*Grant v Cornford* [2010] NTSC 59

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| PARTIES: | GRANT, David |
| | v |
| | CORNFORD, Michael |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA6 of 2010 (20934392) |
| DELIVERED: | 11 August 2010 |
| HEARING DATES: | 11 August 2010 |
| JUDGMENT OF: | MARTIN (BR) CJ |
| APPEAL FROM: | Mr Neill SM |

**CATCHWORDS:**

CRIMINAL LAW – SENTENCING – VARIOUS OFFENCES

Appeal against severity of sentence – whether Magistrate erred in failing to consider appellant's financial circumstances in setting fines – principle of totality – sentence manifestly excessive – appeal allowed – sentence set aside – aggregate fine imposed.

*Sentencing Act* 1995 (NT) s 17(1), s 17(2), s 18 and s 52.
*R v Rahme* [1989] 43 ACR 81, followed.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | M O'Reilly |
| Respondent: | R Noble |

*Solicitors:*

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| Appellant: | Central Australian Aboriginal Legal Aid Service Inc |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | B |
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| Number of pages: | 11 |

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

*Grant v Cornford* [2010] NTSC 59
No. JA6 of 2010 (20934392)

BETWEEN:

**DAVID GRANT**
Appellant

AND:

**MICHAEL CORNFORD**
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered *ex tempore* 11 August 2010)

**Introduction**

[1] This is an appeal against fines imposed for a number of offences that resulted in a total fine of $4380. The individual offences and fines were as follows:

| Count | Offence | Fine |
|---|---|---|
| 1 | Unlawful possession of cannabis | $400 |
| 2 | Unlawfully possessing a bong for use in the administration of cannabis | $200 |
| 3 | Possession of an unregistered firearm | $260 |

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|---|---|---|
| 4 | Possession of an unregistered firearm | $260 |
| 5 | Possession of an unregistered firearm | $260 |
| 6 | Failure to comply with the storage and safekeeping requirements of a firearm | $260 |
| 7 | Failure to comply with the storage and safekeeping requirements of a firearm | $260 |
| 8 | Failure to comply with the storage and safekeeping requirements of a firearm | $260 |
| 9 | Possession of a firearm that the appellant was not licensed to possess | $390 |
| 10 | Possession of a firearm that the appellant was not licensed to possess | $390 |
| 11 | Possession of a firearm that the appellant was not licensed to possess | $390 |
| 12 | Possession of alcohol in a prescribed area | $260 |
| 13 | Possession of level 1 prohibited material, namely, two pornographic videos in a prescribed area | $260 |
| | Driving with a high range blood alcohol content | $400 |
| | Failure to stop at a stop sign | $130 |

[2] The grounds of appeal complain that the total fine of $4380 was not proportionate to the objective circumstances of the offending and that the learned Magistrate, Mr Neill SM, failed to give appropriate weight to the principle of totality and the appellant's capacity to pay the total fine.

Ultimately the appellant submitted that the total fine was manifestly excessive.

[3] For the reasons that follow, the appeal is allowed.

**Facts**

[4] The appellant is now 36 years of age. Born in Tennant Creek, the appellant has lived all his life in Tennant Creek. He attended school, but only until year 4 or 5 when he left at the age of 12 to take up employment as a stock hand on a station. He remained employed in that industry for approximately seven years.

[5] At the age of 16 the appellant met his wife with whom he has remained for over 20 years. There are now six children of the relationship, the first being born when the appellant was aged 18 years. Because of the pregnancy with the first child, the appellant ceased station work, but took up work as a labourer in Tennant Creek. He undertook a mechanics course and obtained a Certificate II.

[6] Over the years the appellant has remained constantly in employment and the Magistrate was provided with a reference from the general manager of the Julalikari Council Aboriginal Corporation of Tennant Creek with which the appellant had been employed full-time on the night patrol since August 2009. The appellant has worked in that area and on CDEP for the past six years.

[7] The referee spoke highly of the appellant as a very reliable and committed worker who was the only employee in possession of a license. In the words of the referee, the appellant had "demonstrated leadership in the night patrol role on a regular basis".

[8] The offending in connection with drugs and firearms was discovered on 10 November 2009 when the police searched the appellant's home. The cannabis that was the subject of count 1 was less than 1 gram of cannabis in a bowl on a table in the kitchen which was found together with the bong which was the subject of count 2.

[9] The three firearms, being rifles, were found unsecured in the walk-in wardrobe of the bedroom. Two cans of Bundaberg rum and cola were in the fridge and two pornographic videos beside the television in the living room.

[10] The Magistrate was told that the appellant was a social user of cannabis on a very occasional basis.

[11] As to the firearms, only one was in working order and it had been given to the appellant when a family member passed away. Counsel advised the Magistrate that it was a cultural obligation for the appellant both to accept the rifle and keep it. It had never been used by the appellant and there was no ammunition for it.

[12] The other two firearms were not in working order. They were more in the line of collector's items and there was no ammunition for them.

[13] The alcohol was left over from alcohol previously purchased for consumption at another location. In breach of the prescribed area the appellant took two cans back to his house and put them in the fridge.

[14] With respect to the two pornographic videos, although the appellant had no control over them, he was the lease holder of the premises. He did not know how the videos came to be in his house and did not have specific knowledge of their existence. However the appellant took full responsibility for the videos as lessee of the premises.

[15] All of the offences to which I have referred were at the lowest end of the scale of seriousness for offences of their type. In addition to the fines, the firearms and bong were forfeited to the Crown.

[16] The road traffic offences occurred at about 11.15pm on Saturday 20 January 2010. The appellant was driving a motor vehicle in Tennant Creek at significant speed. About two metres before a stop sign, the appellant applied his brakes heavily causing the wheels to lock and the vehicle to slide into the intersection by about six metres. In that process the appellant's vehicle crossed two traffic lanes. There were a number of people in the vicinity and a police vehicle was only 10 metres away when the appellant's vehicle slid into the intersection.

[17] The appellant then continued to drive but was apprehended a short time later and subjected to a roadside breath test that was positive. At the Tennant Creek police station the appellant returned a reading of 0.250 percent.

Asked why he was driving intoxicated, he said “To come back from bush, I ended up looking like a dickhead, I fucked up”. Asked about failing to stop at the stop sign the appellant replied “I wasn’t driving dangerously, I wasn’t”.

[18] Counsel informed the Magistrate that the appellant had been drinking with other persons at a location north of Tennant Creek. A sober driver was with the group and had driven them back into Tennant Creek and then to the driver’s residence. Rather than leave the vehicle at that location and walk to the residence where he was to stay the night, the appellant made the unwise decision to drive. It was only a short distance.

[19] The appellant has a record of prior offending commencing in February 1991 when he was convicted of fighting in a public place. Most of the offending concerns offences against the road traffic laws or relatively minor social disorder type of offences. There are no prior offences involving firearms or drugs. In 1996 the appellant was convicted of driving under the influence and a sentence of three months imprisonment was suspended. That 1996 offending was the last offence against the road traffic laws.

[20] As to the appellant’s financial position, counsel informed the Magistrate that, notwithstanding an immediate disqualification notice, the appellant had remained in employment but in a more limited capacity. Council invited his Honour to impose a monetary penalty which would allow the appellant to continue to work and provide for his family. Counsel stated that the

appellant had “the capacity to pay a monetary penalty” and informed his Honour that the appellant received $550 per week from his work on the night patrol. The appellant’s six children all live with the appellant and his wife.

**Fines**

[21] With the exception of the fine of $400 for possessing cannabis, there can be no complaint against the individual fines. Individually they are reasonable and appropriate. The fine of $400 for possessing cannabis was nearly double the maximum on the spot fine which was a course the police could have chosen. Given the very small quantity of cannabis involved, and the fact that possession occurred in the appellant’s home, the fine of $400 was manifestly excessive.

[22] The critical question is whether having regard to the principle of totality, the learned Magistrate, Mr Neill SM, erred in imposing a total fine that was manifestly excessive.

[23] Section 17 of the *Sentencing Act* provides that where a court determines that a fine is an appropriate penalty, the court shall have regard to the financial circumstances of the offender:

> **17 Exercise of power to fine**
>
> (1) Where a court decides to fine an offender, it shall, in determining the amount of the fine, take into account, as far as practicable:

(a) the financial circumstances of the offender; and

(b) the nature of the burden that its payment will impose on the offender.

[24] Although a court is not prevented from fining an offender by reason of lack of information as to the financial circumstances of the offender and the burden that payment of a fine will impose on the offender,[1] nevertheless it is well settled that where possible the court should obtain information about the financial circumstances of an offender before imposing a fine. Behind this statutory requirement is a recognition of the principle that fines imposed upon impecunious offenders run the risk of amounting to an unduly harsh penalty and, in some situations, might amount to a de facto term of imprisonment if imprisonment is a consequence of a failure to pay. Commonly, the impecuniosity of an offender will lead to a lower fine than would otherwise be appropriate.

[25] The relevant principles and a number of authorities are discussed in *R v Rahme*.[2] In particular, Finlay J, with whose judgement Studdert J agreed, noted that the fundamental principle applies notwithstanding the failure to pay might not result in imprisonment:[3]

> "It is trite to say that a court generally should not impose a fine which the offender does not have the means to pay, even though these days failure to pay a fine does not lead to imprisonment but to a civil execution for its non-payment."

[1] Section 17(2).
[2] [1989] 43 ACR 81 at 86-89.
[3] At 86.

[26] The total fine of $4380 was a particularly severe penalty for a person of the appellant's means. From his net wage of $550 per week, the appellant was required to support a wife and six children. In these circumstances the total of $4380 was well beyond the capacity of the appellant to the point where the imposition of such a total offended against the principles underlying s 17 of the *Sentencing Act* and the general principles to which I have referred. The total is manifestly excessive and error has been demonstrated.

[27] There is a further aspect to the question of totality as it applies to the circumstances under consideration. The total sentence must be proportionate to the total offending conduct. In the particular circumstances under consideration, in my opinion the total of $4380 offends that principle.

[28] The appeal is allowed. All fines imposed by the Magistrate are set aside. In respect of counts 1 to 13, being the group of offences all committed on 10 November 2009, I impose an aggregate fine of $1500. For the offences of driving with a high range blood alcohol content and failure to stop at a stop sign, I impose an aggregate fine of $500. On each offence there is a victim's levy of $40. That makes a total fine of $2000 and a total of victim's levies of $600.

[29] In this and other appeals which I have heard in the current sittings in Alice Springs, and in which I have allowed appeals against fines for the reasons I have discussed in this matter, in re-sentencing I have imposed aggregate fines. This is of course authorised by s 18 of the *Sentencing Act*. In this

and other matters counsel for the appellants has submitted that the Magistrate erred in not imposing aggregate fines. Given that I have allowed each of the appeals with respect to fines, it is appropriate that I make a general observation about that submission.

[30] A sentencing court possesses a discretion whether to impose aggregate fines when s 18 applies. Section 52 of the *Sentencing Act* empowers a sentencing court in some situations to impose an aggregate sentence of imprisonment. When either of these sections apply, the sentencing court possesses a discretion as to whether to impose individual penalties or an aggregate penalty. It is not an error to decline to impose an aggregate sentence. However, the power to impose an aggregate sentence is a useful tool in the armoury of a sentencing court, particularly when imposing a large number of penalties which carry with them the potential for the imposition of a total penalty which is excessive. For example, in this matter where fines were imposed for 15 offences the imposition of individually appropriate fines, with the exception of count 1, resulted in a total fine that was manifestly excessive. This was properly conceded by the Crown. Rather than reduce the individual fines in recognition of the principle of totality, in my view the preferred course is to impose an aggregate fine.

[31] In making these observations I do not wish to be interpreted as suggesting that the discretion of a sentencing court should be constrained in some way. Whether individual fines or an aggregate fine is appropriate will depend

upon the circumstances of the individual case and the views of the particular sentencing court.

[32] Counsel has informed the court that it is a common practice in the Court of Summary Jurisdiction to impose aggregate fines and for the reasons I have given in my view it is a practice to be encouraged.

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