ON v Lyons [2016] NTSC 47

PARTIES:	**ON**
	v
	LYONS, Richard Mark
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 1 of 2016 (21522437), LCA 2 of 2016 (2163789), LCA 3 of 2016 (21612772), LCA 12 of 2016 (21610508) and LCA 13 of 2016 (21627983)
DELIVERED:	22 September 2016
HEARING DATES:	31 August 2016
JUDGMENT OF:	HILEY J
APPEAL FROM:	LOCAL COURT

CATCHWORDS:

CRIMINAL LAW – Sentencing – *Youth Justice Act* – significance of recording a conviction – recording convictions for young offenders.

DD v Cahill [2009] NTSC 62; *Ingram v Littman* [2009] NTSC 70; *Verity v SB* [2011] NTSC 26, referred to.

Criminal Code (NT) s 210, s 213, s 241.

Youth Justice Act 2005 (NT) s 4, s 51, s 81(2), s 121(6)(a)(ii), 121(7), Part 3.

REPRESENTATION:

Counsel:

Appellant:	D Bhutani
Respondent:	CW Roberts

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Director of Public Prosecutions

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

ON v Lyons [2016] NTSC 47
No. LCA 1 of 2016 (21522437), LCA 2 of 2016 (2163789), LCA 3 of 2016 (21612772), LCA 12 of 2016 (21610508) and LCA 13 of 2016 (21627983)

BETWEEN:

ON
Appellant

AND:

RICHARD MARK LYONS
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 22 September 2016)

Introduction

[1] These appeals concern:

(a) three convictions recorded by the Youth Justice Court (the **Court**) on 8 April 2016 for three property offences the appellant committed on 19 May 2015;

(b) two convictions also recorded on 8 April 2016 for breaches of bail on 12 March 2016 and 14 March 2016; and

(c) four convictions recorded on 24 June 2016 for another three property offences, committed on 20 February 2016, and a breach of bail on 10 June 2016.

[2] By notices of appeal dated 27 May 2016 and 18 July 2016, the appellant challenges the recording of those nine convictions. In short, the appellant contends that the Court erred in entering convictions in the circumstances, particularly where the offender was very young, had no or very limited prior criminal history and where the offending was not serious enough to warrant convictions being entered.

[3] The property offences in both cases comprised unlawful entry with intent to commit a crime contrary to s 213 of the *Criminal Code* (NT), intentionally or recklessly causing damage to property contrary to s 241, and stealing contrary to s 210.

[4] The offending on 19 May 2015 occurred when the appellant and four other juveniles between the ages of 12 and 15 unlawfully entered an unoccupied house in Tennant Creek shortly before 3 am, caused damage to property both in the course of gaining entry, and also inside, and stole a number of PlayStation games and DVDs. It was estimated that the damage would cost several hundred dollars to repair and that the value of the stolen property was $200.

[5] The offending on 20 February 2016 occurred when the appellant and two other juveniles, both aged about 12, unlawfully entered Rocky's Pizza and Pasta shop in Tennant Creek at about midnight by smashing the glass front door and consuming frozen soft drink and removing several two litre bottles of Coke.

[6] The appellant was born on 5 December 2002. Accordingly she was just under 12½ years of age when she committed the first three property offences and just 13 when she committed the second three at Rocky's Pizza and Pasta shop.

[7] In relation to the three offences committed on 19 May 2015 (file 21522437) the appellant was sent to youth diversion under Part 3 of the *Youth Justice Act 2005* (NT) (**YJA**). However before she completed that program she committed the further offences on 20 February 2016 (file 21610508). This resulted in her being brought back to court on 29 February and then 2 and 4 March 2016.

[8] On 4 March 2016 the Court dealt with the original offending (file 21522437). Without recording any convictions the Court imposed a Good Behaviour Order (GBO)[1] operative for six months in respect of counts 1 (aggravated enter dwelling with intent to commit an offence) and 3 (stealing), a Community Work Order (CWO) for 40 hours for count 2 (damage to property), plus victims levies.

[1] *Youth Justice Act 2005* (NT) ss 83(1)(f) and 91.

[9] The Court also dealt with, and found proven, three breaches of bail, respectively on 18 February (file 21609344), 25 February (file 21610455) and 26 February (21610646). The appellant had previously been found guilty of breaching bail on 27 June 2015. No convictions were entered for any of those breaches. She was sentenced to seven days detention which she had already served.

[10] The Court also gave her bail on file 21610508, to 23 May 2016, pending a further report from the Department of Correctional Services.

[11] However she breached her bail and her GBO by inhaling volatile substances on 12 March and 20 March and by failing to stay at BRADAAG from 14 March.

[12] On 8 April 2016 the Court revoked the GBO (on file 21522437) (under s 121(6)(a)(ii) YJA) because of those breaches. She was resentenced for counts 1 and 3 by the recording of convictions. His Honour said that this in itself would be "sufficient penalty" and he provided detailed explanations about the significance of a conviction.

[13] The Court also dealt with the two breaches of bail. In relation to the breach on 12 March 2016 (file 21612772) she was convicted and sentenced to two days detention backdated to 20 March 2016. In relation to the breach on 14 March 2016 (file 21613789) she was

convicted and sentenced to four days detention also backdated to 20 March 2016.

[14] On 24 June 2016 the Court dealt with the three property offences committed on 20 February 2016 (file 21610508). She was convicted of all three charges and sentenced to three months detention backdated to 15 June 2016 suspended forthwith with an operational period of 12 months on counts 1 (aggravated enter dwelling with intent to commit an offence) and 2 (damage to property), and to seven days detention backdated to 27 February 2016 for count 3 (stealing).

[15] She was also dealt with for breaching her bail on 10 June 2016 (file 21627983). She had been found sniffing Panadol and engaging in conduct that resulted in her being discharged from BushMob. She was convicted and sentenced to seven days detention backdated to 15 June 2016.

Cases concerning recording a conviction against a youth

[16] The appropriateness of convicting a young person, particularly one as young as the appellant in this matter, and particularly where that person is a first offender, has been discussed by this Court on a number of occasions including in *DD v Cahill*[2] and *Verity v SB* (***Verity***).[3]

[2] [2009] NTSC 62.
[3] [2011] NTSC 26.

[17] *DD v Cahill* concerned a 12-year-old boy who unlawfully used a motor vehicle, in company of older children, on three separate occasions. Per Riley J at [11] – [17]:

> [11] Sentencing occurred under the *Youth Justice Act* which provides a wide range of options for a court when a charge has been found proven against a youth. Those options may be exercised whether or not the court proceeds to conviction[4]. Section 4 of the Act sets out the general principles that must be taken into account in administering the Act. Those principles provide guidance to the court in determining an appropriate response to offending behaviour. A youth who commits an offence must be held accountable and encouraged to accept responsibility for his or her behaviour. The youth must be dealt with in a manner consistent with his or her age and maturity and in a way that allows him or her to be re-integrated into the community. There must be a balance between the needs of the youth and the rights of any victim and the interests of the community. Further, any decision affecting a youth should, so far as practicable, be made and implemented within the time frame appropriate to the youth's sense of time. The punishment imposed must be designed to give the youth an opportunity to develop in socially acceptable ways.
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> [12] The duration of the impact of the recording of a conviction against a young person is governed by the *Criminal Records (Spent Convictions) Act*. That Act does not apply to all convictions but, generally speaking, a conviction in the Youth Justice Court will become a spent conviction for the purposes of the Act after five years provided the offender has not, during that period, been convicted of an offence punishable by imprisonment or served any part of a sentence of imprisonment.[5] Where the court does not record a conviction the criminal record is a spent conviction immediately upon the person being discharged.[6] Where a record is a spent record the person to whom it

[4] *Youth Justice Act* s 83.
[5] *Criminal Records (Spent Convictions) Act* s 6.
[6] *Criminal Records (Spent Convictions) Act* s 7.

relates is not required to disclose to another person that spent record. A question concerning the person's convictions does not include a spent record. It is an offence for a person with access to public records to disclose a spent record or information relating to a spent record to a person without the consent of the person to whom the record relates.[7]

Dealing with very young offenders

[13] In relation to very young offenders, of whom the appellant is one, the interests of the community are best served by placing emphasis upon rehabilitation and the development of the young person as a law-abiding citizen. It has been held[8] that:

> "In relation to first offenders committing minor offences, the interests of the community are seldom met with a disposition which emphasises the deterrent aspects of sentencing and much greater emphasis is given to reform, particularly when the offender is very young or immature."

[14] The decision whether or not to impose a conviction on a young person requires careful consideration by a court. In relation to adult offenders there is some guidance to be found in the *Sentencing Act*. Section 8 of that Act requires a court, in deciding whether or not to record a conviction, to have regard to the circumstances of the case including the character, antecedents, age, health or mental condition of the offender; the extent to which the offence is of a trivial nature; and the extent to which the offence was committed under extenuating circumstances. Section 8 does not apply to the Youth Justice Court[9]. The *Youth Justice Act* itself does not provide any guidance as to the matters to be taken into account in determining whether or not to record a conviction. The decision involves an exercise of discretion. However the discretion must be exercised judicially and, in that process, all of the relevant

[7] *Criminal Records (Spent Convictions) Act* s 11 and s 12.
[8] *LA v Kennedy* [2007] NTSC 56 at [16] per Mildren J.
[9] See *Sentencing Act* (NT) s 4.

surrounding circumstances must be considered including factors of the kind identified in s 8 of the *Sentencing Act*.

[15] In addition, it is appropriate to consider the consequences of the imposition of a conviction upon the person concerned. The recording of a conviction has been described as "a formal and solemn act marking the court's and society's disapproval of the defendant's wrongdoing".[10] The recording of a conviction is in itself an element of punishment. In some cases, notably with adult offenders, it may encourage an offender to refrain from further offending and may act as a deterrent to others.[11] That is less likely to be a consideration in the case of a very young offender who may be expected to be less mature, less aware of the consequences of acts, subject to peer pressure and less responsible than an adult.[12]

[16] It is readily apparent that a conviction may impact upon the ability of a person to obtain employment. Many employers require applicants to complete a declaration regarding convictions as part of the employment process. Others who have an interest in convictions may include various licensing authorities, government departments and insurers.[13] A conviction may impact upon the ability of the person to travel to some countries. When sentencing an adult it is possible for there to be direct evidence of the consequences of recording a conviction. However, when dealing with a child as young as 12 it is difficult to identify whether, and if so in what manner, the recording of a conviction may impact upon the child. Nevertheless, the prospect of adverse consequences is real and the recording of a conviction remains for the child "a significant act of legal and social censure".[14]

[17] Further, 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

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[10] *McInerney* (1986) 42 SASR 111 at 124.
[11] *R v Brown, ex parte Attorney-General* [1994] 2 Qd R 182 at 194.
[12] South Australia, Children's Court Advisory Committee, Annual Report 1983 referred to in Fox and Freiberg, Sentencing (second edition) at page 827.
[13] *R v Briese, ex parte Attorney-General* [1998] 1 Qd R 487 at 491.
[14] Fox and Freiberg, Sentencing: State and Federal Law in Victoria (second edition) at [1.504].

> 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, indeed it would seem to be likely to be counterproductive.

[18] *Verity* concerned a young person who pleaded guilty to aggravated assault resulting in the victim sustaining two fractures to his jaw. The Court had declined to convict him, and the prosecutor appealed against this non-conviction.

[19] At [28] – [29] Barr J quoted and referred to what Riley J said in *DD* v *Cahill* at [14] – [16].

[20] Barr J continued, at [30] – [37]

> [30] There is a clear benefit to an offender if a court does not record a conviction. Moreover there is a risk of future injustice or disadvantage if a court does record a conviction. As the Queensland Court of Appeal said in *Briese*[15]:-
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> > "It is reasonable to think that this power [*the power not to convict*] has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation, and it may be thought to be a

[15] (1997) 92 A Crim R 75 at 79, per Thomas and White JJ.

> reasonable tool that has been given to the courts to avoid undue oppression."[16]

[31] In my opinion, the *Youth Justice Act* gives effect to the desirability of avoiding the social prejudice and potential oppression occasioned to young persons by the recording of a conviction. This is seen specifically in the extensive range of sentencing orders which the Youth Justice Court has power to make under the *Youth Justice Act* without recording a conviction.

[32] For example, not only may the Youth Justice Court dismiss a charge, discharge without penalty, conditionally release on a good behaviour bond, impose a fine and/or impose a community work order for up to 480 hours, but the Youth Justice Court may order a youth to serve a term of detention or imprisonment, even a term of detention or imprisonment which is not suspended. All these options are available to the Youth Justice Court whether or not it records a conviction.[17]

[33] In comparison, the options available to a court dealing with adult offenders under s 7 *Sentencing Act*, where the court does not record a conviction, are limited to dismissal of the charge, release of the offender, imposing a fine, and making a community work order. The options of imprisonment (suspended or otherwise) or a home detention order cannot be imposed without a conviction.

[34] In youth sentencing, therefore, a conviction is not a condition precedent to the imposition of even the most serious punishments. The power of the Youth Justice Court to punish, even severely, without recording a conviction, suggests that the Youth Justice Court may appropriately take into account quite separate and distinct considerations on the question of whether or not to record a conviction to such considerations as the seriousness of the offence.

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[16] cf *Wild v Balchin* [2009] NTSC 35, where Olsson AJ suggested that suppressing publication of an offender's name directly impacts on the issue of rehabilitation, but that recording convictions "does not necessarily have that effect".

[17] *Youth Justice Act* s 83.

[35] The *Youth Justice Act* enables the Court in the case of youth offenders, to an extent which would not be possible in the case of adult offenders, to reconcile, on the one hand, the principle of holding the offender accountable and imposing condign punishment and, on the other, the rehabilitation principle of enabling the offender to move on after being punished without a conviction to hinder full re-integration into the community.[18]

[36] In sentencing, therefore, the Youth Justice Court should consider in the facts of each case whether sentencing principles lead to the need to record a conviction, bearing in mind that recording a conviction falls nowhere expressly on the scale of sentencing options set out in s 83(1) *Youth Justice Act*. Rather than asking why a conviction should not be recorded, the Court might well ask itself why a conviction should be recorded. The offender's age, maturity, character and previous offending would always be relevant. The nature of the offence and the seriousness of the offence would both be relevant considerations.[19] It may also be relevant to consider the provisions of the *Criminal Records (Spent Convictions) Act* to assess the legal effect of a conviction or other sentencing order.[20] As Riley J said in *DD v Cahill*[21], all of the relevant surrounding circumstances must be considered.

[37] However, in exercising its sentencing discretion, the Court should be alive at all times to the differences between youth sentencing and adult sentencing with respect to the recording of convictions. The question always has to be asked whether a conviction, "a significant act of legal and social censure" and "a formal and solemn act marking the court's and society's disapproval of wrongdoing", is required in addition to the wide range of sentencing

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[18] See *Youth Justice Act* s 4 principles (a) and (f).
[19] See generally *Youth Justice Act* s 81(2).
[20] For example, s 7(3) *Criminal Records (Spent Convictions) Act* provides as follows: "A criminal record of a finding or order made under section 83 of the *Youth Justice Act*, not being an order made under subsection (1)(a) or (b) of that section, without the court proceeding to conviction, is a spent conviction immediately the period specified in the order expires if the person subject to it has by that time complied with all of its requirements or where, before that time, he or she has complied with all of its requirements and there is no continuing obligation to be met, on the completion of those requirements."
[21] [2009] NTSC 62; see par [28] above.

> options, some severe, which are available without conviction under the *Youth Justice Act*.

[21] Several of the factors identified in [14] of *DD v Cahill* are particularly relevant in the present matter. These include the appellant's poor and unfortunate background, the volatile substance abuse issues underlying her offending and, of course, the seriousness of the offending.

Convictions on 8 April 2016

[22] At the time when she committed the offences on file 21522437, 19 May 2015, she was a first offender. This was recognised by the penalties imposed on 4 March 2016, and by the non-recording of convictions for those offences and the three breaches of bail in February 2016.

[23] Prior to then, 4 March 2016, the appellant had also been charged with the further offending on 20 February 2016 (file 21610508), but bail was continued on those matters because reports were being sought concerning her progress with supervision, with BushMob and with her schooling. His Honour had known about those charges when he sentenced her on 4 March and declined to record convictions and imposed the GBO.

[24] Section 121(7) YJA requires the Court when determining how to deal with a youth under s 121(6), relevantly if revoking a GBO and resentencing the youth, to take into account the extent to which the

youth had complied with the order. When re-sentencing, the Court would also be required to take into account the general principles of youth justice set out in s 4 and the considerations set out in s 81(2) YJA.[22]

[25] The only things that happened between the time when the GBO was made (4 March) and 8 April 2016 were her breaches on 12 March and 14 March by sniffing volatile substances and failing to continue attending BRADAAG. These were the breaches that amounted to breaches of the (six month) GBO and warranted resentencing.

[26] I do not consider that the breaches on 12 March and 14 March provided sufficient reason to depart from the relevant principles concerning convicting juveniles. This further offending, albeit in breach of the GBO, was fairly minor in the scheme of things, and itself resulted in her spending seven days in detention. It did not involve offending similar to the initial offending or other substantial offending. Rather it involved breaches that followed her ongoing problems with sniffing of petrol and other substances.

[27] The Court also had the benefit of a report under s 51 of the YJA which contained positive information about the appellant and her rehabilitation. This included her willingness to attend the BushMob

[22] *Ingram v Littman* [2009] NTSC 70 at [8].

program and to accept treatment for outstanding medical issues such as her problems with volatile substance abuse.

[28] I consider that the imposition of convictions for the original offending was manifestly excessive.

[29] When he ordered the convictions his Honour said: "That hopefully should be sufficient penalty." He informed the appellant of the serious consequences of having convictions recorded against her name for offending as a 12-year-old.[23] As the authorities point out, these are indeed serious consequences. Hence the need for extreme caution before entering convictions in relation to a very young first offender.

[30] Similarly, I consider it was manifestly excessive for convictions to be recorded in relation to the breaches of bail, particularly where the appellant had already spent time in detention as direct consequences of those breaches and commensurate sentences of detention were imposed in addition to the entry of the convictions.

Convictions on 24 June 2016

[31] Three of the four convictions recorded on 24 June 2016 related to the appellant's further offending on 20 February 2016, the second occasion when the appellant had committed substantive offending. The offending was of a similar nature to that which she committed on 19

[23] Transcript 8 April 2016 p9.

May 2015. By this time she was almost 13¼ years old.

[32] When she committed those offences (on 20 February 2016) she had not been sentenced for her earlier offending (of 19 May 2015). In particular she would not have had the valuable experience of having a judge tell her about the seriousness of such offending, and she would not have been aware of the penalties and other consequences that could flow from such offending.

[33] As it was, she was sentenced to three months detention for that offending. This was more than adequate punishment for that offending. By then she had completed the 40 hours CWO previously ordered, thereby demonstrating some progress with her rehabilitation.

[34] Moreover, it may be that his Honour wrongly assumed that the appellant had previously been sentenced for the offending on 19 May 2015. Immediately after expressing the view that the 22 February 2016 offending required the sanction of a conviction his Honour said: "You committed this offending whilst under a good behaviour bond without conviction for similar offending."[24] That was incorrect – the GBO was not imposed until 4 March, that is after the 22 February 2016 offending.

[24] Transcript 24 June 2016 p12.

[35] His Honour's earlier comment to the effect that entering a conviction in relation to the further breach of bail on 10 June 2016 would not "be detrimental,"[25] also suggests that he may not have been considering the relevant principles when imposing these convictions. More relevantly, in light of my conclusions that convictions should not have been entered on 8 April 2016, or for the offending on 20 February 2016, the imposition of a conviction for this further breach of bail would have been detrimental.

[36] In relation to the conviction for breach of bail, I also repeat the reasons expressed above in relation to the earlier convictions.

Resentence

[37] I allow the appeals. The recording of convictions rendered the sentences manifestly excessive.

[38] With the exception of counts 1 and 3 on file 21522437, the Court did impose actual sentences in addition to entering convictions. In my opinion those sentences remain appropriate and will be the same on resentence.

[39] In relation to each of counts 1 and 3 on file 21522437, the appellant was ordered to pay victims levies of $50. I would have imposed community work orders and ordered them to be served concurrently

[25] Transcript 24 June 2016 p6.

with the community work order that was ordered in relation to count 2. However as the appellant has already performed that work there is no utility in me making such further orders. Accordingly I simply reinstate the orders concerning payment of the victims levies.
