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| PARTIES: | BRIAN EARL NOTTLE<br>v<br>ROBIN TRENERRY |
| TITLE OF COURT: | In the Supreme Court of the Northern Territory of Australia |
| JURISDICTION: | Supreme Court of the Northern Territory of Australia exercising Territory jurisdiction |
| FILE №: | № 349 of 1992 |
| DELIVERED: | Delivered at Darwin 23 June 1993 |
| HEARING DATES: | Heard at Darwin 28 April & 15 June 1993 |
| JUDGMENT OF: | Mildren J |

**CATCHWORDS:**

**CRIMINAL LAW** - Appeal against sentence - Conditions precedent to appeal s171(2) *Justices Act (NT)* - Accused has done all that is reasonably practicable - Order pursuant to s165 *Justices Act (NT)*

**CRIMINAL LAW** - Appeal against sentence - Sentencing error - Exceed jurisdictional limit - Failure to antedate - Sentence greater than maximum by indirect means

*Justices Act (NT)*, s121A(2)
*Criminal Code (NT)*, ss405(1) and (2)
*Marshall* (1992) 62 A Crim R 162, applied
*Maynard v O'Brien* (1991) 78 NTR 16, applied
*R v McHugh* (1985) 1 NSWLR 588, applied
*Reed* (1992) 59 A Crim R 23, applied

**CRIMINAL LAW** - Appeal against sentence - Sentencing error - Failure to antedate sentence - Serious effect on appellant's liberty

*Reed* (1992) 59 A Crim R 23, applied

**REPRESENTATION:**

*Counsel*
Appellant: G Barbaro
Respondent: C Delaney

*Solicitors*
Appellant: NT Legal Aid Commission
Respondent: DPP

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

№ 349 of 1992
(9300106)

BETWEEN:

**BRIAN EARL NOTTLE**
Appellant

AND:

**ROBIN TRENERRY**
Respondent

CORAM: Mildren J

**REASONS FOR JUDGMENT**
(Delivered 23 June 1993)

This is an appeal against sentence imposed by the Darwin Court of Summary Jurisdiction on 5 November 1992.

This matter first came before me on 28 April 1993.

After hearing submissions I made an order pursuant to s165 of the *Justices Act* dispensing with the requirements of s171(2) of the Act to enable the appeal to be heard out of time. Submissions on the merits on the appeal were not finalised until 15 June 1993. I then allowed the appeal, set aside a sentence of imprisonment of two years for a breach of ss154(1) and (4) of the *Criminal Code* and the non-parole period fixed by the learned magistrate (both effective from 5 November 1992) and in lieu thereof I sentenced the appellant to two years' imprisonment and I fixed a non-parole period of twelve months, both effective from 24 September 1992. I now publish my reasons for the making of those orders.

The Notice for Appeal in this matter was not lodged until 11 December 1992. Therefore the first problem facing the appellant was that he had not lodged his appeal within the time limited by s171(2) of the *Justices Act*.

Section 165 of the Act permits this Court to dispense with compliance with s171(2) if the appellant has done whatever is reasonably practicable to comply with the Act.

On 23 November 1992, the appellant contacted the Darwin office of the Northern Territory Legal Aid Commission requesting that a solicitor attend Berrimah Gaol to speak with him. On Saturday 28 November, a solicitor employed by the Commission did attend the gaol and was instructed by the appellant to appeal against a sentence imposed by the learned magistrate. Due to a communications break down between that solicitor and another in the office of the Commission, the appeal was not lodged in time. The appellant's solicitors, and not the appellant, were therefore at fault. In cases such as this, where the appellant is in custody and can do little more than trust an apparently competent solicitor to do that which was necessary to put his appeal on foot, and where the instructions to appeal were given in ample time for the solicitors to comply with the provisions of the Act, it is well established that the appellant has done all that is reasonably practicable by him to comply with the provisions of the Act and that accordingly it is appropriate to make an order, pursuant to s165, dispensing with compliance with the condition precedent imposed by s171(2) that the appeal should be instituted within twenty-eight days: see *Seven v Seears* [1984] NTJ 1112; *Fry v Williams* [1985] NTJ 397; *Commissioner of Taxation v Arnhem Air Engineering Pty Ltd* (1987) 90 FLR 140 at 150. The respondent did not oppose the making of that order and accordingly on 28 April 1993, when this matter was first before me, I made an order dispensing with the requirements of s171(2).

The appellant was charged upon information with two offences: (1) aggravated unlawful assault contrary to s188 of the *Criminal Code* (2) dangerous act together with the aggravating circumstance that the act was committed whilst under the influence of an intoxicating substance, contrary to ss154(1) and (4) of the *Criminal Code*. The appellant

also faced two charges on complaint, namely (1) unlawful damage to property contrary to s251 of the *Criminal Code*, and (2) driving a motor vehicle whilst having a concentration of alcohol in his blood in excess of .08, contrary to s19(2) of the *Traffic Act*.

The appellant consented to the two matters upon information being dealt with summarily pursuant to s121A of the *Justices Act*. He pleaded guilty to all offences. The learned magistrate imposed sentences of imprisonment in relation to each of the offences except the offence of exceed .08 and ordered that the sentences be served concurrently. The total sentence imposed was two years' imprisonment, effective from 5 November 1992, and the court fixed a non-parole period of twelve months.

At the time of imposing those sentences, the appellant had been on a remand for forty-three days whilst waiting for these matters to be determined. The learned magistrate was told that the appellant had been so remanded and in his remarks upon sentence he said that he took that period into account in determining the penalty.

Pursuant to s121A(2), the learned magistrate was not empowered to impose a penalty that is greater than imprisonment for two years. The learned magistrate was well aware of that limitation, which is a jurisdictional limit and not the maximum penalty which the appellant faced: see *Maynard v O'Brien* (1991) 78 NTR 16. The maximum penalty available for the offence of dangerous act with the circumstance of aggravation alleged was nine years imprisonment. The learned magistrate, after referring to the circumstances of the offence and of the offender, and of the maximum penalty of nine years fixed by the statute, said that "I have decided that the proper sentence is within my power, but I have also decided that it is right at the upper limit of my power."

It was submitted on behalf of the appellant that by imposing a sentence of two years imprisonment and not backdating the sentence, pursuant to s405(2) of the *Criminal Code*, the learned magistrate had in fact exceeded his jurisdictional limit.

Sections 405(1) and (2) provide as follows:

> "405. CALCULATION OF TERM OF SENTENCE: CUMULATIVE SENTENCES: ESCAPED PRISONERS
>
> (1) Except as is hereinafter expressly provided and when expressly ordered a sentence of imprisonment upon conviction on indictment takes effect from the day the court passes sentence upon the offender and a sentence of imprisonment upon summary conviction takes effect from the commencement of the offender's custody under the sentence.
>
> (2) Where the offender has been in custody on account of his arrest for an offence and he is then convicted of that offence and sentenced to imprisonment it may be ordered that such imprisonment shall be regarded as having commenced on the day on which he was arrested or on any other day between that day and the day on which the court passes sentence."

Undoubtedly the power conferred by the court under s405(2) to antedate a sentence is discretionary, but it is well established that the failure to antedate a sentence is sentencing error unless reasons are given for the failure to adopt that practice: see *Reed* (1992) 59 A Crim R 23 at 25. The correct practice, in my opinion, is set out in a passage of the judgment of Street CJ, speaking for the Court of Criminal Appeal, in *R v McHugh* (1985) 1 NSWLR 588 at 590-1:

> "It is desirable sentencing practice that, where there has been a period of pre-sentence custody exclusively referrable to the offences for which sentence is being passed, the commencement of the sentence (and the non-parole or non-probation period) should be backdated for an equivalent period. This is to be preferred to a process of assessing the proper sentence (and non-parole or non-probation period) and allowing, as it were, a discount in consequence of the pre-sentence custody. The desirable practice will promote the accuracy of the record, preventing there being a hidden factor affecting the length of the custody involved in consequence of the sentencing order. In

> addition, this practice will remove inequalities and unfairnesses as between prisoners arising from delays prior to sentencing, in particular in relation to remission or reduction entitlements; recognition of this does not infringe the principle in *R v O'Brien* [1984] 2 NSWLR 449 that remissions and reductions are to be disregarded when determining the length of sentences, non-parole and non-probation periods. A judge departing from this practice could be expected to indicate his reasons for so doing."

In the Northern Territory, the length of remissions earned must be taken into account in determining the length of the non-parole period: see *R v Mulholland* (1991) 1 NTLR 1. That, however, does not affect the authority of *R v McHugh, supra,* on this point.

The learned magistrate in this case gave no reasons for failing to antedate the sentence. He found that the proper sentence was at the upper limit of his jurisdictional power, namely two years' imprisonment. In arriving at that decision he took into account the time spent on remand. The net effect, therefore, of the head sentence is that the appellant will serve a maximum term of seven hundred and seventy three days in custody (two years plus forty-three days). Remissions are not available on the forty-three days; therefore if the appellant accrues full remissions of one third of his head sentence, the maximum term served will be four hundred and ninety-seven days. If sentenced initially to seven hundred and seventy three days, the appellant's maximum term would be four hundred and eighty-two days. The appellant will have spent four hundred and eight days in custody prior to being eligible for parole rather than three hundred and sixty-five days. The failure to backdate the sentences have a serious effect on the appellant's liberty.

I have not been directed to any authority which specifically determines whether or not a magistrate exceeds his jurisdictional limit in circumstances such as these. It seems to me, however, that where a magistrate imposes the maximum penalty and fails to properly antedate the sentence

of necessity he must exceed his jurisdictional limit. There are two authorities that tend to support this proposition. The first is the case of *Reed* (1992) 59 A Crim R 23. In that case, the appellant had been held in detention for two years and four months before he was sentenced. The Court of Criminal Appeal of Victoria observed that, having regard to the fact that that period did not earn any remissions, the credit to which the appellant was entitled in that case, there being no order to antedate the sentence, was a total period of three years and six months. On one of the counts, a sentence of seven years was imposed to which had to be added the credit of three years and six months, which would produce a total term of ten years and six months. The learned trial judge had failed to add the credit and had given no reasons for doing so. The maximum penalty fixed by Parliament for that particular offence was ten years' imprisonment. The court said (at 26):

> "... the penalty imposed ... exceeds that prescribed as the maximum by Parliament by six months and it is clear that in the circumstances that penalty imposed by the judge constitutes sentencing error."

An even clearer statement of the relevant principle is to be found in the decision of the Court of Criminal Appeal (Qld) in the case of *Marshall* (1992) 62 A Crim R 162. In Queensland, there is no power to antedate a sentence. The trial judge imposed the maximum term of imprisonment fixed by statute for the offences in question. The appellant had in that case been in custody for six months prior to the date of his sentence. The practice in Queensland is for the court to allow twice the time actually spent in custody on pre-sentence remand in fixing the head sentence because of the peculiarities of the Queensland parole system. Davies JA and Williams J said (at 169):

> "The problem arises in Queensland because pursuant to s20 of the *Criminal Code* (Qld) 'a sentence of imprisonment upon conviction on indictment takes effect from the day the court passes sentence upon the offender.' In many other jurisdictions the sentence is calculated to run from the date on which the offender was taken into custody with respect to the offence. In those jurisdictions the problem with which this Court

is now concerned does not arise.

> Given what has been said it follows that it would be a wrong exercise of discretion to refuse to give any credit for time spent in custody in order to provide effectively for a greater maximum penalty than is fixed by the *Code*. Even if the offence was a particularly bad example of the charge in question, and the offender had previous convictions for similar offences, as in this case, it would nevertheless not be within the power of the judge to impose a sentence greater than the maximum either directly or by indirect means.
>
> The weight of authority is such that it must now be recognised that, other than in exceptional cases, it would be a wrong exercise of discretion to refuse to give any credit for time spent in custody awaiting sentence" (emphasis added).

In my opinion, the learned magistrate's jurisdictional limit of two years' imprisonment could not be extended by the indirect means of refusing to antedate the sentence, and the learned magistrate fell into error. Accordingly, on 15 June 1993, I allowed the appeal and I set aside the learned magistrate's sentence of two years' imprisonment and the non-parole period of twelve months fixed by him effective from the 5 November 1992, and in lieu thereof I sentenced the appellant to two years' imprisonment effective from 24 September 1992, and I fixed a non-parole period of twelve months effective from that date.