. I have regarded totality principles. The first he's charged with, burglary, charges 1, 2 and 3, convicted and sentenced to 2 months imprisonment, backdated to 28/8, suspended forthwith for 12 months.
>
> The next burglary, convicted on charges 1, 2 and 3, aggregate sentence of 2 months imprisonment, concurrent with the previous sentence and similarly backdated. The breach of bail, convicted and discharged and with a $150 levy.
>
> Don't come back again. You come back again, you've got nearly two months' gaol hanging over your head. No more breaking into places and pinching stuff. You behave yourself. I don't want to see you again.
>
> And, how is he going to get back to Milingimbi Mr Murphy? I take into account all of the principles and guidelines of the *Sentencing Act*.

Grounds alleging sentence manifestly excessive

June 2017 offending – File 21731960

[12] The appellant was one of four people who were involved in entering an unoccupied building and stealing three spray cans and some food items. It seems that he sniffed the contents of one of the spray cans and ate some of the food. That was the extent of his involvement once he had entered the building with his co-offenders. The financial consequences of the stealing and cutting the hole in the security screen were minimal. His offending was very much at the lower scale of offending of this kind.

[13] The appellant was an 18 year old first offender. He cooperated with the police by showing them how he had jumped over the fence and the spray can which he had used.

[14] He had a habit of paint sniffing and chroming which began when he was 13. Both of the offences were committed in furtherance of his addiction. By the time of the hearing, almost a year after the October offending, he had already spent 10 days in custody and had ceased chroming. He had been with his new partner for just under a year and engaged in productive activities such as working under the CDP scheme, hunting and fishing, and playing football. With the exception of his breach of bail by failing to attend Court on 31 January 2018 there is no suggestion that he committed any further offences during the 11 months or so prior to the hearing. His prospects of rehabilitation were very good.

[15] The appellant should have been given the benefit of having no conviction entered and a good behaviour bond, for the June offences. Indeed the sentencing judge acknowledged that despite the prevalence of this kind of offending in remote communities a good behaviour bond would have been sufficient but for the fact that he subsequently engaged in the October offences. The imposition of a conviction coupled with the sentence of two months imprisonment was manifestly excessive. I would set aside that sentence and resentence him.

10 October 2017 offending – File 21749514

[16] The appellant's role in this offending was also relatively minor. Apart from entering the kitchen building and stealing food and drinks his only involvement in the overall offending was him subsequently sniffing from a tin of paint that had been stolen by co-offenders. His involvement was far less serious than that of his co-offenders, who used bolt cutters to cut the hole in the cyclone wire fencing, damaged motor vehicles, and rummaged through vehicles and trailers looking for volatile substances to sniff. Again, his offending was very much at the lower end of offending of this kind.

[17] The only relevant difference between this offending and the June offending and the relevant sentencing considerations and disposition was that this was the second occasion of him committing similar offences. He was not a "first offender". He had been spoken to by

police about the June offending and issued with a notice to appear in court. He should have known that he would get into trouble again by engaging in this conduct.

[18] However he had not been dealt with by a court when he engaged in this further offending. Nor had he spent any time in custody.[3] He was unlikely to have been aware of the significance of having a conviction recorded against him and of the prospect of being sentenced to a term of imprisonment.

[19] Clearly the occurrence of this further offending rendered it necessary for the Court to give greater consideration to sentencing factors such as specific deterrence, protection of the community, denunciation and general deterrence, than was necessary for the June offending. However, he was still a very young man and his rehabilitation was a significant factor for the Court to take into account when determining an appropriate sentence. See for example *R v Mills*[4] and *Yeomans v The Queen*[5], referred to by Barr J in *Qadir v Rigby*[6].

[20] The imposition of a conviction coupled with the sentence of two months imprisonment for the October offending was manifestly excessive. I would set aside that sentence and resentence the appellant.

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3 He first went into custody on 19 October 2017 and was granted bail on 25 October.

4 [1998] 4 VR 235 at 241.

5 [2011] VSCA 277 at [46].

6 [2012] NTSC 90 at [21].

Other grounds of appeal

[21] Because I have concluded that both sentences were manifestly excessive, as a consequence of which the appeals will be allowed and the appellant resentenced, it is unnecessary for me to deal with the other grounds of appeal. However in deference to the detailed submissions made by counsel I shall make some brief comments about some of those matters.

[22] In short I consider there is some merit in the complaints about the inadequacy of the reasons, in particular the sentencing judge's failure to explain why he considered it appropriate to:

(a) order convictions to be entered - having particular regard to the matters required by s 8(1) of the *Sentencing Act*; and

(b) order terms of imprisonment without referring to the alternatives identified in s 78B of the *Sentencing Act*, namely a community work order, and whether there were "exceptional circumstances in relation to the offence or the offender."

[23] The sentencing judge did not say anything to suggest that he had considered those two matters. In some cases a failure to refer to important matters such as this might cause an appellate court to infer

that they were not in fact considered and amounts to an error of law. See for example *Yendall v Smith*.[7]

[24] Having said that, it is well recognised that a sentencing judge in a busy summary court such as was the case here is not expected to provide detailed reasons.[8] Further, it can generally be assumed that a judge, particularly one with the experience of the sentencing judge in this case, was well aware of and would have taken into account common and fundamental sentencing principles. These would include principles pertaining to the sentencing of youthful offenders with no or little prior history of offending, the prospects and need for their rehabilitation, the seriousness of the offending, remorse and co-operation with police and other subjective circumstances of the offender.

[25] Counsel for the defendant had expressly asked the judge not to impose a conviction, and to impose a good behaviour bond or community work order. The prosecutor did not say anything in opposition to these contentions. I consider that the sentencing judge should have responded to these particular contentions, albeit briefly during submissions or when pronouncing his sentence, and indicated why he

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7 [1953] VLR 369 at 379. See too *Lee v The Queen* [2016] NSWCCA 146 at [26] and *Denham v Hales* [2003] NTSC 87 at [15].

8 See for example *Midjumbani v Moore* [2009] NTSC 27 at [26] and *Laskie v Rigby* [2013] NTSC 39 at [48].

had decided to impose convictions and two months imprisonment for each set of offending.

[26] I understand that there may have been some difficulty with the implementation of a community work order at Millingimbi, and that if a community work order had been ordered the defendant may have had to travel to Maningrida or Ramingining in order to perform such work. However counsel had expressly suggested the imposition of such an order. I would have thought it more appropriate to require the defendant to perform community work than to sentence him to a term of imprisonment, albeit suspended without conditions. If the judge had given serious consideration to counsel's request for a community work order I would have expected him to indicate why he did not consider that appropriate. If a reason for that was any reservations that he may have had about the availability of such work he should have said so and considered giving the defendant's counsel an opportunity to make further enquiries about that and to obtain an assessment report.

Resentence

[27] As is well known, this kind of offending, particularly by young people, breaking into premises at night time, and in company, for the purposes of stealing relatively small items, is prevalent. The community strongly disapproves of this kind of conduct and expects offenders to

be appropriately punished. General deterrence is always a necessary feature of sentencing for such offending. So too, sometimes, but not so much in the present case, is a need for specific deterrence. As I have said, the appellant has already demonstrated an ability and inclination to lead a productive crime-free life. His prospects of rehabilitation are good. Also, as I have said, the appellant's particular role in each set of offending was relatively minor. Further, he has already spent 10 days in custody in relation to this offending. He has also been the subject of the order made on 6 September 2018 suspending his sentence for 12 months.

[28] I do not consider it necessary or appropriate to order convictions in relation to either set of offences. The observations of Southwood J in *Hales v Adams*[9] and Martin (BF) CJ in *Hesseen v Burgoyne*[10] are apt in relation to this offender and this offending.[11] These include the need for offender to retain the full opportunity to obtain employment and/or licenses and to participate fully in community affairs without having his record permanently tainted with convictions for his relatively minor role in this offending.

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9 [2005] NTSC 86 at [12] – [18] and [35].

10 [2003] NTSC 47 at [13] – [21].

11 See too *Harding v Kendrick* [2013] NTSC 52 at [18] – [26]; *Musgrave v Yarllagulla* [2006] NTSC 17 at [15]; *R v KAG, KYG and MOK*, SCC 21641537, 21641538 and 21641540, 19 July 2017 at pp 13 -14; and *R v JF*, SCC 26102016, 26 October 2016.

[29] In each case I consider that the appropriate sentence would be to order a good behaviour bond. In the circumstances of this particular offender and his particular offending such a disposition is appropriate. He has already been punished to some extent by serving 10 days in custody. He should be deterred from further offending by having to continue to be of good behaviour for a further period of time. Such a sentence would also serve some deterrent effect when others, particularly other associates of his, are aware of his sentence and the need to not engage in conduct which might facilitate his breach of his good behaviour order.

[30] In relation to the three offences committed on 12 June 2017 I order no conviction be entered and that the appellant enter into a bond to be of good behaviour for 6 months, operative from 6 September 2018.

[31] In relation to the three offences committed on 10 October 2017 I order no conviction be entered and that the appellant enter into a bond to be of good behaviour for 12 months, operative from 6 September 2018.

[32] I order that the two sentences be served concurrently. In other words the appellant must enter into a bond to be of good behaviour for 12 months operative from 6 September 2018.

Conclusions and orders

[33] The appeals are allowed. The sentences on file numbers 21731960 and 21749514 are quashed.

[34] The appellant is sentenced as follows:

1. On file 21731960 without conviction the appellant is to enter into a bond to be of good behaviour for 6 months, operative from 6 September 2018;

2. On file 21749514 without conviction the appellant is to enter into a bond to be of good behaviour for 12 months, operative from 6 September 2018.