JL v Nicholas & Ors [2013] NTSC 31

PARTIES:	**JL** v **NICHOLAS, Sally, WOOD, Paul and KENDRICK, Suzanne**
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 20 of 13 (21304385), JA 21 of 13 (21304596), JA 22 of 2013 (21308379) and JA 23 of 13 (21309457)
DELIVERED:	26 June 2013
HEARING DATE:	5 June 2013
JUDGMENT OF:	BARR J
APPEAL FROM:	YOUTH JUSTICE COURT

CATCHWORDS:

APPEAL AGAINST SENTENCE – Conditions of suspended sentence – conditions too wide – appeal upheld – remitted to Youth Justice Court

CRIMINAL LAW – Appeal against sentence – conditions too wide – appeal upheld – remitted to Youth Justice Court

SENTENCING – Suspended sentence – conditions too wide – conditions quashed

APPEAL AGAINST CONVICTION – Mistake of fact – appeal upheld – convictions quashed

LEGISLATION – Youth Justice Act – recording conviction – mistake of fact – appeal upheld – convictions quashed

CRIMINAL LAW – specific offences – breach of bail – appeal against conviction – mistake of fact – low level offending –limited deterrence to youth – conviction quashed

Justices Act 1929 (NT)
Youth Justice Act 2005 (NT)

R v SW Bugmy [2004] NSWCCA 25; *Dunn v Woodcock* [2003] NTSC 24; *Verity v SB* [2011] NTSC 26; *DD v Cahill* [2009] NTSC 62 referred to.

REPRESENTATION:

Counsel:

Appellant:	A Pyne and F Bain
Respondent:	D Jones

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Bar1308
Number of pages:	11

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

JL v Nicholas & Ors [2013] NTSC 31
Nos. JA 20 of 13 (21304385), JA 21 of 13 (21304596),
JA 22 of 2013 (21308379) and JA 23 of 13 (21309457)

BETWEEN:

JL
Appellant

AND:

SALLY NICHOLAS, PAUL WOOD AND SUZANNE KENDRICK
Respondents

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 3 July 2013)

Introduction

[1] The appellant was born on 10 September 1998. He has very low intelligence. He attends a school for children with special needs. He was just over 14 years old at the time of offending and 14 years 7 months old when he was sentenced by the Youth Justice Court on 10 April 2013.

[2] The appellant was sentenced for a number of offences. A chronology of events relevant to his offending is set out below.

27 December 2012	The appellant and co-offenders unlawfully entered a dwelling in Hummel Court, Malak and stole various items. (File 21304596).

27 January 2013	The appellant and co-offenders unlawfully entered a BP Service Station in Malak. The appellant stood outside while co-offenders entered and stole various items. (File 21304385)
29 January 2013	The appellant was arrested for the BP Service Station offending and taken to the Darwin Watch House. He participated in a formal interview. He made admissions. He was granted bail to attend the Darwin Youth Justice Court.
31 January 2013	The appellant was arrested, as a result of a positive fingerprint identification, for the unlawful entry of the dwelling in Malak on 27 December 2012. He was taken to the Darwin Watch House. He participated in a formal interview. He made admissions. He was granted bail to attend the Darwin Youth Justice Court.
7 February 2013	The appellant appeared at the Darwin Youth Justice Court. His matters were adjourned until 26 February 2013 so he could be considered for Youth Diversion.
17 February 2013	The appellant beached his bail by not being at home when required to present at the front door (Count 1, File 21308379).
21 February 2013	The appellant again breached his bail by not being at home when required to present at the front door (Count 2, File 21308379).
26 February 2013	The appellant failed to appear before the Darwin Youth Justice Court. A warrant was issued. The appellant was charged with breach of bail in respect of his non-appearance (File 21309457).
5 March 2013	The appellant was arrested on the warrant. He was charged with the above breaches of bail. He appeared before the Youth Justice Court. He pleaded guilty to all matters. The Court ordered a pre-sentence report. He was granted bail on similar conditions to those set previously, to appear next on 10 April 2013.
13 March 2013	The appellant was arrested in relation to another allegation and refused bail. He was remanded in

	detention until 15 March 2013 to appear in the Darwin Youth Justice Court.
15 March 2013	The appellant appeared in custody before the Darwin Youth Justice Court. His matters were adjourned until 10 April 2013 for submissions and sentence.
10 April 2013	The appellant appeared in custody, and was sentenced on the matters the subject of this appeal.

[3] It may be noted that the appellant spent the period from 13 March to 10 April in custody or in detention on remand.

[4] The appellant was sentenced on the two unlawful entry files (Files 21304596 and 21304385), without conviction, to enter into separate but identical good behaviour orders pursuant s 83(1)(f) read with s 91(2) *Youth Justice Act*. The magistrate imposed the following conditions on each order:[1]

(i) The defendant (appellant) must fully comply with all directions of DS,[2] including directions as to curfew, schooling and associates;

(ii) The defendant (appellant) must not be absent from [address edited] during the hours of darkness unless with DS or with her consent; and

(iii) The defendant (appellant) must not associate with NW, TG, RS, JB or EA.

---

1 s 91(2) *Youth Justice Act*.
2 DS is the grandmother of the appellant.

[5] The appellant was discharged, but with convictions recorded, on the three breaches of bail (Files 21308379 and 21309457).

Issues on appeal

[6] The appellant argues that the conditions of the good behaviour orders imposed by the Youth Justice Court were unreasonable or unduly onerous. He also argues that the magistrate erred by failing to apply properly the principle of parity.

[7] The appellant also argues that the magistrate erred in recording convictions for the three breaches of bail.

Conditions of the good behaviour orders

[8] Section 91(2) *Youth Justice Act* contains a number of provisions relating to the conditions that may be imposed on a good behaviour order. In particular, the Youth Justice Court has a discretion to impose a condition that the youth reside with a particular person, or at a particular place, specified in the order; that the youth obey the reasonable directions of a person specified in the order; that the youth refrain from the activities, or from associating with persons, specified in the order.

[9] The impugned conditions of the good behaviour orders are conditions (i) and (ii) set out in [4] above. It is of concern that the learned magistrate ordered that the offender fully comply with all directions of his grandmother, including directions as to curfew, schooling and associates, without limiting the appellant's compliance obligation to "reasonable" directions. I agree

with counsel for the appellant that an unqualified condition of this nature represents an impermissible encroachment into the appellant's private and family life. It could convert a minor household discipline matter into a breach of a good behaviour order and render the appellant subject to court proceedings for breach. It could go beyond directions which may be relevant to the appellant's criminal offending and rehabilitation.[3] The condition is too wide, and in my view is unreasonable. Moreover, where it may later be necessary to determine compliance or non-compliance on the part of the appellant with a direction given, the condition creates the difficulty of establishing objectively what direction was actually given (and if so when) by his grandmother.

[10] I uphold the appeal on this ground. In these circumstances, I would normally hear submissions from counsel and re-draft the conditions so as not to infringe the principles referred to. However, I have been informed by counsel that the appellant is still to be dealt with by the Youth Justice Court in relation to further offences committed in March 2013: unlawful use of a motor vehicle, trespass on enclosed premises and use of cannabis. Counsel for both the appellant and the respondent submit that I should therefore quash the impugned conditions and remit the matter to the Youth Justice Court to enable that Court to fix appropriate conditions relevant to the

[3] In *R v SW Bugmy* [2004] NSWCCA 258 at [61], the NSW Court of Criminal Appeal acknowledged that the discretion as to the conditions that may be attached to a bond are broad, but explained that there are limits: "The conditions must reasonably relate to the purpose of imposing a bond, that is, the punishment of a particular crime. They must therefore relate either to the character of that crime or the purposes of punishment for that crime, including deterrence and rehabilitation." See *Dunn v Woodcock* [2003] NTSC 24 at [7], where Mildren J summarised many of the circumstances in which a superior court of review will reject a condition of a bond.

offending the subject of the appeal to this Court and any other offending before the Youth Justice Court. I agree with the course proposed by both counsel.

[11] The appellant argues also that condition (ii), the curfew condition, is impermissibly vague because it refers to "hours of darkness" rather than specifying particular times. In my opinion, the appellant's contention is correct. Precision is called for. It is for this reason that the expression "night-time", an aggravating circumstance for a charge of unlawful entry of a building, is specifically defined in the *Criminal Code* to mean the interval between nine o'clock in the evening and six o'clock in the morning.[4]

[12] The appellant also argues on appeal that the curfew condition is unduly harsh and onerous because the effective one-year curfew amounts to home detention. The appellant contends that he had already served one month's detention when he came to be sentenced, and that he should have been discharged without further penalty. Given my decision to remit the appellant's matters for further hearing before the Youth Justice Court, which as noted will deal with the appellant on additional matters, it is preferable that I not decide or make any comment on what is, in effect, an argument on the merits. It will be for the Youth Justice Court to decide whether a curfew condition should be imposed as a condition of the appellant's good behaviour orders and, if so, the hours and other conditions of curfew.

---

[4] *Criminal Code* s 1 (definitions), s 213(5).

[13] For the same reason, I do not propose to decide or make any comment on the appellant's contention on appeal that the magistrate erred by failing to properly apply the principle of parity.

Convictions for breaches of bail

[14] The appellant also argues that the magistrate erred in recording convictions for the breach of bail offences.

[15] The magistrate was aware that the appellant's developmental IQ was "significantly low". He nonetheless reasoned that a conviction on the breach of bail offences was appropriate to send a message to the appellant:

> "I considered the matters put forward in relation to 'no conviction' by Ms Musk, but consider that a conviction is appropriate to send him a message that he simply can't ignore court orders and bail and disregarding at his will. To do so, he must accept he's under some peril of something."

[16] It would appear that his Honour was concerned in relation to specific deterrence: the need to impress upon the appellant that there would be consequences if he were in future to disregard court-ordered conditions of bail.

[17] Counsel for the appellant argues that his Honour proceeded under the mistake of fact that there had been no consequences for the appellant for his breaches of bail, whereas (he argues) the appellant had been taken into custody after his arrest on 5 March for failing to appear in court on

26 February;[5] and he was subsequently held in detention without bail from 13 March to 15 March, and then in detention on remand until 10 April 2013, when he came before the court for sentencing.

[18] I have some difficulty with the appellant's argument. Although the consequence of the appellant's breach of bail was that he was arrested on 5 March, and lost his liberty, he was released on bail by the Youth Justice Court on the same day as his arrest, as the chronology set out in [2] makes clear. Therefore, it is not obvious that he suffered any consequence, at that time, on account of his breaches. Subsequently, however, although the period of detention from 13 March to 15 March was in relation to other offending, the decision to refuse bail was probably influenced by the fact that the appellant had breached the conditions of bail previously.[6] Likewise, his remand in detention from 15 March to 10 April was probably influenced by his previous breach of bail conditions. In the circumstances, therefore, I accept that there had been consequences, and that the appellant knew by the time he was sentenced on 10 April 2013 that a breach of bail in future would adversely affect his liberty. He knew that, in the words of the magistrate, he would be "under some peril of something".

[19] I discussed the purpose of recording a conviction against a youth offender in *Verity v SB*.[7] I pointed out that, whereas under the *Sentencing Act* a conviction is a step precedent to imposing one of the more serious penalties

---

5 However, as appears from the chronology in [2] above, he was granted bail the same day.

6 This is reflected in the magistrate's sentencing remarks for breach of bail in file 21308379, where his Honour made reference to the "two days he has already served" (Transcript 10/04/2013, 19.9).

7 [2011] NTSC 26 at [31]-[37].

in the range of available sentencing dispositions, the *Youth Justice Act* is different, in that it is possible to impose even the most serious available sentence without convicting an offender. Another aspect, which I did not mention in *Verity v SB*, is whether the significance of recording or not recording a conviction is appreciated or understood by youth offenders, particularly those younger teenagers who have not had to fill out an application for employment, an application for a foreign visa or any other form (with which an adult would be familiar) which would require the applicant to disclose past convictions.

[20] Riley CJ in *DD v Cahill* [8] made the following observations in relation to the limited deterrent effect of a conviction on a 12 year old boy, charged with three separate counts of unlawful use of a motor vehicle:

> "... The deterrent aspect of imposing a conviction is likely to be of little weight for an offender who is so young and not readily able to appreciate the significance of such a punishment. Whilst it may be argued that the recording of a conviction may be necessary in cases where a very young offender has committed quite serious offences or a crime of a particular character, it is difficult to see any public interest in so doing in the circumstances of the matter under consideration. Viewed from the perspective of the rehabilitation of the child there would seem to be no reason to record a conviction …".

[21] The observations of Riley CJ are relevant also to the appellant, who was 14 at the time of offending but who had and still has the particular characteristics referred to in [1] above. In the case of the appellant, I assess

[8] [2009] NTSC 62 at [17].

the specific deterrent effect of recording a conviction as very limited, if not nil.

[22] The appellant argues that the inconsistency in his Honour's decision that it was appropriate not to record convictions for the more serious offences, but at the same time recording convictions for matters which were relatively minor, demonstrates error. In my judgment that is not correct. The principle of parity impacted on his Honour's sentencing of the appellant for the more serious offences, and his Honour was persuaded (correctly in my view) that he should deal with the appellant in the same manner as another magistrate had dealt with a co-offender. Moreover, a conviction for breach of bail might be seen as far less damaging for future prospects than a conviction for aggravated unlawful entry and stealing. Nonetheless, I consider that a conviction for breach of bail was undesirable in that it would most probably raise questions in the mind of a third party as to the nature of the charges for which the appellant had been on bail at the time of breach.

[23] In my judgment, in relation to the breaches of bail, the combination of (1) low level offending, (2) his Honour's mistake as to there being no past consequences of the appellant's breaches and (3) the limited deterrent effect on the appellant of recording convictions, resulted in error on the part of the magistrate in recording convictions. He therefore erred in the exercise of his sentencing discretion.

Orders

[24] I propose making the following orders:

> In files 21304596 and 21304385, pursuant to s 177(2)(d) *Justices Act* read with s 144(3) *Youth Justice Act*, I quash conditions (i) and (ii) of the good behaviour orders made against the appellant by the Youth Justice Court on 10 April 2013, but otherwise affirm the orders made. I remit to the Youth Justice Court for further hearing the question as to the conditions, if any, to be imposed on the appellant under the good behaviour orders.
>
> In files 21308379 and 21309457, pursuant to s 177(2)(d) *Justices Act* read with s 144(3) *Youth Justice Act*, I quash the convictions recorded against the appellant but otherwise affirm the orders made.

[25] The matter should be listed to enable the parties to make submissions on final orders.
