*HB v Wood & Anor* [2014] NTSC 45

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| PARTIES: | HB<br><br>v<br><br>WOOD, Paul Jason<br><br>and<br><br>HB<br><br>v<br><br>BOTT, Steven |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | 21327952 and 21348839 |
| DELIVERED: | 8 October 2014 |
| HEARING DATE: | 8 August 2014 |
| JUDGMENT OF: | BARR J |
| APPEAL FROM: | YOUTH JUSTICE COURT |

**CATCHWORDS:**

CRIMINAL LAW– APPEAL– APPEAL AGAINST SENTENCE

Use of an offensive weapon – manifestly excessive sentence – relevant considerations - misconception of magistrate as to the offence –

magistrate failed to properly apply the principle that a sentence of detention is a last resort – failure by magistrate to consider appellant's youth and antecedents –conviction and sentence quashed.

CRIMINAL LAW – APPEAL AGAINST SENTENCE

Breach of bail conditions – manifestly excessive sentence – relevant considerations – youth – first offender – breached the principle that imprisonment is the last resort – conviction and sentence quashed.

*Bail Act 1982* (NT) s 37B
*Justices Act 1928* (NT) s 177(2)(c)
*Weapons Control Act 2001* (NT) s 8(1)
*Youth Justice Act 2005* (NT) s 4(c), s 81(6), s 83(1)(b), s 83(1)(f), s 83(1)(g), s 144(3)

*Verity v SB* [2011] NTSC 26 followed.

*Pascoe v Davis* [2010] NTSC 40; *R v Mills* [1998] 4 VR 235; *Ryan v Malagorski* [2012] NTSC 55, referred to.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | A Abayasekara |
| Respondent: | S Ozolins |

*Solicitors:*

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| Appellant: | Northern Territory Legal Aid Commission |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | B |
| Judgment ID Number: | Bar1412 |
| Number of pages: | 15 |

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

*HB v Wood & Anor* [2014] NTSC 45
No. 21327952 and 21348839

BETWEEN:

**HB**
Appellant

AND:

**PAUL JASON WOOD**
Respondent

AND:

**HB**

AND:

**STEVEN BOTT**

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 8 October 2014)

**Appeal against severity of sentence – file 21327952**

[1] Under s 8(1) *Weapons Control Act*, it is an offence to possess, carry or use an offensive weapon without lawful excuse. In the case of an individual, the maximum penalty is 200 penalty units or imprisonment for 12 months.

[2] On 12 March 2014, the appellant stood trial before the Youth Justice Court on a charge that, on 16 March 2013, without lawful excuse, he used an

offensive weapon, namely a pair of scissors (count 1). After a contested hearing, the appellant was found guilty. He was found not guilty of a second count, unlawfully assaulting a male victim, KM, with the alleged circumstances of aggravation that the victim suffered harm and that the victim was threatened with an offensive weapon, namely a pair of scissors. The two charges arose out of separate incidents which occurred on the same evening, but at different places and at a time interval of up to one hour.[1]

[3] At the time of offending, the appellant was 16 years and nine months old.[2]

[4] In his oral reasons for finding the appellant guilty of the offence charged as count 1, the learned magistrate stated the facts as found by him, as follows:

> On 16 March 2013 in the early night time – it was dark, it was early rather than late, that's as far as we get on the evidence – the defendant, youth HB, then 16 and three quarter years old, was out and about in his community with a pair of scissors either in his hand or on his person somewhere. The evidence is he had no pockets. The later evidence is that he pulled the scissors from under his shirt. I take it it would have been taped under the waistband of his shorts or trousers under the shirt at that time. ….
>
> … the definition of 'offensive weapon' in s 3 of the Act is 'an article'... 'made or adapted to do certain things' – that's not the evidence in this case – 'by which the person having it intends to cause damage to property or to cause injury or fear of injury to a person' and the onus of proving the rationale for carrying that weapon in the circumstances is on the defendant. No effort at all was made to discharge that onus and I am satisfied that the defendant is guilty on count 1. …

[1] Transcript 12/03/2014, p 30.2. The time period was "quite a few minutes" up to an hour.
[2] He turned 17 on 18 June 2013.

[5] The only possible 'use' identified by the magistrate in finding the appellant guilty on count 1 was that the appellant pulled the scissors from under his shirt. However, the magistrate's reference to "the later evidence" indicates that he may have been referring to the appellant's conduct relevant to count 2. Therefore, the precise 'use' identified by the magistrate in finding the appellant guilty on count 1 was unclear. The magistrate's reasoning suggests that he was more concerned with the fact that the appellant was carrying the scissors and with the method used by the appellant to conceal the scissors on his person.

[6] Later in the magistrate's oral reasons,[3] relevant to his finding the appellant not guilty of the offence charged as count 2, his Honour described the earlier incident (giving rise to count 1) as follows:

> On the evidence before me I am satisfied that the victim, KM, sought to fight the defendant on the night of 16 March 2013. He came up to the defendant outside the clinic [*the medical clinic in Wadeye*]. The defendant was not in any way doing anything at that moment which could justify the actions of KM. KM had formed the belief that the defendant had spoken to his wife by telephone. KM wanted to fight the defendant.
>
> Of real significance is the fact that at that time the defendant was aged 16 and three quarter years. KM told us today he is 26, so he was then 25 years. I was invited to look at any disparity in the size between the two men today. I am unhelped by that … I am satisfied that the disparity in age and stage is a very significant factor in this case.
>
> The victim threatened the defendant. He sought to engage him in a fist fight. The victim had no weapon. The defendant sought to avoid the fight, told him he didn't want a fight, told him that he had

[3] Transcript 12/03/2014, p 29.5 et seq.

> suffered a broken arm not long before that, it was still sore and he didn't want to fight. The defendant left. But before he left, he produced a pair of scissors and poked the victim in the stomach and said, "go away or I will stab you".
>
> The defendant is not charged with that offence, he's solely charged for that point of time with being armed with an offensive weapon, a charge of which I have already found him guilty.

[7] A fair reading of the above extracted passages suggests that the magistrate did not appreciate, at the time of giving his reasons for decision (extracted in [4] above), that the charge (count 1) on which he had found the appellant guilty was the charge of *using* an offensive weapon. The appellant was not charged with being in possession of (or carrying) an offensive weapon. His Honour's confusion continued during submissions on sentence by counsel for the appellant. When defence counsel, Ms Snell, started to make submissions in relation to count 1, the following exchange took place:[4]

> MS SNELL: … I note in relation to the weapons charge it was essentially a matter in which he poked scissors at the ---
>
> HIS HONOUR: No, that's not the charge. He wasn't charged with any assault for that.
>
> MS SNELL: No, your Honour, he wasn't.
>
> HIS HONOUR: It's the possession.
>
> MS SNELL: It was the possession of ---
>
> MS SWINDLEY: Use, I believe was the charge, use offensive weapon.
>
> MS SNELL: Thank you.

[4] Transcript 12/02/2014, p 38.2.

> HIS HONOUR: (inaudible) the particulars of the use are not that he poked a man in the stomach (inaudible) assault.
>
> MS SWINDLEY: Your Honour, I didn't particularise things. I simply said there were two separate incidents. Your Honour, it's (inaudible) on the facts before the court.[5]
>
> HIS HONOUR: (inaudible). What I need to hear from you, Ms Snell, is what he was doing with a pair of scissors in his possession (inaudible).

[8] It can thus be seen that the magistrate was mistaken as to the precise charge until the prosecutor, Ms Swindley, reminded his Honour that the charge was '*use* offensive weapon'.[6] His Honour nonetheless then engaged defence counsel in an inquiry as to the reason the accused had scissors in his possession. This led to defence counsel informing the magistrate, on the basis of her instructions, that the appellant had the scissors in his possession for the purpose of making a slingshot. Objectively, that explanation was difficult to believe, and it is clear from the transcript that the magistrate did not accept it. However, with respect, the magistrate's inquiry was somewhat misdirected. On the charge of *using* an offensive weapon, as distinct from a charge of possessing or carrying an offensive weapon, the more relevant

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5 The transcript attributes this statement to Ms Snell. However, that does not make sense. That statement "I didn't particularise things" makes it far more likely that the statement was made by the prosecutor, Ms Swindley, referring to her opening of the Crown case at p 4 of transcript. There, she made the following statement: "… the allegation in the prosecution case will be that the victim and the defendant came into contact with each other on two separate occasions. On the first occasion, the scissors were produced and that is the occasion upon which we rely for count 1 …". The prosecutor did not, in opening, specify the actual use alleged, beyond production of the scissors. However, evidence as to the actual use in the prosecution case was quite clear. The evidence of the alleged victim, KM, at T 6.9 was as follows: "What did he do with those pair of scissors when you first saw him? - - - Pointing at my – in my gut." Defence counsel met the Crown case and led evidence from the appellant at T 15.1 that he said to KM: "Go away, you want me to stab you with scissors or what?" Further at T 16.7, evidence to the effect that the appellant was poking KM in the stomach with the scissors, but that it was not hard poking.

6 Transcript 12/03/2014, p 38.5.

enquiry was the purpose for which the weapon was used, and the circumstances of its use. In calling for an explanation as to the appellant's possession of the scissors, the magistrate was pursuing a less relevant issue.

[9] I reproduce in full the magistrate's sentencing remarks for count 1,[7] with underlining and italics added by me:

> This morning I found HB guilty of <u>being armed with an offensive weapon</u>, namely a pair of scissors, and the circumstances – not being armed, of using – and the circumstances as we heard in the hearing matter that proceeded today which forms the factual substratum to his finding of guilt is that he used those scissors to threaten another person who was offering him violence. The explanation that's been proffered today by the youth through his solicitor that he had those scissors because he was going to make himself a slingshot is frankly not creditable.
>
> At the time, it was the early night time in Wadeye. It was dark. He was standing out in a public street in front of the clinic. It beggars the imagination as to precisely what way he proposed to use those scissors which is the gravamen of the offence today, it's the use in the circumstances as found, which illustrates precisely why s 8 of the Weapons Control Act exists in that form.
>
> The maximum penalty is 12 months' prison. The maximum penalty applies to possess, carry or use an offensive weapon. That maximum penalty does not apply to assaults with the weapon, to matters of that sort. Other charges exist for such matters. And therefore I am satisfied that within the overall range contemplated by this type of offence, HB's use of the weapon on this occasion was a significant example of that type of offending.
>
> There is a principle upheld frequently by our Supreme Court in relation to youth justice matters, firstly that commonly a conviction will not be recorded and second, that imprisonment is a last resort. These are not at the level of some immutable dogma, these are guiding principles in these matters. The imprisonment as a last resort is actually set out in a section of the Youth Justice Act. The issue about convictions to be recorded or not recorded is not set out in the

[7] Transcript 12/03/2014, p 41.4 et seq.

Youth Justice Act and arises as part of the overall approach of the courts taking youth justice principles into account.

In relation to being armed with an offensive weapon, I take into account the age of the youth at the time of the offending, 16 and three quarter years; his age at the time of sentence, 17 and three quarter years; the fact that he was out at night in a very public place in Wadeye armed with these scissors with an explanation which I do not accept and that he then used them in this fashion in my view make this a very serious offence. The fact that it happened with Wadeye with all the problems in Wadeye that we know of is a factor I take into account.

It may be that if the youth were more truthful in his explanation of why he had those scissors that night that I'd have more sympathy towards him if he simply said, 'I anticipated trouble; that's what happens when you go out and about in Wadeye and I was generally going to protect myself'.

While that is not an offence under s 8 of the Weapons Control Act, it would be a significant mitigating factor, but the youth has not chosen to offer an explanation of that type. Rather, I've been given an explanation which I've stated I do not accept. *That would have been an explanation in any event as I've said for the possession, not for the use as found.*

The use of the weapon in these circumstances is not a matter of self-defence because all the other factors which were relevant to count 1 had not then developed. At the time of the use of the scissors for the purposes of count 2, he had simply been approached in an aggressive fashion by another person without blows being struck, without any of the further developments being in place. The matter is serious.

I also take into account that the youth has been in detention for a lengthy period. I accept he's on detention for other matters. I believe that the issue of recording a conviction in this case – I've determined I will record a conviction on the basis of the seriousness of the offending and the impression I am left with that the youth has not himself made it plain that he understands the seriousness of the offending, and I take into account in part the explanation proffered to the court today for that offending which I have rejected.

The youth is convicted. Bearing in mind also that ordinarily a sentence of imprisonment is the last resort, I am determined that it is

> appropriate in the circumstances of this case. He is sentenced to one month's detention from 1 November 2013.

[10] Although the magistrate recognized in his remarks that he had to consider the appellant's "use [of the scissors] in the circumstances as found", the sentencing remarks indicate a significant ongoing emphasis by the magistrate on the fact that the appellant went armed with the scissors at night, and that the appellant had given a less than credible explanation for being in possession of the scissors. I refer to the passages underlined by me. His Honour appeared to overlook or not fully consider the circumstances in which the scissors were used and the purpose for which the scissors were used; he focused instead on the fact that the appellant was (1) out at night in a very public place in Wadeye; (2) armed with the scissors; (3) gave an explanation for possession which his Honour did not accept; and (4) used the scissors in the fashion found, all of which made the offence very serious, in the magistrate's view.

[11] The learned magistrate did correct himself on several occasions in relation to whether the offence was possession or use of the scissors, and at one stage had the insight to identify that the explanation (which he did not accept in any event) would only have been an explanation for possession, not for the use as found.[8] Given his Honour's insight that the explanation he rejected was in relation to possession - an offence not charged - it is hard to

[8] See the italicized sentence at the end of the eighth paragraph in the sentencing remarks extracted in [9].

understand why he considered it an aggravating circumstance in sentencing for the offence actually charged.

[12] Misconception as to the relevant offence for sentencing was not argued as a discrete ground of appeal, but in my judgment the magistrate's misconception distracted him from a proper consideration of important factors in sentencing the appellant on count 1.

[13] The learned magistrate had earlier made findings as to the circumstances in which the appellant used the scissors and the purpose for which he used the scissors.[9] Those findings were very much in the appellant's favour. I briefly summarise. KM, a 25-year-old man, threatened the appellant, who was aged 16 years and nine months, and attempted to engage the appellant in a fist fight. There was a "substantial disparity in age and stage" between KM and the appellant youth. The appellant had done nothing which justified KM seeking to engage him in a fight. The appellant tried to avoid fighting KM; he said that he did not want to fight and even explained that he had suffered a broken arm not long before, which was still sore. In that context, the defendant produced a pair of scissors, poked KM in the stomach, and said "go away or I will stab you". On all the evidence, the purpose for which the appellant used the scissors was to avoid a fight, to persuade KM to go away,

[9] See [6] above.

to warn him off.[10] The 'avoidance' purpose was not a defence to the charge, but it was a very relevant factor in mitigation.

[14] In sentencing the appellant for the use of an offensive weapon, the magistrate referred to the maximum penalty of 12 months imprisonment and stated that he was satisfied that "within the overall range contemplated by this type of offence, [the appellant's] use of the weapon on this occasion was a significant example of that type of offending". I do not disagree with that statement, but I note, with reference to the maximum penalty of 12 months imprisonment, that some weapons are 'more offensive' than others. For example, the appellant was not charged with the use of a commando knife with a 12-inch serrated edge blade; he was not charged with the use of an axe; he was not charged with the use of a baseball bat with protruding nail points. I do not underestimate or wish to understate the potential danger of sharp scissors, but in relation to count 1, the appellant's use of the scissors was only very limited.

[15] Significantly, the appellant had no prior criminal record.

[16] It is argued on appeal that the sentence of one month's detention was manifestly excessive, and that the magistrate failed properly to take into consideration the appellant's youth and antecedents. I agree.

[10] Transcript 12/03/2014, p 31.7.

[17] This Court has generally accepted the proposition stated in *R v Mills*[11] that the youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises.[12] In such a case, rehabilitation is usually far more important than general deterrence. In *Ryan v Malagorski,* Blokland J stated a consequential proposition, that in the sentencing of youthful offenders, particularly first time offenders, the benchmark for crimes justifying a custodial sentence is higher.

[18] In my judgment, a sentence of actual detention for a youthful first offender in the circumstances as found by the learned magistrate failed to take account of the prior threats and actions of KM directed at the appellant, the very limited use made of that weapon by the appellant, and the purpose for which the weapon was used.

[19] The magistrate failed to properly apply the principle that a sentence of detention is a last resort.[13] The sentence imposed was wrong in principle and manifestly excessive.

[20] I also consider that his Honour erred, essentially for the reasons explained by me in *Verity v SB*,[14] in imposing a conviction on the appellant, who was a youthful first offender.

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[11] [1998] 4 VR 235 at 241, per Batt JA.
[12] *Pascoe v Davis* [2010] NTSC 40 [22]; *Ryan v Malagorski* [2012] NTSC 55 [16].
[13] *Youth Justice Act*, s 4(c), s 81(6).
[14] [2011] NTSC 26 at [31] – [37].

[21] Pursuant to s 177(2)(c) *Justices Act* read with s 144(3) *Youth Justice Act*, I quash the conviction recorded against the appellant by the Youth Justice Court on 12 March 2014. Further, I quash the sentence of one month's detention imposed.

[22] In lieu of the sentence imposed, pursuant to s 83(1)(f) *Youth Justice Act*, without proceeding to conviction, I order that the youth be released on his giving security by his own recognisance in the sum of $100 that he will appear before the Youth Justice Court if called on to do so during the period of 12 months commencing this day, and that he will be of good behaviour for the said period of 12 months.

**Appeal against severity of sentence – file 21348839**

[23] The appellant has also appealed against a sentence of seven days' detention imposed for breach of the conditions of his bail.

[24] On 12 March 2014, the appellant pleaded guilty to the charge that on 28 October 2013 he engaged in conduct that resulted in a breach of his bail undertaking.[15]

[25] The agreed facts were brief.[16] On 23 October 2013 the appellant was granted police bail requiring him to attend court in Wadeye on 12 November 2013. One of his bail conditions required that he reside at an outstation and that he not enter Wadeye unless for medical emergency or to attend court. At

[15] Contrary to s 37B of the *Bail Act*.
[16] Transcript 12/03/2014, p 36.5.

6.40 am on 1 November 2013 the police found the appellant in Wadeye. They asked him why he failed to go to the outstation in accordance with his bail conditions and he replied, "I had no car". He offered no emergency reason for being in Wadeye, and was not seeking medical attention at the time.

[26] The facts were admitted and the offence was found proven.

[27] There was no contest that the appellant had not complied with the condition that he go to the nominated outstation; that is, his breach was an ongoing one from the time he had been granted bail to the time he was arrested by the police.

[28] Defence counsel informed the court that, from her reading of the file and her instructions, arrangements had been made for the appellant to be taken from Wadeye to the outstation. However, when he was flown to Wadeye, no-one was in a position to be able to take him to the outstation.[17] Counsel reminded the magistrate that the appellant had pleaded guilty at a very early opportunity, and that he was a first offender.

[29] In sentencing, the learned magistrate said that he regarded the breach as a serious offence.[18] The magistrate referred to the particular offending in respect of which bail had been granted, mentioning specifically a charge of unlawfully causing serious harm and a charge of being armed with an

[17] Transcript 12/03/2014, p 40.2.
[18] Transcript 12/03/2014, p 43.9.

offensive weapon. Those particular matters were not part of the facts read out by the prosecutor, but were within the knowledge of the magistrate.

[30] In his sentencing remarks, the magistrate said, in response to the explanation provided by defence counsel referred to in [27]:

> This is a youth who is able to act proactively and responsibly drive a motor vehicle in Darwin on 31 August but was too overcome by the helplessness of his position to get himself out to where he really had to be or to prevail upon his uncle or anybody else in his family. I'm satisfied that this was, if not a contempt of the worst sort, certainly a disregard by the youth of his obligations in all the circumstances here.

[31] The magistrate convicted the appellant and sentenced him to seven days detention, to be served concurrently with the other sentence of detention imposed.

[32] It is argued on appeal that this sentence also was manifestly excessive. I agree. The appellant was 17 years and four months old at the time he committed the offence, and was before the court as a first offender. His breach had the effect that he was taken into custody and hence suffered that significant consequence. He had been held accountable by the loss of his liberty. In my opinion the sentence of seven days detention breached the principle that detention is the last resort.[19]

[33] I quash the conviction and sentence imposed. Pursuant to s 83(1)(g) *Youth*

[19] *Youth Justice Act*, s 4(c), s 81(6).

*Justice Act*, without proceeding to conviction, I fine the youth $80.00, with a victims' levy of $50.00, a total of $130.00.

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