Dobbs v Winzar & Ors [2001] NTSC 25

PARTIES:	DOBBS, PHILLIP v WINZAR, KEVIN DAVID DOBBS, PHILLIP v STEVEN MARK EDGINGTON DOBBS, PHILLIP v LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
JURISDICTION:	Appellate
FILE NO:	JA 22 OF 2001 (20018346) JA 23 OF 2001 (20000327) JA 24 OF 2001 (9809365)
DELIVERED:	12 April, 2001
HEARING DATES:	22 March, 2001
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Appellant:	D. Conidi
Respondent:	C. Roberts

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service Incorporated
Respondent:	Director Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Phillip Dobbs and Kevin David Winzar [2001] NTSC 25
No. JA 22 of 2001 (20018346)
No. JA 23 of 2001 (20000327)
No. JA 24 of 2001 (9809365)

BETWEEN:

PHILLIP DOBBS
Appellant

AND:

KEVIN DAVID WINZAR
Respondent

AND BETWEEN:

PHILLIP DOBBS
Appellant

AND:

STEVEN MARK EDGINGTON
Respondent

AND BETWEEN:

PHILLIP DOBBS
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 12 April, 2001)

MILDREN J*:*

[1] These three appeals against sentence relate to three out of four matters dealt with at the same time by the Court of Summary Jurisdiction on 17 January 2001. The appeals were also heard together.

Background

[2] On 8 December 2000 the appellant appeared before the Court of Summary Jurisdiction and entered pleas of guilty to the following matters, which were disposed of by his Worship in the manner indicated below:

(a) *File 9809369 – Date of Offences 6 May 1998*

Count 1 –	exceed .00 (.053)	Fine $200
Count 2 –	drive disqualified	2 months imprisonment

(b) *File 9928719 – Date of Offences 16 December 1999*

Count 1 –	withdrawn	
Count 2 –	possess an offensive weapon	Convicted and fined $250

(This file is not the subject of any appeal).

(c) *File 2000327 – Date of Offences 5 January 2000*

Count 1 –	drive unlicensed	Fined $300
Count 2 –	exceed .08 (.219)	3 months imprisonment cumulative
Count 3 –	control of liquor in a Restricted area	2 months imprisonment cumulative

Count 4	Withdrawn
Count 5 – give false name to police	convicted without penalty

(d) *File 20018346 – Date of Offences 15 November 2000*

Count 1 – exceed .08 (.283%)	9 months imprisonment cumulative
Count 2 – drive whilst disqualified	6 months imprisonment cumulative

[3] The total sentences of imprisonment added up to 22 months. His Worship ordered that the sentences be suspended on certain conditions after the appellant had served eight months of those sentences. The sentences were back dated so that the earliest sentence was deemed to have commenced on 1 December, 2000. In addition the file in relation to matter 20000327 notes that the appellant was disqualified from holding or obtaining a drivers licence for 5 years from 5 January 2001 and the file in relation to matter 9809365 records a period of licence disqualification for 5 years from 6 May 1998. It appears from the transcript that neither of those periods of licence disqualification were pronounced by the learned Magistrate at the time of sentencing. Perhaps that matter was attended to at a later time for which there is no transcript. I will return to this later.

The Grounds of Appeal

[4] The grounds of appeal are as follows:

1. that the sentences imposed were manifestly excessive;

2. that the learned Stipendiary Magistrate failed to take into account the totality principle;

3. that in relation to file 20018346, the learned Stipendiary Magistrate failed to take into account s 58 of the *Sentencing Act;*

4. that the learned Stipendiary Magistrate failed to take into account, or accorded insufficient weight to the Appellant's pleas of guilty.

Prior Convictions

[5] The Appellant's prior convictions included the following:

1. On 18 July 1989 he was convicted of exceed .08 in the Alice Springs Juvenile Court. He was fined $400 and disqualified for 18 months.

2 On 8 January 1996 he was convicted on 3 separate charges of exceed .08. These offences were committed on separate dates as shown below:

Date of Offence	Reading	Penalty
3 May 1995	.235	Fined $550 and disqualified for 18 months
4 May 1995	.278	Fined $1000 and disqualified for 5 years from 4 May 1995
8 January 1996	.293	Fined $1200 and disqualified for 5 years.

3. On 8 January 1996 he was convicted of driving whilst disqualified and sentenced to a term of imprisonment for 2 months. The sentence was fully suspended and he was released on a good behaviour bond in the sum of $1000 in his own recognizance for a period of 12 months.

Facts

[6] In relation to file 9809369, the Appellant was driving a vehicle north along North Stuart Highway. Upon reaching the Tanami Road turnoff, he was stopped at a random breath testing station. He showed a positive result. He was arrested and conveyed to the Alice Springs Police Station where a reading of 0.053% was obtained. When asked why he was driving whilst disqualified and after drinking he made no reply. His counsel submitted that he was driving to Murray Downs with his father and some other people. He was the most sober of the group and was asked to drive, which he did. It is to be noted that it is an offence to have any reading at all if the person is disqualified or does not hold a licence: see *Traffic Act*, ss 19 (4) and (5) (e).

[7] In relation to file 9928719, on 15 December 1999, the appellant, whilst at Mount Nancy Camp saw one Archie Nelson smashing the windows of his sister's car. The next day the appellant confronted Nelson about this. A fight ensued during which the appellant pulled out from his pocket a 10 centimetre folding pocket knife and threatened to stab Nelson, who, on

seeing the knife, ran away. The appellant opened the knife and gave pursuit. Nelson saw the appellant following, stopped and punched the appellant in the mouth. Police, who were in attendance, intervened. The learned Magistrate accepted that the appellant merely intended to frighten Nelson, and that this was not a particularly serious breach of the law. The appellant had no priors for offences against the person.

[8] In relation to file 20000327, on 5 January, 2000 the appellant was seen driving in an erratic manner along Kinjarra Drive, Ali Kurang, a "dry" area. The appellant was stopped by police, and a roadside breath test proved positive. Inside the vehicle were two open cans of beer in the possession of two co-offenders, 24 375ml stubbies of VB beer, 20 375ml cans of VB beer, four 750ml bottles of McWilliams Port wine, and a 750ml bottle of Yalumba sweet sherry, which the appellant said belonged to all of them. The appellant admitted to consuming a beer inside the "dry" area. He told police he was on his way to Murray Downs Aboriginal Community which was also a "dry" area. He was conveyed to Ali Curang Police Station where breath analysis revealed a reading of 0.219%. He was unlicensed (and in fact driving whilst disqualified). The liquor and the motor vehicle was seized but at the time of the hearing there was no indication as to whether the vehicle had been forfeited to the Crown under the provisions of the *Liquor Act.* As can be seen, the appellant had four prior convictions for driving with a concentration of alcohol in his blood above the prescribed

limit for which he had received fines and periods of disqualification in the past.

[9] In relation to file 20018346, on 15 November, 2000 the appellant was driving north along the Stuart Highway approximately 200 metres south of the township of Ti Tree in an erratic manner. He was pulled over by police, breath tested and conveyed for breath analysis which provided a reading of 0.283%. He told police he was "going home", which, according to the complaint was at Murray Downs.

[10] The appellant is Aboriginal, and almost 28 years of age at the time of sentencing. He had attended Yirara College until Year 10. Thereafter he had been employed at Murray Downs in full time employment as a station hand, for the last 10 years. He comes from a religious family and regularly attends church services with his family. The appellant has a positive attitude towards entering into a rehabilitation centre to deal with his alcohol problem. An assessment had been made at the request of the Court to see if he was suitable to enter the Barkly Region Drug and Alcohol Advisory Groups' premises pursuant to a home detention order, there to undergo alcohol rehabilitation, but he was considered unsuitable because of the violent nature of the offence of possessing an offensive weapon to which he had pleaded guilty.

Failure to take into account s 58 of the *Sentencing Act*

[11] It is convenient to start with this ground of appeal first. S58 (1) of the Act requires the court, when it sentences an offender to a term of imprisonment of less than 12 months to take into account the abolition of remissions as a consequence of s 6 of the *Prisons (Correctional Services) Amendment Act (No. 2) 1994.* The practical effect of s 58 (1) is that, whatever sentence would have been appropriate must be reduced by one third. Consequently, as has been pointed out by this Court previously on more than one occasion, a sentence of imprisonment of between 8 months and just under 12 months is simply not possible. It is plain that the sentence of 9 months imposed in relation to count 1 on file 20018346 must be set aside, as Mr Roberts, for the respondent, very properly conceded. Whilst this demonstrates that the learned Magistrate failed to take into account s 58 (1) in respect of that count, I consider that it raises a serious question as to whether or not he failed to take into account s 58 (1) in relation to the other counts as well. A sentence of 3 months, which was imposed in relation to count 2 on file 20000327, must mean that the learned Magistrate, if he took into account s 58 (1), had in mind a head sentence of 4 ½ months. This seems to me to be very unlikely, and leads to the conclusion that his Worship did not take into account s 58 (1) in relation to any of the sentences imposed.

Failure to take into account the pleas of guilty

[12] In *Kelly v The Queen* (2000) 113 A Crim R 263, the Court of Criminal Appeal said, at 270:

> In our opinion it is desirable that a sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor, but we do not consider that it is possible to lay down any tariff.

[13] The court went on to say that "it may be appropriate in the circumstances, rather than reduce the head sentence, to give effect to the value of the plea by other means such as a partially suspended sentence or a home detention order, or by the imposition of a fine, to mention only some of the obvious examples".

[14] The court did not say that the failure to observe the desirable practice would automatically amount to error. However where the sentences imposed are high, and no mention is made of the guilty plea and of the value given to it, appellate courts will more easily be able to infer that the plea was either not taken into account at all, or given inadequate weight.

[15] In the present case, the total head sentences imposed are very significant for the offending involved given the maximum penalties which the appellant faced. The learned Magistrate in his sentencing remarks made no mention at all of the pleas of guilty and of his having taken them into account. On the other hand, he had partially suspended the sentences after requiring the appellant to serve 8 months, but on terms that he be placed under

supervision. Although this is not complained of, there is nothing in the transcript or in the documents placed before the learned Magistrate to indicate that the appellant had been assessed as suitable for supervision as required by s 103 (1) of the *Sentencing Act.*

[16] When all this is considered in the light of the conclusion I have reached in relation to s 58 (1), it gives rise to the inference that no weight was given to the pleas of guilty at all, and there is no reasonable explanation for that fact.

Failure to apply the totality principle

[17] This ground assumes that the individual sentences were not in themselves manifestly excessive and each properly made consecutive in accordance with the principles governing consecutive sentences. There is no specific appeal challenging the order that the sentences be all made cumulative upon one another. However it is to be observed that in respect of both counts in file 20018346, there is a common element, namely driving a motor vehicle; or to put it another way, the same conduct gave rise to two offences. The significance of this is explained in such cases as *Pearce v The Queen* (1998) 194 CLR 610 and *R v Robinson and Stokes, ex parte Attorney-General* (2000) 2 Qd. R. 413, the principle being that, to the extent to which two offences contain common elements, it would be wrong to punish the offender twice for the commission of the elements that are common.

[18] S 50 of the *Sentencing Act* provides that unless the court otherwise orders, sentences for different offences whether imposed at the same time or not,

are to be served concurrently. In *Kelly v The Queen, supra* at p 271, the Court of Criminal Appeal, applying *Pearce v The Queen, supra* observed that differing elements of the two offences there under consideration provided a sound basis for departing from "the normal rule of concurrency." Even though not pressed as a separate ground of appeal, this consideration has some relevance to the argument that the learned Magistrate failed to properly apply the totality principle.

[19] In *Mill v The Queen* (1988) 166 CLR 59, the court specifically approved of a passage from Thomas, *Principles of Sentencing*, 2nd ed. (1979) at pps 56-57 the effect of which is to require a sentencer who has passed a series of sentences which are then added up to make a total, to take a last look to see whether it looks wrong:

> when…cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.

[20] In the present case, each of the sentences were made cumulative upon each other, without any indication that his Worship undertook the exercise which the totality principle required him to do. Had he done so, in my view his Worship should have made at least some of the sentences concurrent or partly concurrent: see *Mill v The Queen, supra,* at p 63. I reject the submissions of Mr. Roberts that totality can be reflected in a partial

suspension of the head sentence. The principle applies to the head sentence, not to the fixing of any period of suspension.

Conclusion

[21] Enough has been said to show that his Worship's sentencing discretion miscarried and it is unnecessary to consider the other grounds of appeal. It therefore falls to this court to resentence the appellant.

[22] Before resentencing the appellant I should point out three other matters. First, the sentences were back dated to 1 December 2000 when in fact the appellant had been in custody since 15 November, 2000. I am not sure how that mistake occurred, and this may not have been the learned Magistrate's fault. Secondly, when his Worship suspended the total sentence of 22 months, he failed to specify a period during which the appellant was not to commit a further offence, as required by s 40 (6) of the *Sentencing Act*. These were not raised as appeal points. If that had been all that was wrong, these matters could have been corrected by his Worship *vide* s 112 of the *Sentencing Act*. As the appellant is to be resentenced, nothing turns on this now, but the failure of his Worship to apply the provisions of s 40 (6) fortifies the conclusion that his Worship's sentencing discretion has miscarried. Thirdly I note in passing that his Worship did not comply with ss 101 and 102 of the Act when attaching conditions to the order suspending sentences.

[23] It was not suggested that the appellant ought not to have had sentences of imprisonment imposed. The complaint is, in a nutshell, that the sentences were individually and in the aggregate excessive. His Worship was no doubt right to take a stern view of the offending. The offending represented the appellant's fifth and sixth convictions for exceed .08%, and his second and third convictions for driving whilst disqualified. The appellant committed these offences whilst on bail, which makes them objectively more serious. Even allowing for the gap, sentences of imprisonment were inevitable for those offences.

[24] I consider also that a sentence of imprisonment is appropriate for the offence of being in control of liquor in a restricted area, contrary to s 75 (1) (b) of the *Liquor Act,* even though the appellant has no previous convictions for this offence. This type of offence is aimed at providing for the safety and security of those people whose communities are at risk from serious offending caused by the over-indulgence in intoxicating liquor. This is a very serious problem in many Aboriginal communities. The quantity of liquor involved is sufficient to indicate that those involved intended to do some serious drinking. The possibility of harm to the community is therefore real. The breach of the section is a serious one, and there must be a sentence of imprisonment to deter the appellant as well as others from offending in this way.

[25] The head sentences will be discounted by one third to take into account the abolition of remissions, will be made partly concurrent to reflect the

common elements of offending where that has occurred, and to take into account the totality principle. In considering the totality principle, I have had regard to all of the sentencing orders made by the learned Magistrate, whether subject to appeal or not. In this case, the sentences will be partially suspended to take into account the pleas of guilty, and in order to do what can be done to encourage the appellant's rehabilitation by his attendance at an appropriate alcohol rehabilitation programme. I indicate that the partial suspension has been reduced from 8 months to 6 months to take into account the guilty pleas.

[26] The appeal is allowed. I set aside the sentences of imprisonment and sentencing orders imposed by the learned Magistrate in respect thereof and I impose the following sentencing orders:

(1) In relation to file 9809369, count 2, the appellant is convicted and sentenced to 2 months imprisonment. I order that that sentence be deemed to have commenced on 15 November, 2000. I realise that this is the same sentence as imposed by the learned Magistrate, and I might have dismissed this appeal *vide* s 177 (2) of the *Justices Act*, but this seems a more convenient method of disposing of this matter.

(2) In relation to file 20000327, as to count 2, the appellant is convicted and sentenced to imprisonment for 2 months. As to count 3, the appellant is convicted and sentenced to imprisonment for 1 month.

I order that counts 2 & 3 be served concurrently with each other but cumulatively upon count 2 in file 9809369.

(3) In relation to file 20018346, as to count 1, the appellant is convicted and sentenced to imprisonment for 6 months. As to count 2, the appellant is convicted and sentenced to imprisonment for 4 months.

I order that 2 months of the sentence on count 2 be served cumulatively with the sentence on count 1, and that the sentence on count 1 be served cumulatively upon the sentences imposed on file 20000327.

This is a total effective sentence of 12 months.

(4) I order that these sentences be suspended and that the appellant be released after having served 6 months of those sentences subject to the condition that the appellant be placed under the supervision of a probation officer, and that he obey the probation officer's directions with regard to treatment for alcohol addiction and reside as and where directed by his probation officer. I specify the period of 2 years as the period during which the appellant is not to commit another offence punishable by imprisonment if he is to avoid being dealt with under s 43 of the *Sentencing Act*.

(5) I direct that the order in paragraph (4) above is not to become effective unless and until:

(a) the appellant has been assessed as suitable for probation and a report to that effect has been filed in this court at the Alice Springs registry;

(b) the appellant has consented in writing to the order and his written consent has been filed in the registry;

(c) there has been explained to the appellant in accordance with s 102 of the Act the matters referred to in s 102 (1) (a) (b) (c) and (d) thereof, either by the appellant's solicitors or by a prison officer, and a certificate to that effect is filed in the registry.

[27] Finally, there is the question of licence disqualification. This is not raised by the appeals so what I have to say is intended for guidance only. The provisions of the *Traffic Act* appear to have effected a minimum period of disqualification automatically, without the need for a court order, but there remains a discretion in the court to order a longer period. If the court did not intend to order a longer period it ought nevertheless to have explained to the appellant that his licence was disqualified and to have informed him of the periods of disqualification. I presume that the periods of disqualification noted by the learned Magistrate are the appropriate minima effected by force of the Act. I note also that his Worship purported to backdate the periods of disqualification to dates commencing prior to the date of sentence. I have not heard submissions on whether such a power

exists, so I make no findings. It may be covered by s 39 (3A), but if so, the material on the transcript in this case would seem to be inadequate to account for this. It is desirable that Magistrates take care to ensure that proper findings are recorded in relation to a licence disqualification and that the requirements of s 39 (3) of the Act are complied with. I acknowledge the possibility that this was in fact properly attended to at a later time and for which there is no transcript available.