*Webb v Winzar* [2016] NTSC 32

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| PARTIES: | WEBB, Douglas<br><br>v<br><br>WINZAR, Kevin |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 22 of 2015 (21556215) |
| DELIVERED: | 15 JUNE 2016 |
| HEARING DATES: | 6 MAY 2016 |
| JUDGMENT OF: | BLOKLAND J |
| APPEAL FROM: | Local Court |

**CATCHWORDS:**

CRIMINAL LAW – Justices Appeal – appeal against sentence – manifestly excessive –appellant contended the learned sentencing Judge failed to take into account young age and limited antecedents – appellant contended imprisonment should be a sentence of last resort – facts of the offending and subjective circumstances fully appreciated by the learned sentencing Judge - no positive requirement on court to suspend a term of imprisonment- appropriate exercise of discretion – appeal dismissed

CRIMINAL LAW- Justices Appeal – appeal against sentence- denial of procedural fairness – failure by the learned sentencing Judge to provide an opportunity to the appellant to present evidence – a real possibility the assumption made by the learned sentencing Judge contributed to the

conclusion not to partially suspend the sentence- appeal allowed – case remitted to the Local Court for further hearing

*Criminal Code* (NT) ss 213(5), 241(1)
*Local Court Act* ss 84, 87
*Local Court (Criminal Procedure) Act* ss 176A, 177(2)(d), 177(2)(f)
*Sentencing Act* s 40

*Dinsdale v The Queen* (2000) 202 CLR 321; *Hanks v The Queen* [2011] VSCA 7; *Kioa v West* (1985) 159 CLR 550; *Noakes v The Queen* [2015] NTCCA 7; *R v ADJ* (2005) 153 A Crim R 324; *Whitehurst v The Queen* [2011] NTCCA 11, applied

*R v Zamagias* [2002] NSW CCA 17; *Ross v Toohey* [2006] NTSC 92; *Truong v The Queen* [2015] NTCCA 5; *Wayne v Cornford* [2013] NTSC 1, referred to

*Droullos, Metcalfe and Laver* (1994) 71 A Crim R 82; *Marika v Maley* (1998) 101 A Crim R 345; *Stephen v Lush & Ors* [2015] NTSC 55, distinguished

**REPRESENTATION:**

*Counsel:*

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| Appellant: | T Collins |
| Respondent: | M Brennan |

*Solicitors:*

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

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| Judgment category classification: | B |
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

*Webb v Winzar* [2016] NTSC 32
No. JA 22 of 2015 (21556215)

BETWEEN:

**DOUGLAS WEBB**
Appellant

AND:

**KEVIN WINZAR**
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 15 June 2016)

**Introduction**

[1] This is an appeal against a sentence passed by a Judge of the Local Court on 29 November 2015.[1]

[2] The appellant pleaded guilty to the following counts:

Count 1: Attempt to unlawfully enter a building, the Red Ochre Grill with intent to steal, at night time, contrary to s 213(5) of the *Criminal Code*; and

[1] At the time the sentence was passed, the Court below was constituted as the Court of Summary Jurisdiction. Since the appeal was filed, but prior to the hearing, the Court of Summary Jurisdiction and the old Local Court became the new Local Court: s 84 *Local Court Act*. Appeals to this Court generally follow the same principles and procedures as the repealed *Justices Act;* see Part III of the *Local Court (Criminal Procedure) Act*. Judgments and orders made by the Court of Summary Jurisdiction have ongoing effect and become judgments and orders of the new Local Court: s 87 *Local Court Act*.

Count 2: intentionally or recklessly caused damage to property, a window, belonging to Red Ochre Grill, contrary to s 241(1) of the *Criminal Code*.

[3] The appellant was sentenced to four months imprisonment for count one and fourteen days concurrent imprisonment for count two. Both sentences were to commence from 20 November 2015. Clearly there was significant overlap with respect to the offending represented in both charges.

[4] The appellant appeared in custody on the day of the plea proceedings. He had been found to be in breach of bail conditions that were set by police when he was initially arrested and released on bail. The plea proceedings were expedited and brought forward from 8 December 2015 to 20 November 2015. On the breach of bail offence (file 21557470) the appellant was convicted and fined $100.

[5] The appellant also admitted that he breached a good behaviour bond he had entered into on 16 April 2015. He was re-sentenced as a result of that breach. He was convicted and sentenced to fourteen days imprisonment, to be served concurrently with the fresh offending. Neither the penalty for the breach of bail nor the re-sentencing as a result of the breach of bond were the subject of the appeal.

**Ground One: Sentence Manifestly Excessive**

[6] To succeed on this ground, "the sentence must be unreasonable or plainly unjust".[2] The exercise of the sentencing discretion is not to be interfered with on the ground of manifest excess unless error in the exercise of the discretion is shown. The presumption is that there is no error. The appellate Court interferes only if it is shown that the sentencing judge was in error in acting on a wrong principle, in misunderstanding, or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive as to manifest such error. In relying on this ground it is incumbent upon an appellant to show that the sentence was clearly and obviously and not just arguably excessive.[3]

[7] Recently the Court of Criminal Appeal[4] applied the following statement of Bongiorno JA in *Hanks v The Queen:*[5]

> The term 'manifest excess' is usually used when a ground of appeal alleges that a sentence is so egregiously erroneous that the sentencing judge must have made a sentencing error although that error cannot be identified. To succeed on this ground the excess must be obvious, plain, apparent, easily perceived or understood or unmistakable. It must be so far outside the range of a reasonable discretionary judgment as to itself bespeak error.

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2 *R v ADJ* (2005) 153 A Crim R 324 at [51] per Batt J; see also *Dinsdale v The Queen* (2000) 202 CLR 321 at [325] per Gleeson CJ and Hayne J.
3 *Whitehurst v The Queen* [2011] NTCCA 11 at [12]; *Noakes v The Queen* [2015] NTCCA 7 at [23].
4 *Truong v The Queen* [2015] NTCCA 5 at [37].
5 [2011] VSCA 7 at [22].

[8] In my opinion, when the facts of the offending and the subjective features of the appellant as found by his Honour are fully appreciated, the sentence cannot be regarded as manifestly excessive. Given the appellant is a young offender, the sentence may well be regarded as in the higher range, however it is not plain that the sentence is excessive. Arguably, an actual term of imprisonment for the charge of attempt and the damage charge is a stern sentence for a young person, but not obviously excessive in the circumstances. The breach of a bond imposed six months before the current offending may well have been a factor relevant to the decision not to suspend some or all of the sentence.

[9] The facts involved the appellant who was 19 years old and three co-offenders. While intoxicated, they decided to unlawfully enter the Red Ochre Grill for the purpose of stealing money and alcohol. They walked past the premises to ensure there was no one inside the premises and that security personnel were not in the area. The co-offenders used their jumpers and a beanie to conceal their faces. The appellant did not. They all walked to the front of the premises. The three co-offenders stood by while the appellant kicked the glass at the front of the shop window twice. The force of the kick broke the hinges on the window forcing it open. The appellant attempted to force the window open further but the alarm sounded. All offenders fled the area. The damage caused to the window was valued at approximately $300. The appellant was arrested on 13 November 2015. He declined to participate in a formal record of interview.

[10] The appellant had been dealt with on 16 April 2015 for an offence of aggravated entry of a building and stealing. Aside from two drive unlicensed matters, one associated charge of driver provide false information, and breach of bail matters, at that time the appellant had no previous convictions for property matters. Two of the traffic offences including the provide false information had been dealt with in the Youth Justice Court. As indicated, the resentence for the breach of bond ordered on16 April 2015 is not the subject of appeal, but no doubt was a matter taken into account by his Honour in respect of the final disposition.

[11] In terms of personal circumstances, the sentencing Judge was told the appellant was 19 years old, residing at Hidden Valley Camp with his grandmother and that he was fairly well educated, as he had completed year 12 at Yirara College. His counsel submitted that during his school years he was occupied, engaged and was at school on a full time basis. It was emphasized that prior to the offending that took place in early February 2015, the subject of the bond, the appellant had not been involved in any sort of property offending.

[12] His Honour was told that after the appellant completed school he began looking for work and stayed in Alice Springs for that purpose. He worked at the Yeperenye School as an aide for a year two class. At that time it was submitted he was well occupied and away from becoming involved in trouble. Upon leaving that position for holidays he stayed at Harts Range,

his regional home community, before returning to Alice Springs in February 2015. It was in February 2015 that he offended and was placed on a bond.

[13] His counsel submitted the appellant was in a difficult position, as his only real prospects for employment were in Alice Springs, rather than his home community of Harts Range. He had been engaging in the work for the dole program through Tangentyere and was actively looking for employment. It was said that town had its temptations to engage in this type of offending with other young men. When at Harts Range he had less temptation but at Harts Range it was difficult for him to find meaningful work. His counsel described him as highly educated given he had completed year 12 as an accredited student, unlike many others who appear before the Court.

[14] On the occasion of the offending, the subject of the appeal, the Court was told the appellant had been living at Hidden Valley Camp when the co-offenders came to see him. They all went for a walk; the appellant had resisted getting involved at first but then agreed to.

[15] It was pointed out to his Honour that the breach of bail was a conditional breach. The appellant had been on a condition to reside at one house in Hidden Valley Camp and to keep a curfew. Outside of the curfew time, he was found in a different house belonging to his aunty. He had consumed alcoholic drinks while watching a movie at her house. He was still in Hidden Valley Camp. It was emphasised that the breach was not in respect of failing to attend Court.

[16] It was submitted in the Local Court, the appellant was still a young man who had prospects for the future and had for the first time spent a brief period in custody. It was said that this short period of custody had been a warning to him against engaging again in criminal offending. Counsel asked the Court to consider community work or a suspended sentence.

[17] It is clear from his Honour's reasons that the property offending in April of 2015 was a significant consideration in the decision to order a term of imprisonment, to be actually served. His Honour considered the offending serious, noting it was prevalent offending. He commented that there was not one licensed premises in Alice Springs that had not been the target of break-ins by young people. His Honour said that given the appellant had completed year 12 he would have understood the concepts of property, not taking what belongs to him and knowing that offences such as these would create damage for other persons. Clearly his Honour considered both specific and general deterrence to be significant aspects of the sentencing exercise. Any further opportunity for a Court order was rejected as the appellant had previously breached Court orders. His early plea and youthfulness were taken into account.

[18] On behalf of the appellant it is argued the sentence is manifestly excessive because at least some of the sentence should have been suspended. Reliance was placed on the principle that a sentence of actual imprisonment should be

a sentence of last resort.[6] Counsel also submitted that when a court first determines that a sentence of imprisonment is warranted, it must then determine the appropriate term of imprisonment before turning to a consideration of the manner in which the sentence is to be served. Reliance was placed on the approach taken by Kirby J in *Dinsdale v the Queen*.[7] It was argued the appellant's antecedents were not such that he should have been considered ineligible for a partially suspended sentence. This is particularly in light of his young age and that he has never been subject to imprisonment or had the opportunity of a supervision or community work order.

[19] Before this Court counsel for the respondent emphasised the discretionary nature of decision making. Further it was submitted that while s 40 of the *Sentencing Act* provides a Court with the option to suspend a term of imprisonment in whole or in part if it is desirable to do so in all of the circumstances, there is no positive requirement on a Court to do so. In other words, it was within the sentencing Judge's discretion to find that a suspended sentence was not appropriate in all the circumstances. This was particularly so given the appellant had breached a good behaviour bond that had been imposed for offending of a similar nature. His Honour made this clear, stating:

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[6] *Dinsdale v The Queen* (1999) 202 CLR 321; *R v Zamagias* [2002] NSW CCA 17 at [25]; *Ross v Toohey* [2006] NTSC 92 at [14].
[7] *Dinsdale v The Queen* (1999) 202 CLR 321.

> I also reject giving you another opportunity at a court order, because you've demonstrated clearly that you don't appreciate court orders.[8]

[20] As indicated at the outset, I reject this ground. I accept the respondent's approach to the matter. His Honour was not satisfied on the material before him that a partially suspended sentence or a community work order was warranted. Clearly there were multiple reasons to sentence in the manner his Honour ultimately did. It would be inappropriate to interfere with the exercise of the discretion on this basis on appeal, notwithstanding it may be regarded as a stern sentence. In rejecting this ground I have assumed the overall correctness of his Honour's approach without considering ground 2 or the material discussed in that context which may have altered the sentence.

**Ground 2: That the Sentencing Judge Denied the Appellant Procedural Fairness by Failing to Enable the Appellant to Call Evidence**

[21] During the course of submissions in the Local Court counsel for the appellant put the following matters concerning the appellant's attempts to find employment and relocating to Alice Springs from Harts Range for that purpose:

> Your Honour, Mr Webb was caught in a difficult position, certainly not as an excuse for his offending, your Honour, but by way of explanation, being that he is a person who- the only real prospects he has for looking for employment are here in Alice Springs. It is the most fruitful place for him to look for employment. He has been engaging in the work for the dole program through Tangentyere at Rand Street and can look for employment.

[8] Transcript of Proceedings, 8.

> However, town has its own issues, being that it offers the temptations of alcohol, and ultimately the temptations of engaging in criminal offending with other young men on his age, and some men somewhat younger and older. And whereas when he goes out bush he has less temptation to find himself in trouble, but it's certainly something that's very difficult for him to look for any sort of meaningful work. He's a very highly educated man.[9]

[22] In the sentencing remarks his Honour rejected the submission that the appellant has been looking for work stating:

> I don't accept the premise that you were idle in Alice Springs as the only place that you can get reasonable work, and therefore you stay in Alice Springs and you're subject to the pressures of other members of your family to drink and to break into premises. No evidence has been put before this court of the efforts that you've made to get a job. Is there any evidence of your registration at Centrelink, the numbers of jobs you've applied for, the references that you've got for those jobs? I don't see anything like that.
>
> So I infer you're in Alice Springs because it's convenient to be in Alice Springs because this is where you can do one thing that you can't do at Harts Range, drink.[10]

[23] Although during the course of submissions the sentencing Judge queried the appellant's education attainment, there is no indication at all in the proceedings until the sentencing remarks that his Honour did not accept, took issue with or required further evidence before accepting or acting on the appellant's submission about attempts to find employment. No issue was taken by the prosecution signalling that any of those matters were disputed. The submission on behalf of the appellant that had obvious implications for rehabilitation remained unchallenged.

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[9] Transcript of Proceedings, 5.
[10] Transcript of Proceedings, 8.

[24] On behalf of the respondent it was pointed out that this was not a case where the sentencing Judge gathered or relied on extraneous material not available to the appellant.[11] Counsel for the respondent submitted that all that was being argued was that the appellant was not given the opportunity to correct the Judge's conclusion that he was not in Alice Springs to seek meaningful employment and as a consequence was an unsuitable candidate for rehabilitation.

[25] It was argued this conclusion was open to his Honour given the breach of the orders already outlined. Counsel for the respondent argued the sentencing Judge's conclusion was consistent with the appellant's submissions concerning the issues of town, with the temptations of alcohol and offending with other young men.

[26] Reliance was placed on the nature of what is required by way of procedural fairness as summarised by Mason J in *Kioa v West:*[12]

> What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision- maker is acting.
>
> In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case (citations omitted).

[11] As occurred in e.g. *Marika v Manley* (1998) 101 A Crim R 345; *Droullos, Metcalfe and Laver* (1994) 71 A Crim R 82; *Stephen v Lush & Ors* (2015) 302 FLR 9.
[12] (1985) 159 CLR 550, 584-585.

[27] In the circumstances of this case, the respondent argued there was no need for further evidence to be produced about seeking employment. Such evidence, it was submitted, would not have taken the matter further. Regardless of the reasons, the appellant's offending demonstrated he had succumbed to the temptations of town. What was important was the link between the appellant's alcohol consumption, the breaches and the alcohol related offending. Further, it was submitted it was not correct to align his Honour's rejection of the appellant's reasons for being in Alice Springs with any conclusion about the appellant's prospects for rehabilitation. Ultimately it was submitted that if his Honour had indicated a rejection of the appellant's submission about seeking employment, it would not have made a difference to the sentencing outcome. I disagree with the respondent's conclusion on this point.

[28] In sentencing remarks of understandably short compass, his Honour appeared to rely very significantly on a lack of evidence about the appellant seeking employment in Alice Springs. For his Honour, this appears to have been important to the outcome of the sentencing process. I have come to the conclusion that given his Honour considered this to be important, an opportunity should have been given to the appellant to place relevant material before the Local Court.

[29] The governing principles with respect to sentencing proceedings are uncontroversial. When unchallenged material in relation to a mitigating factor is not to be accepted, the sentencing judge is required to inform the

defendant or their counsel of their provisional view in order to provide them with an opportunity to address the matter, usually by providing evidence.

[30] During the argument on appeal, I was told that evidence of the kind his Honour indicated he would have expected to be available could have been produced to the Local Court if the opportunity had been given.

[31] There is in my view, a real possibility that his Honour may have entertained a partially suspended sentence with or without conditions or community work if there was evidence before him about work and the appellant's prospects. It appeared from the sentencing remarks, that verification of the efforts to find employment was an important factor. Given the importance that this issue ultimately assumed in the remarks on sentence, I would not dismiss the appeal under s 177(2)(f) of the *Local Court (Criminal Procedure) Act.*[13] I am not confident the breach of procedural fairness identified could not have affected the outcome.

[32] Although on appeal I was advised the evidence was available, there was no application to adduce fresh evidence. Consequently there has been no argument about whether it would pass the tests as set out in s 176A of the *Local Court (Criminal Procedure) Act*.

[33] It was acknowledged that the appropriate resolution in the event that the appeal was allowed on this ground was to remit the matter to the Local

[13] A similar conclusion was reached by Kelly J in *Wayne v Cornford* [2013] NTSC 01. Compare *Stephen v Lush & Ors* [2015] NTSC 55 where it was held a breach of procedural fairness would not have affected a decision to restore a suspended sentence.

Court for further hearing to give the appellant the opportunity to produce evidence. I understand the appellant was granted bail pending appeal.

**Orders**

1. Ground 1 of the appeal is dismissed.

2. Ground 2 of the appeal is allowed.

3. The case is remitted to the Local Court for further hearing pursuant to s 177(2)(d) of the *Local Court (Criminal Procedure) Act*.

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