CITATION: *Police v MK* [2007] NTMC 047

PARTIES: JASON ROTHE

v

MK

TITLE OF COURT: Youth Justice Court

JURISDICTION: Youth Justice Act

FILE NO(s): 20701454

DELIVERED ON: 31 July 2007 (Corrected Copy Republished 2 August 2007)

DELIVERED AT: Darwin

HEARING DATE(s): 17 April 2007, 4 May 2007

JUDGMENT OF: Jenny Blokland CM

CATCHWORDS:

SENTENCING – YOUTH – FINES - MANDATORY MINUMUM FINE – WHETHER APPLICABLE

Traffic Act (NT) s 34(1)
Youth Justice Act (NT) ss 3, 4, 83, 81, 71
Traffic Regulations (NT) *r 88*
Sentencing Act (NT) ss 4, 78BA, 78BB
Fines and Penalties (Recovery) Act (NT) s 88
Juvenile Justice Act (NT) s 53(c)

Braun v R; Ebatarinja v R (1997) 6 NTLR 94
Byder v Gokel (1998) 8 NTLR 91
MCT v McKinney & Ors [2006] NTCA 10

The Convention on the Rights of the Child (1989), Art 40,4

United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) (reproduced in Flynn, Human Rights in Australia, Butterworths at 192-194).

Pearce and Geddes "Statutory Interpretation in Australia" (6th ed) Butterworths at 255.

REPRESENTATION:

Counsel:

Informant:	Sgt Marinov
Defendant:	Mr McGorey

Solicitors:

Informant:	Summary Prosecutions (ODPP)
Defendant:	North Australian Aboriginal Justice Agency

Judgment category classification:	A
Judgment ID number:	[2007] NTMC 047
Number of paragraphs:	21

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20701454

[2007] NTMC 047

BETWEEN:

JASON ROTHE
Authorised Officer

AND:

MK
Defendant

REASONS FOR DECISION

(Delivered 31 July 2007)

Ms BLOKLAND CM:

Introduction

1. MK pleaded guilty in the *Youth Justice Court* to four counts, namely illegal use of a motor vehicle (contrary to s 218(1) *Criminal Code*); drive a motor vehicle without holding a license (contrary to s 32(1)(a)(i) *Traffic Act*); drive an unregistered vehicle (contrary to s 33(1)(a) *Traffic Act*); and drive a vehicle that did not have a current compensation contribution (contrary to s 34(1) *Traffic Act*). MK agreed to be bound by a bond that was imposed on count 1. I adjourned the sentencing on the remaining counts in the face of a submission that the mandatory minimum fine for an offence under s 34(1) *Traffic Act* (I will use the legal colloquial "drive uninsured"), did not apply to cases under the *Youth Justice Act*.

2. I was informed that MK had just turned 15; her father was recently deceased and there were various family problems, and that not long before her court appearance she had recommenced school at Nungalinya College. On

sentencing principles as they apply to youths, a fine of $550 on count 4 would be impossible to justify however, as it is the statutory minimum under the *Traffic Act* and if Parliament intended that it be imposed on youths, the Youth Justice Court is obliged to impose it. None of the other counts MK faced involved statutory minimums, even for the arguably more serious charge of unlawful use of a motor vehicle.

Relevant Statutes

3. The offence under question and its penalties are set out under s 34(1) *Traffic Act*:

> **34. Driving uninsured or improperly insured vehicle**
>
> (1) Subject to subsection (4), a person shall not drive or permit to be driven on a public street or public place a motor vehicle in respect of which a current compensation contribution has not been paid under Part V of the *Motor Vehicles Act.*
>
> Penalty: If the offender is a natural person – 100 penalty units.
>
> If the offender is a body corporate – 500 penalty units.
>
> In both cases, the minimum penalty is –
>
> (a) for a first offence – 5 penalty units; and
>
> (b) for a second or subsequent offence – 10 penalty units.

4. Converting from the current rate of penalty units, the minimum penalties are $550 for a first offence and $1100 for a second offence against the section. Of potential relevance also is s 34(4) *Traffic Act* allowing regulations to exempt certain classes of offences from the minimum penalty. I note r 88 *Traffic Regulations* has provided that the minimum penalty does not apply if the offence takes place in the same month and year as indicated in the registration label or the vehicle is a *box trailer*.

5. As with the previous *Juvenile Justice Act*, the *Sentencing Act* is expressly excluded from operation from the *Youth Justice Court:* (s 4 *Sentencing Act*).

After the commencement of the *Sentencing Act* in 1995 a number of issues concerning the inter-relationship of the *Sentencing Act* and the *Juvenile Justice Act* were considered in detail by the Court of Appeal and the Full Court: (*Braun v R; Ebatarinja v R* (1997) 6 NTLR 94; *Bynder v Gokel* (1998) 8 NTLR 91). One consequence of the non-application of the *Sentencing Act* to the Youth Justice Court is that mandatory minimum sentences that apply to second time violent offences or sexual offences (ss 78BA and 78BB *Sentencing Act),* are saved from their application to "youths" as defined by the *Youth Justice Act*. (Although I note with respect that a conviction in the *Youth Justice Court* can trigger the operation of the section if the defendant offends a second time as an adult). What distinguishes this matter is that it is the *Traffic Act* that sets the *minimum* fine, not the *Sentencing Act*. Sgt Marinov for the prosecution submitted the express exclusion of the *Sentencing Act* from the *Youth Justice Act* supported the argument that all penalties set by the *Traffic Act* including the minimum fines, (given they have not been expressly excluded), must apply to the *Youth Justice Court*.

6. Relevant parts of the *Youth Justice Act* include the Objects and Principles contained in ss 3 and 4:

> **3. Objects**
>
> The following are objects of this Act:
>
> (a) to specify the general principles of justice in respect of youth;
>
> (b) to provide for the administration of justice in respect of youth;
>
> (c) to provide how a youth who has committed, or is alleged to have committed, an offence is to be dealt with;
>
> (d) to ensure that a youth who has committed an offence is made aware of his or her obligations (and rights) under the law and of the consequences of contravening the law;
>
> (e) to ensure that a youth who has committed an offence is given appropriate treatment, punishment and rehabilitation;

(f) to continue in existence the Juvenile Court, established by the repealed Act, as the Youth Justice Court;

(g) to establish the Youth Justice Advisory Committee.

4. Principles

The following are general principles that must be taken into account in the administration of this Act:

(a) if a youth commits an offence, he or she must be held accountable and encouraged to accept responsibility for the behaviour;

(b) the youth should be dealt with in a way that acknowledges his or her needs and will provide him or her with the opportunity to develop in socially responsible ways;

(c) a youth should only be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time;

(d) a youth must be dealt with in the criminal law system in a manner consistent with his or her age and maturity and have the same rights and protection before the law as would an adult in similar circumstances;

(e) a youth should be made aware of his or her obligations under the law and of the consequences of contravening the law;

(f) a youth who commits an offence should be dealt with in a way that allows him or her to be re-integrated into the community;

(g) a balanced approach must be taken between the needs of the youth, the rights of any victim of the youth's offence and the interests of the community;

(h) family relationships between a youth and members of his or her family should, where appropriate, be preserved and strengthened;

(i) a youth should not be withdrawn unnecessarily from his or her family environment and there should be no unnecessary interruption of a youth's education or employment;

(j) a youth's sense of racial, ethnic or cultural identity should be acknowledged and he or she should have the opportunity to maintain it;

(k) a victim of an offence committed by a youth should be given the opportunity to participate in the process of dealing with the youth for the offence;

(l) a responsible adult in respect of a youth should be encouraged to fulfil his or her responsibility for the care and supervision of the youth;

(m) a decision affecting a youth should, as far as practicable, be made and implemented within a time frame appropriate to the youth's sense of time;

(n) punishment of a youth must be designed to give him or her an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways;

(o) if practicable, an Aboriginal youth should be dealt with in a way that involves the youth's community;

(p) programs and services established under this Act for youth should –

(i) be culturally appropriate; and

(ii) promote their health and self-respect; and

(iii) foster their sense of responsibility; and

(iv) encourage attitudes and the development of skills that will help them to develop their potential as members of society;

(q) unless the public interest requires otherwise, criminal proceedings should not be instituted or continued against a youth if there are alternative means of dealing with the matter;

(r) as far as practicable, proceedings in relation to youth offenders must be conducted separately from proceedings in relation to adult offenders.

7. The Sentencing Options are contained in s83 *Youth Justice Act*. The relevant option here is specifically s83(1)(g)

83. Orders Court may make

(1) If the Court finds a charge proven against a youth it may, whether or not it proceeds to conviction, do one or more of the following:

……………..

(g) fine the youth not more than the maximum penalty that may be imposed under the relevant law in relation to the offence (*see* Division 5);

8. Division 5 of the *Youth Justice Act* applies if the Court imposes a fine under s83(1)(g). That Division provides that the fine may be enforced under the *Fines and Penalties (Recovery) Act* unless the Court orders detention or imprisonment in default. The Court is empowered to order default detention or imprisonment if the fine is not paid within 28 days at the rate of one day for each amount prescribed for the purposes of s88 *Fines and Penalties (Recovery) Act*. The section empowers the *Youth Justice Court* to order accumulation of sentences or concurrency in circumstances of default of payment.

9. Of significance also are the Principles to be applies by the *Youth Justice Court:*

81. Principles and considerations to be applied to youth offenders

(1) When sentencing a youth who has been found guilty of an offence, the Court must have regard to –

(a) the principles applying generally for disposing of charges of offences, except as those principles are modified by this Act; and

(b) the general principles of youth justice set out in section 4.

(2) The Court must consider any information about the youth or the offence that may assist the Court to decide how to dispose of the matter, and in particular must consider –

(a) the nature and seriousness of the offence; and

(b) any history of offences previously committed by the youth; and

(c) the youth's cultural background; and

(d) the age and maturity of the youth; and

(e) any previous order in relation to an offence that still applies to the youth, and any further order that is liable to be

imposed if the youth has not complied with the terms of the previous order; and

(f) the extent to which any person was affected as a victim of the offence.

(3) The Court must dispose of the matter in a way that is in proportion to the seriousness of the offence.

(4) The Court must have regard to the fact that the rehabilitation of a youth may be facilitated by –

(a) the participation of the youth's family; and

(b) giving the youth opportunities to engage in educational programs and in employment,

but the absence of such participation or opportunities must not result in the youth being dealt with more severely for the offence.

(5) The Court must take into account whether the youth has taken steps to make amends with any of the victims of the offence.

(6) The Court must impose a sentence of detention or imprisonment on a youth only as a last resort, and a sentence of imprisonment only if there is no appropriate alternative.

10. In the context of fines or restitution, the Court is directed to satisfy itself *that the sentence is appropriate having regard to the financial circumstances of the youth.* Section 71 *Youth Justice Act* provides:

(2) If the Court is considering a sentence that involves a fine or restitution by financial compensation, the Court must satisfy itself (if necessary by requiring a report) that the sentence is appropriate having regard to the financial circumstances of the youth.

11. Relevant also to this discussion is s53(c) *Juvenile Justice Act* (repealed) providing that the Juvenile Justice Court may "fine the juvenile not more than the maximum penalty that may be imposed under the relevant law in relation to the offence of $500, whichever is the lesser amount". The *Youth Justice Act* does not include the $500 limit on fines.

Consideration of the Arguments

12. This is as a question of whether on the point of minimum fines, the *Traffic Act* and the *Youth Justice Act* are so inconsistent that one prevails over the other on this narrow point. I start from the proposition that every effort must be made to read the two Acts together. The only way it is possible to do that is to suggest that the sentencing principles that the *Youth Justice Court* is bound to impose, (including the obligation on the Court to satisfy itself that whenever it makes a financial penalty (s71(2) *Youth Justice Act*), the youth has the means to pay), cease to be of relevance to a minimum fine. The *Youth Justice Act* even directs the Court to obtain a report on this issue if necessary. Such a provision, as well as the other principles set out in the *Youth Justice Act* cannot sit with the mandatory minimum fine under the *Traffic Act*. Further, it must be remembered that youths as young as ten years of age are subject to criminal liability and therefore to the jurisdiction of the *Youth Justice Act*. If the *Youth Justice Court* is mandated to fix minimum fines on youths regardless of their ability to pay, the detention or imprisonment default provisions will apply to detain youths who by virtue of their age (less than 15 years) cannot be subject to detention for longer than prescribed by the Act for their age, or imprisonment if the default period is not served until after 15 years of age. (s 83(2) and (3) *Youth Justice Act*). The imposition of the mandatory minimum fine in question defeats the objects, purposes and principles of the *Youth Justice Act*. Its application could result in the *Youth Justice Court* making orders for imprisonment on youths who were too young under the legislation to be imprisoned at the time of the imposition of the fine.

13. I respect the argument put by Sgt Marinov that if it were intended to limit fines, including mandatory fines in the *Youth Justice Act*, parliament would have done so as it did in the *Juvenile Justice Act*, however, in my view the contrary is the case. The legislative intention manifest in the *Youth Justice Act* is that the Court should impose fines only in accordance with the *Youth*

Justice Act and has legislated a reasonably elaborate process to ensure that fines are within the capacity of a youth to pay. The *Youth Justice Act* does not exempt mandatory fines from the provision of s71(2) nor Division 5. Its approach is to ensure the *Youth Justice Court* satisfies itself of the capacity to pay. This obviously ensures against the danger that youths (especially those under 15) will not be detained for longer than the permissible statutory limits for failure to pay a fine.

14. I have reminded myself of the strong principles that govern the interpretation the Court has been asked to embark on. I note the discussion in Pearce and Geddes "Statutory Interpretation in Australia" (6th ed) at 255:

> **Test of inconsistency**
>
> The implied repeal of an earlier by a later statute can arise where those statutes are 'inconsistent'. The meaning of this expression in Australia tends to be greatly affected by the interpretation of s 109 of the Constitution which gives privacy to Commonwealth laws over inconsistent state laws. However, Fullagar J in *Bulter v Attorney General (Vic)* (1961) 106 CLR 268 at 276 indicated that this approach was not always apt to judge inconsistency of state laws. It was to be assumed that the Commonwealth intended its law to override state law on the same topic but the assumption was the reverse in the case of competing state laws. It was to be assumed that a state would not wish to contradict itself and therefore inconsistency would not be intended. Every attempt should therefore be made to reconcile the competing statutes. See the like view of Gummow and Hayne JJ in *Ferdinands v Commr for Public Employment* [2006] HCA 5 at [49].
>
> **Application of implied repeal approach**
>
> The application of the principles referred to in the preceding paragraphs in a particular case is at heart one of judgment by the court as to whether or not one provision can stand with another. If the maintenance of an earlier Act would defeat the purpose of the later, the earlier must give way. If inconvenience or incongruity would result from both Acts continuing in force, the pater must prevail. The cases must, therefore, be very much dependant on their facts.

15. I am compelled to conclude that the minimum penalty contained in s34(1) *Traffic Act* defeats the very purpose, objects and principles of sentencing contained in the *Youth Justice Act*. Whether the process of interpretation is correctly categorized as a reading down of the minimum penalty to the extent of the inconsistency with the *Youth Justice Act* or, whether this is to be regarded as reconciling the two Acts by virtue of giving the *Youth Justice Act* prevalence over the *Traffic Act* on this point in the *Youth Justice Court* is moot – the result is the same – the minimum fine cannot apply.

16. Sergeant Marinov also raises the potential problem that if the Court takes the view I have advanced, it throws into doubt the issue of mandatory disqualification from driving for youths. I keep an open mind on that issue but that is quite a different point. I note that the *Youth Justice Act* provides for disqualification and does not require the Court to go through a process similar to that required for fining, namely assessing capacity to pay. In other words, disqualification periods are not readily analogous to fines. Sgt Marinov also argued that a number of Acts (eg. some provisions of the *Bail Act*) expressly exclude the *Youth Justice Act* and Parliament would have done that in relation to the minimum fines if that were the intention. In my view, the principles discussed that are drawn from the *Youth Justice Act* effectively rule out the application of the minimum fine. In my view the situation under discussion has similarities to second time offenders under the *Domestic Violence Act* who are liable to a mandatory seven days imprisonment. That must surely be read subject to the *Youth Justice Act* as offenders may well be younger than the age for which they can be lawfully detained or imprisoned under the *Youth Justice Act*. (I am not here referring to the situation where a finding of conviction in the *Youth Justice Court* might trigger the second or subsequent strike as an adult).

17. As a party to the Convention on the Rights of the Child, Australia is obliged under Article 40, para 4, to promote "a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care;

education and vocational training programmes and other alternative to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence". Parliament is assumed not to have intended to legislate contrary to international law and I should adopt an interpretation consistent with international law. The *Youth Justice Act* requires the Court to dispose of matters proportionally (s81(3) *Youth Justice Act*). Mandatory fines tend to undermine the obligation to ensure proportionately. Further, this obligation to ensure proportionately in matters concerning youths is bolstered in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985) ("The Beijng Rules") (as reproduced in Flynn, Human Rights in Australia, Butterworths at 192-194). Principle 17.1 provides:

> The disposition of the competent authority shall be guided by the following principles; (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society; (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum; (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response; (d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

Adopting the interpretation advanced by the prosecution would result in an interpretation undermining widely accepted international law principles. If that were Parliament's intention, Parliament would need to be more specific. I note with respect the Court of Appeal's acknowledgment of those international instruments in *MCT v McKinney and Ors* [2006] NTCA 10.

18. On behalf of the defendant, Mr McGorey advanced a technical and interesting argument that although the *Traffic Act* sets the maximum and minimum fines, it is the *Sentencing Act* in relation to adults that empowers

the Court to impose the fine (ss7(a) and 5(2)), whereas with youths the *Youth Justice Act* empowers the *Youth Justice Court* to impose fines. Mr McGorey argues the difference is that when dealing with an adult s5(2) *Sentencing Act* directs the court to have regard to (a) the maximum <u>and any minimum penalty prescribed for the offence</u> (emphasis added). He argued the Court is obliged to impose a penalty that is no lower than the minimum. On the contrary, the power to fine under the *Youth Justice Act* (s83(1)(g) *Youth Justice Act*), does not refer to minimum penalties, only maximum penalties, hence the intention he argues is that the *Youth Justice Court* is not obliged to consider minimum penalties. By itself, that argument would not necessarily persuade me to the conclusion I have come to, but when those provisions are seen in the broader context of the *Youth Justice Act* and the other provisions relating to fines under the *Youth Justice Act*, those arguments add to the strength of the argument that Parliament did not intend that the *Youth Justice Court* be bound to impose the mandatory minimum fine.

19. There is one further matter that needs attention, namely the argument that a charge of "drive uninsured" is inevitably charged with other charges. To ensure the justice of the situation and to attempt to ensure that fines on impecunious youths are not excessive, a practice has developed, (and I have sentenced in this way myself), where the *Youth Justice Court* has imposed the mandatory fine on "drive uninsured" and then imposed either no further penalty or a nominal penalty on all other counts effectively, recognising that the minimum fine was excessive. That is not an exercise the *Youth Justice Court* should be compelled to engage in. It involves a distortion of principle. From my own researches concerning this matter, I cannot find any power of the *Youth Justice Court* to aggregate fines – so the assumed amelioration of a harsh consequence may not be legally possible as previously assumed by many who practice in the Youth Justice jurisdiction.

Orders

20. I will publish these reasons today by forwarding them to the parties representatives. Given I have already placed the defendant on a no conviction bond for one count, given her young age, her personal circumstances, the plea and cooperation and lack of previous matters and the fact she has no capacity to pay a fine, I will make findings of guilt on counts 2, 3 and 4 with no further penalty apart from three victims levies totalling $60.

21. I will list this matter on 3 August 2007 at 9.00 to make the formal orders so that any appeal time can run from then.

Dated this 31st day of July 2007.

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Jenny Blokland
CHIEF MAGISTRATE