Daly v Marshall [2004] NTSC 43

PARTIES:	STEVEN SHANE DALY
	v
	ADRIAN MARSHALL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 11/04 (20209370)
DELIVERED:	3 September 2004
HEARING DATES:	20 August 2004
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Appellant:	N Miles
Respondent:	M Hunter

Solicitors:

Appellant:	Katherine Regional Aboriginal Legal Aid
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Daly v Marshall [2004] NTSC 43
No. JA 11/04 (20209370

BETWEEN:

STEVEN SHANE DALY
Appellant

AND:

ADRIAN MARSHALL
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 3 September 2004)

[1] This is an appeal from a sentence imposed on the appellant in the Court of Summary Jurisdiction on 20 February 2004. On that date, the learned stipendiary magistrate fully restored a suspended sentence of six months imprisonment which, by virtue of s 59 of the Sentencing Act, was not concurrent with a sentence of imprisonment imposed in the Supreme Court. On 17 October 2003, the appellant was convicted in the Supreme Court following a plea of guilty to an offence of attempted arson. The appellant was convicted and sentenced to two years and three months imprisonment with a non parole period of 14 months, backdated to 13 June 2003.

[2] The appellant does not complain that it was unjust to fully restore the six months suspended sentence. The essence of the appeal is that on the submission of Ms Miles, counsel for the appellant, the learned stipendiary magistrate wrongly concluded that he could not make the restored part of the sentence of six months imprisonment wholly or partly concurrent with the 14 months non parole period of the sentence imposed in the Supreme Court on 17 October 2003. It is the submission by counsel for the appellant that the learned stipendiary magistrate, having concluded that pursuant to s 59 of the Sentencing Act the sentence could not be concurrent, failed to turn his mind to the provisions of s 43(6) and (7) of the Sentencing Act and consider the reasons which would justify making the restored sentence wholly or partly concurrent with the non parole period the appellant was serving for attempted arson.

[3] The relevant provisions of the Sentencing Act are s 43(6), s 43(7) and s 59:

> "43. **Breach of order suspending sentence**
>
> ....
>
> (6) Where a court orders an offender to serve a term of imprisonment that had been held in suspense, the term shall, unless the court otherwise orders, be served –
>
> (a) immediately; and
>
> (b) concurrently with any other term of imprisonment previously imposed on the offender by that or any other court.
>
> (7) A court shall make an order under subsection (5)(c) unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence and, if it is of that opinion, the court shall state its reasons.

59. **Order of service of sentences of imprisonment**

(1) Where an offender has been sentenced to several terms of imprisonment in respect of any of which a non-parole period was fixed, the offender shall serve –

(a) the term or terms in respect of which a non-parole period was not fixed;

(b) the non-parole period; and

(c) unless and until released on parole, the balance of the term or terms after the end of the non-parole period,

in that order.

(2) Where, during the service of a sentence of imprisonment, a further sentence of imprisonment is imposed, service of the first-mentioned sentence shall, if necessary, be suspended in order that the sentences may be served in the order referred to in subsection (1)."

[4] The relevant background to this matter is contained in the written submission of Ms Miles, counsel for the appellant, as follows:

"On 31 July 2002 at Katherine Court of Summary Jurisdiction the Appellant entered pleas of guilty to the following offences –

20207766:	Aggravated assault	s.188(2) of the Criminal Code
20209370:	Aggravated assault	s.188(2) of the Criminal Code
	Fail to comply with Domestic Violence Orders.	Domestic Violence Act

The Appellant was sentenced by his Worship Mr Birch SM to be imprisoned for the periods shown opposite below –

20207766:	aggravated assault	3 months commencing 19 June 2002
20209370:	aggravated assault	6 months count 1 & 2 on file 20209370 are to be served concurrently with each other but cumulatively upon sentence imposed on 20207766

fail to comply with restraining order	1 month

It was further ordered that the Appellant be released after serving 3 months, and the balance of the period of imprisonment be suspended pursuant to s. 40(6) of the Sentencing Act for a period of 14 months from the making of the order in which time the Appellant not commit another offence punishable by imprisonment so as to avoid being dealt with under s. 43 of the Sentencing Act.

Conditions –

1. Supervision by a delegate of the Director of Corrections Services; and

2. As soon as practicable following release, take part in CAAPS or other such alcohol rehabilitation programme and complete that programme.

On 2 January 2003 the Appellant committed a further offence, namely –

Unlawfully set fire to clothing that was so situated that a building, namely, house 4, Yarralin Community was likely to catch fire from it. s.240(b) of the Criminal Code.

A plea of guilty was indicated at an early stage. Justice Bailey convicted the Appellant in the Darwin Supreme Court and imposed a sentence of imprisonment for this offence on 17 October 2003 of 2 years and 3 months with a non-parole period of 14 months.

On 20 February 2004 at the Darwin Court of Summary Jurisdiction the appellant admitted failure to comply with the order suspending imprisonment on the basis that a further offence was committed. Pursuant to s.43 of the Sentencing Act, his Worship Mr Trigg SM restored the whole of the sentence held in suspense on file 20209370 from 20 February 2004.

On 10 March 2004 the appellant filed a Notice of Appeal against the order restoring the term of imprisonment held in suspense pursuant to s.163 Justices Act."

[5] The grounds of appeal are as follows:

"[1] That the learned Magistrate erred in law in that the sentence imposed was manifestly excessive in all of the circumstances of the case of the Appellant.

> [2] That the learned Magistrate erred in law in that he had not considered, or given insufficient weight to, the totality of the sentence imposed.
>
> [3] That the learned Magistrate erred in law in that he had not considered, or given insufficient weight to s.43(7) of the Sentencing Act.
>
> [4] That the learned Magistrate erred in considering himself without the discretion to restore the sentence such that it could be served concurrently with the non-parole period imposed by Bailey J."

[6] I will deal with these grounds in reverse order, being the order in which they were argued by counsel for the appellant.

Ground 4: That the learned magistrate erred in considering himself without the discretion to restore the sentence such that it could be served concurrently with the non-parole period imposed by Bailey J.

[7] I agree that on reading the transcript of the proceedings before the learned stipendiary magistrate his Worship was intending to fully restore the six month suspended sentence and proceed under s 59 of the Sentencing Act. I do not agree with the submission made by Ms Miles that the learned stipendiary magistrate concluded he had no alternative other than to proceed under s 59 of the Sentencing Act and consequently shut his mind to reasons for exercising his powers under s 43(6) and s 43(7) of the Sentencing Act.

[8] At page 3 of the transcript on 20 February 2004, the prosecutor stated that he would not be asking anything more than that the restored sentence of six months be concurrent with the sentence imposed by the Supreme Court. The learned stipendiary magistrate indicated he was not in favour of concurrency and stated that the appellant had been given the chance not to serve this six

months imprisonment but had committed another offence. His Worship stated "I don't see why he shouldn't serve some of it". The police prosecutor then submitted that if this occurred it would be necessary to set a new non parole period. The court was then addressed by Mr Johnson who appeared in the Court of Summary Jurisdiction proceedings as counsel for the appellant. Mr Johnson detailed matters in mitigation that he asked the learned stipendiary magistrate to take into account. Mr Johnson then (tp 5) made reference to s 43 of the Sentencing Act and submitted that to fully impose or restore the suspended sentence would not be just.

[9] His Worship then queried the position with s 59 of the Sentencing Act. His Worship then recited the provisions of s 59 of the Sentencing Act and stated "As soon as I restore this, it suspends the service. He's a – it can't be concurrent by law."

[10] This is a correct statement of the position under s 59 of the Sentencing Act. I do not take this to mean that therefore the learned stipendiary magistrate did not consider any other alternatives under the Sentencing Act.

[11] Immediately after he made that statement Mr Johnson made further submissions relating to the options under s 43 in particular s 43(7). The learned stipendiary magistrate noted that if he were to proceed under those provisions then he would have to give reasons. He then asked counsel for the appellant "what do you say are the reasons which indicate that it would

be unjust to restore the sentence?" Mr Johnson then further addressed the court as to the reasons.

[12] I agree with the submission made by Mr Hunter, counsel on behalf of the respondent, that the learned stipendiary magistrate did consider the interaction of s 43 and s 59 of the Sentencing Act and the question of restoring suspended sentences concurrently with a sentence already being served. I consider on a reading of the transcript that the learned stipendiary magistrate made a deliberate decision to proceed under s 59 of the Sentencing Act because he considered that was the appropriate way to proceed to sentence the offender, after he had heard all the submissions. I do not agree with the interpretation urged on the Court by counsel for the appellant that at an early stage of the plea the learned stipendiary magistrate made a decision to proceed pursuant to s 59 of the Sentencing Act and consequently excluded from his mind the options available to him under s 43 of the Sentencing Act.

Ground 3: That the learned magistrate erred in law in that he had not considered, or given insufficient weight to, s 43(7) of the Sentencing Act.

[13] The normal consequence of a breach of suspended sentence will be its restoration. See *Marston v R* (1993) 60 SASR 320 at 322 and *R v Buckman* (1988) 47 SASR 303 at 304.

[14] In the Court of Appeal decision of *Roper v Dore* [2000] NTCA 2 at par 23, Angel, Mildren and Riley JJ stated as follows:

> "… Whilst it may not have been unjust to impose a period of imprisonment upon the appellant in order to maintain the integrity of suspended sentences the reimposition of a period of 18 months imprisonment was disproportionate to what was required in the circumstances of this matter.

[15] It is the submission on behalf of the appellant that in deciding to fully restore the suspended sentence, in such a way as to ensure that the term is served consecutively with the sentence imposed by the Supreme Court, the magistrate failed to turn his mind to all the circumstances which had arisen since the suspended sentence was imposed.

[16] The circumstances referred to by counsel for the appellant are as follows:

- "The nature of the breaching offence and its dissimilarity with the original offence.
- The Honourable Bailey J had handed down sentence for the 'breach offence' and was aware that the Appellant was, at the time of the commission of the crime, subject to conditional liberty.
- The circumstances that led to the offending behaviour.
- The fact that the Appellant had otherwise complied with the order.
- The Appellant's efforts at rehabilitation.
- The lengthy and unexplained delay between the Supreme Court imposing sentence and 'breach proceedings' – approximately 4 months."

[17] I do not accept that the breaching offence was so dissimilar to the original offences. The partially suspended sentences were imposed in respect of two offences of assault upon the appellant's wife and the breach of a Domestic Violence Order whilst he was under the influence of alcohol. The offence of attempted arson, also while under the influence of alcohol, was again

directed at his wife when he became angry with her. It was in that sense an act of violence. The act of attempted arson was a more serious offence than the two previous offences for assault. See also *Wilson v Taylor & Trenerry* (1997) 113 NTR 1.

[18] In his reasons for sentence for this offence, Bailey J noted that the value of the damage to the house was $96000 on the Yarralin Community. Bailey J had the benefit of a psychological assessment and a presentence report. His Honour said this in the course of his reasons for sentence in *The Queen v Steven Shane Daly* SCC 20300147 delivered 17 October 2003:

> "The prisoner's drinking has escalated to the point where it has impacted upon his health and led to anti-social behaviour. The author of the presentence report considers that having regard to the prisoner's criminal record the risk of his re-offending is escalating."

[19] Bailey J may well have been aware from the record of prior convictions that was placed before him as an exhibit that at the time of the commission of the offence the appellant was under the terms of a suspended gaol sentence. His Honour did not allude to this fact. There was probably no point in his doing so because he would have been well aware that any application for breach of a suspended sentence would have to be dealt with in the Magistrates Court.

[20] Counsel for the appellant submits that the circumstances that led to the offending behaviour should have been taken into account. From a reading of the reasons for sentence, Bailey J found the appellant was affected by alcohol, angry with his wife and in this drunken and irrational state set fire

to his wife's clothes as a form of revenge. As a consequence of this act, the house was completely destroyed by fire. In the course of his reasons for sentence, his Honour states as follows:

> "The fact that the prisoner was affected by alcohol when he offended provides no excuse whatsoever. It may help to explain the prisoner's act of criminal stupidity but it does not excuse it or mitigate it. No-one forced the prisoner to drink; no-one forced him to set alight his wife's clothes. The prisoner chose to drink and he chose to set fire to the clothes. He must now live with the consequences."

[21] I can find nothing in the circumstances leading up to the offending behaviour that mitigates the offence.

[22] In restoring the suspended sentence of imprisonment, the learned stipendiary magistrate noted that the appellant would have been released on about 18 September "He committed the current offence on the 2nd January 2003, so its just over three months after his release." A little over three months is a short period of time after his release to have re-offended. The learned stipendiary magistrate was entitled, as he did, to take this into account.

[23] The next circumstance counsel for the appellant argues should have been taken into account, is the appellant's efforts at rehabilitation. I note that for reasons which were beyond his control, the appellant did not attend the alcohol rehabilitation program at CAAPS that he was required to complete as a condition of his suspended sentence. His Worship acknowledged this in his reasons. There were no submissions made about exactly what other steps the appellant may have taken to address his problem with alcohol. The

rehabilitation relied upon would appear to be the submissions to the effect that he did comply with the conditions of his suspended sentence for a little over three months before re-offending. There were further submissions as to the appellant's own intentions in the future of returning to live at Pigeon Hole Station which is a dry area, resuming his relationship with his wife, engaging in stock work and renovating the house. I note there was nothing put before the learned stipendiary magistrate to the effect that the appellant's wife was amenable to resuming the relationship with the appellant or that he would be welcome to live at the Pigeon Hole community.

[24] In view of the appellant's prior history of offending, particularly the commission of violent offences upon his wife, I consider the learned stipendiary magistrate was correct in emphasising as he did the importance of not re-offending whilst under the terms of a suspended sentence.

[25] The learned stipendiary magistrate stated as follows (tp 8):

> "The most important thing about a suspended sentence is the complying with not committing offences provision. That is the purpose of a suspended sentence; to give people last changes to not spend a long time in gaol. People who disregard that and go about committing offences; even if they not be the same type; if they're serious offences can expect to have all or part of the sentence restored.
>
> I see no unjustness in doing that now. I'm obliged to restore some or all of the sentence, unless I consider it to be unjust to do so and unable to be satisfied that it would be unjust."

[26] The final circumstance relied upon is the delay between the sentence of imprisonment imposed by the Supreme Court on 17 October 2003 and the application for breach of suspended sentence on 20 February 2004, a period of four months. Counsel for the appellant relies on the decision of *R v Wilson Jagamara Walker* (1994) 116 FLR 198.

[27] I agree it would have been preferable to have prosecuted the breach of suspended sentence at an earlier date following sentence for the offence of attempted arson. I am not persuaded that in the circumstances of this case the delay justifies interfering with the decision of the learned stipendiary magistrate.

[28] I do not consider the learned stipendiary magistrate has been shown to be in error in that he gave insufficient weight to s 43(7) of the Sentencing Act (NT).

[29] This ground of appeal is dismissed.

Ground 2: That the learned magistrate erred in law in that he had not considered, or given insufficient weight to, the totality of the sentence imposed.

[30] In his reasons for sentence, the learned stipendiary magistrate summarised the facts which constituted the two offences of assault by the appellant upon his wife. His Worship noted there was also a breach of a Domestic Violence Order. These were serious offences.

[31] The learned stipendiary magistrate did not make reference to the principle of totality. I have found he did make a deliberate decision that the sentence for the breach of suspended sentence would not be made concurrent with the non parole period of the sentence for attempted arson. I have found he did this while being well aware of the powers he had under s 43 of the Sentencing Act to proceed differently.

[32] I consider this was a decision within the bounds of his sentencing discretion, and not as counsel for the appellant submits because he maintained a single-minded approach to ensure that his preference for accumulation was achieved.

Ground 1: That the learned magistrate erred in law in that the sentence imposed was manifestly excessive in all of the circumstances of the case of the appellant.

[33] The appellant must show that the sentence was clearly and obviously, and not just arguably, excessive (*Cranssen v R* (1936) 55 CLR 509 at 520).

[34] Applying this principle I am not able to find that the sentence was manifestly excessive.

[35] For these reasons the appeal is dismissed and the sentence imposed by the learned stipendiary magistrate is confirmed.

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