

Case and Comment

Editor's Note: On the eve of the retirement of the Territory's longest serving magistrate, Alasdair McGregor SM, Mark Hunter presents this special Case Note.

POLICE v ANTHONY JAMES SULLIVAN

Darwin Court of Summary Jurisdiction (McGregor SM) -
File No. 20001963

7 November 2000

The defendant pleaded guilty to several dishonesty offences, including the theft in Darwin on 30 December 1999 of one ladder and five rolls of electrical tape.

This crime was the defendant's third "property offence" for the purpose of mandatory sentencing legislation (Sentencing Act), which was last year partially repealed by the Martin Labor Government. This legislation removed from Mr McGregor SM any sentencing discretion, and required His Worship to impose for this offence a term of imprisonment of not less than twelve months.

In the course of submissions on behalf of the defendant, Mr Delaney (NAALAS) stated that mandatory sentencing had "corrupted" the sentencing process. His Worship opined in reply that although the use of the word corrupt was unfortunate, it was true that the sentencing process in respect of property offences had been corrupted by the Legislature's removal of sentencing discretion - *in the sense that a worm might corrupt a ship*.

Mr McGregor SM then proceeded to impose the mandatory one year prison sentence dictated by the Act. The Country Liberal Party government had since early 1997 required Territory magistrates to impose mandatory prison sentences for a variety of crimes.

COMMENTARY

The twentieth century was littered with illustrations of judicial officers who, in the course of enforcing manifestly unjust laws, displayed silent obedience to the authority of the day. South Africa and Nazi Germany immediately spring to mind.

For his public declaration against injustice, Mr McGregor SM was in the national media vilified by (then) Attorney-General and Chief Minister, Denis Burke.

In an unprecedented step, Mr Burke on 8 November 2000 urged Territory judicial officers who did not have "...confidence in the system in the Northern Territory" to resign. "There are many more who are willing to take their place...and (who) would fill a worthwhile role", Mr Burke declared.

The above character trait, highlighted in cases such as *P v Sullivan*, is matched by compassion and the considerable legal acumen which His Worship demonstrates on the Bench.

Mr McGregor SM has announced his imminent retirement. His Worship will have served the Territory as a magistrate for 26 years. Contrary to the implication contained in Mr Burke's insulting remarks, the loss to the Territory's justice system upon Mr McGregor's departure will be of considerable magnitude.

In 1999, the Commonwealth Attorney-General, Daryl Williams, criticised four judges of the Supreme Court of New South Wales for publicly stating their opposition to mandatory sentencing.

It seems that Messrs Burke and Williams have little regard for Principle 8 of the UN Basic Principles on the Independence of the Judiciary, which reaffirms that judges, like everyone else, are entitled to the freedoms of expression and belief.

Mandatory sentencing is unjust. It perverts the sentencing process and the criminal justice system.

The Chief Justice of New South Wales,



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the Hon JJ Spigelman, in June 1999 addressed staff of the Office of the DPP (NSW) in the following terms:

"The continued existence of sentencing discretion is an essential component of the fairness of our criminal justice system. Unless judges are able to mould the sentence to the circumstances of the individual case then, irrespective of how much legislative forethought has gone into the determination of a particular regime, there will always be the prospect of injustice. No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice."

In his book *The First Circle*, Alexander Solzhenitsyn wrote:

"What is the most precious thing in the world? It seems to be the consciousness of not participating in injustice. Injustice is stronger than you are, it always was and it always will be; but let it not be committed through you."

Mandatory sentencing persists in the Northern Territory Supreme Court and in the Court of Summary Jurisdiction.

(The resource for this commentary was a speech by the Hon. Justice James Wood - "Matters of Principle - A Reflection on the Judicial Conscience" (1999) - at www.lawlink.nsw.gov.au/sc/sc.nsf/pages/sp_141199.)