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SUPREME COURT OF SOUTH AUSTRALIA

W v MARSH

Johnston J

15 September, 8 November 1983 — [1983] 35 SASR 333; [1983] 12 A Crim R 90

CRIMINAL LAW – ATTEMPTED BURGLARY – SENTENCING OFFENDER OF GOOD CHARACTER ON DRUNKEN DARE – WHETHER OFFENCE "TRIVIAL" "TRIFLING" – PROPRIETY OF REMAND IN CUSTODY FOR SENTENCE: *OFFENDERS PROBATION ACT* 1913 (SA) S4.

W., a music student and violinist of some note, attempted to break into a book exchange shop by forcing the rear door with a crowbar. He was intercepted by Police and said that his attempt to break in was in consequence of a bet in the nature of a dare made by a friend shortly before the attempt. W. also said that he intended to take property from the shop to prove that he had broken into it. It also appeared that W.'s actions were "alcoholicly influenced bravado". Subsequently W. pleaded guilty to the charge, the magistrate recorded a conviction, ordered a pre-sentence report and remanded W. in custody for 21 days. After representations were made the following day, the magistrate adjourned the matter for 4 weeks and released W. on bail. Upon the adjourned date, the magistrate sentenced W. to 3 months' imprisonment with hard labour, such sentence suspended upon a $10 recognizance to be of good behaviour for 3 years. On appeal against sentence—

HELD: Appeal allowed. Conviction and sentence set aside. W. discharged without conviction upon entering $100 recognizance to be of good behaviour for 12 months.
(1) The head sentence was manifestly excessive, having regard to the defendant's remorse, his lack of premeditation and professionalism and unlikelihood of re-offending.

(2) As the defendant had close family ties in his home State and there was no suggestion that he was not likely to answer bail, there was no justification in remanding him in custody for 21 days pending the pre-sentence report.

(3) Notwithstanding the unusual features of the case, the offence could not be regarded as trivial. *Williams v May* [1908] VicLawRp 85; [1908] VLR 605; [1908] 14 ALR 504; 30 ALT 89, referred to.

JOHNSTON J: *[After setting out the facts the antecedents and previous good character of the defendant, and the sentence and reasons of the Magistrate, His Honour continued]* … **[95]** It is unnecessary for me to consider what in all the circumstances would be an appropriate head sentence because in my view "it is expedient" in terms of **[96]** the *Offenders Probation Act* not to enter a conviction. I say only that if imprisonment was appropriate, which personally I think it was not, a matter of days only was called for. Section 4(1) of the *Offenders Probation Act* as amended is as follows:

> "4(1) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of the opinion that, having regard to—
> (a) the character, antecedents, age, health, or mental condition of the person charged, or
> (b) the trivial nature of the offence, or
> (c) the extenuating circumstances under which the offence was committed,
> it is expedient to exercise any of the powers conferred by this sub-section, the court may—
> I. without convicting the person charged dismiss the information or complaint;
> II. having convicted the said person discharge him without penalty;
> III. without convicting or having convicted the said person discharge him conditionally on his entering into a recognizance, with or without sureties—
> (i) to be of good behaviour, and
> (ii) to appear before a court of summary jurisdiction for conviction and sentence, or for sentence, if he fails, during the term of the recognizance, to observe any of its conditions."

In relation to *placitum* (a) it was asserted by Mr McNamara (for the appellant) and conceded, correctly in my view, by Mr Johnston that the appellant's character, antecedents and age were all such as to justify consideration as to whether it was expedient to use any of the powers enumerated in the sub-section; but Mr Johnston argued that the offence was not trivial and

that there were no extenuating circumstances under which the offence was committed. I agree with his submission as to extenuating circumstances; the question of triviality is more difficult partly from the fact that there is little discussion that I have been able to find in the cases as to the concept of triviality in this context. Mr McNamara argued that I should regard the offence as trivial. I observe that the power to dismiss granted by s75(2) above-mentioned of the *Justices Act* uses the word "trifling" as opposed to "trivial" in the section being considered. In *Vigers Bros v London County Council* [1919] 1 KB 56 a question arose as to whether there were grounds upon which a magistrate could find that an offence was "trivial" in nature within the meaning of s1 of the *Probation of Offenders Act* 1907. In their reasons for judgment both Darling and Avory JJ used "trivial" and "trifling" apparently interchangeably and Salter J agreed with their reasoning. Likewise, Poole J in *Simons v Campbell* [1924] SASR 1 uses the two words as synonymous (see 3). *The Shorter Oxford English Dictionary* (3rd ed) gives "trifling" as one of the meanings of "trivial". "Trifling" as used in s75(2) of the *Justices Act* was discussed by Richards J in *Dayman v Darwin* [1939] SASR 29 where he cited with approval a passage in the judgment of Kennedy J in *Barnard v Barnard* [1906] 1 KB 357 at 360:

> "Now it may be that an offence serious in its nature can be rendered trifling by the circumstances under which it was committed; on the other hand an offence may be in its nature trifling; for example, a merely technical or casual breach of a by-law, if there be no deliberate intention to commit a breach thereof, is in its nature, as well as in its circumstances, an offence which might be treated by justices as one of a trifling nature within the meaning of the enactment, which in my view would cover cases trifling in themselves as well as in those circumstances."

To the like effect but with additional comment is the *dictum* of Hood J in *Williams v May* [1908] VicLawRp 85; [1908] VLR 605 at 608; 14 ALR 504; 30 ALT 89:

> "... the Legislature has afforded no guide as to what is meant by an offence of a trifling nature, and it is probably impossible, and certainly unwise, for this Court to lay down any hard and fast rule. An offence may be of a trifling nature in itself, or when serious, the facts of the particular case may reduce the gravity of it, but in the latter event the mitigating circumstances ought to be very marked in order to bring this section into operation."

Richards J, after referring to these cases, suggested that it would be better to speak of the "offending" being trifling rather than the "offence". It is apparent from these and other authorities that the generally serious nature of the offence charged against the appellant does not absolutely prevent the matter from being regarded as trivial if the general circumstances permit it to be so regarded, even on the assumption that "trivial" in the *Offenders Probation Act* is equivalent to "trifling" in the *Justices Act* 1921 (SA). However, Mr McNamara contended that "trivial" in the former Act was to be more flexibly understood and for this proposition he placed reliance upon the decision of the Queensland Court of Criminal Appeal, *Blair-West* [1982] Qd R 597. In that case the court had to consider whether it was appropriate to exercise a power not to enter a conviction in cases where two young men had been guilty of shop lifting. The appellants relied on s657A of the *Criminal Code Act* 1899 (Qld) the terms of which are set out at 599 - 600 of the report and which is in many respects similar to s4(1) of the *Offenders Probation Act* 1913 (SA). In particular *placita* (a), (b) and (c) in the South Australian legislation appear in the Queensland section, the powers granted are similar and the operative words are "it is not expedient to inflict any punishment or ... the court may..." In the event the court treated the offences as trivial and set aside convictions which had been recorded by a stipendiary magistrate. In the course of his reasons Andrews SPJ (with whom Connolly and Thomas JJ agreed) said:

> "I think that one must not apply rigid tests in determining whether the nature of an offence is trivial. There would, I think be certain offences of such severity as never to fit the description 'trivial' in this context. On the other hand there are many offences serious enough in their nature which would nevertheless permit of the description 'trivial' as applied to the circumstances of a particular case ... It is relevant to what is intended to be encompassed by the word 'trivial' that under this section **[98]** an offender may be called to enter into a recognizance with or without sureties in a sum thought appropriate to be of good behaviour etc. during a period of three years. There can be little doubt that triviality to be considered in this context is quite flexible."

Mr McNamara relied upon the above passage, but in my opinion the reasoning does not apply to the South Australian Act. In the Queensland section the various *placita* are expressed conjunctively and all are to be had regard to; in our section the *placita* are expressed disjunctively.

In *Giles v Barnes* [1967] SASR 174 Bray CJ after noting this feature, gave as his view that it was "clearly contemplated by the legislature that a court might think it expedient to exercise those powers having regard only to those considerations, which are purely personal to the individual offender". And in *Cobiac v Liddy* [1969] HCA 26; [1969] 119 CLR 257; [1969] ALR 637; (1969) 43 ALJR 257 the High Court held that a South Australian magistrate had material which could justify the exercise of discretion not to convict where clearly the offence was not trivial, there was no suggestion of extenuating circumstances and the matters relied on to found the discretion were all within *placitum* (a).

Accordingly, since in South Australia there is not a necessity to have regard to triviality in order to found the exercise of the power, I do not think one can base the same argument as was used by the Queensland Court of Criminal Appeal upon the existence of the powers relating to recognizance for lengthy periods. Although I reject Mr McNamara's reliance upon the Queensland decision it does not follow that there is not some substance in his general argument. "Trivial" is used in a number of sub-sections of s4 of the *Offenders Probation Act* and it appears to me that there may be an argument that it can be interpreted with some flexibility. It is to be borne in mind that the *Justices Act* 1921 (SA) provision related exclusively to matters that can be dealt with under that Act whereas the *Offenders Probation Act* provisions, in part at least, apply over the whole spectrum of criminal behaviour except where a fixed penalty is prescribed by statute. In this case the appellant took a crowbar to the door of the shop, damaged the shop door to the extent of $75 and would probably have entered if he had not been interrupted. Despite the unusual features I am inclined to the view that this offence should not be regarded as trivial.

Accordingly, I approach the matter from the point of view that the offence is not trivial, there are no extenuating circumstances but the matters personal to the appellant are of a very compelling nature. *(His Honour then gave reasons for not recording a conviction and said):* **[102]** Finally, I express the point of view that there was no justification for the order made by the learned special magistrate on the first day of hearing that the appellant be remanded in custody for a period of three weeks pending receipt of the pre-sentence report. The subsequent events demonstrate that, upon the magistrate's own reasoning and sentence, the three weeks in custody would not have been in accordance with the justice of the case. On the material then before the magistrate the appellant had close ties in South Australia and there was no suggestion whatever that he was likely not to answer bail.
