Geiszler v Bolton [2003] NTSC 37

PARTIES:	GEISZLER, JUSTIN MATTHEW v BOLTON, NAOMI KATHLEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 41 OF 2003 (20302135) JA 42 OF 2003 (20214871) JA 43 OF 2003 (20302135
DELIVERED:	11 April 2003
HEARING DATES:	2 April 2003
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	I. Read
Respondent:	G. Fisher

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Commonwealth Director of Public Prosecutions

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

Geiszler v Bolton [2003] NTSC 37
JA 41 of 2003 (20302135)
JA 42 of 2003 (20214871)
JA 43 of 2003 (20302135)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

JUSTIN MATTHEW GEISZLER
Appellant

AND:

NAOMI KATHLEEN BOLTON
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 11 April 2003)

[1] On 13 February 2003 the appellant pleaded guilty in the Court of Summary Jurisdiction to four offences being:

(a) one count of knowingly obtaining payment of a Social Security payment, namely New Start Allowance, by means of a fraudulent device contrary to s 216 and s 217 of the Social Security(Administration) Act;

(b) one count of opening an account with a cash dealer in a false name contrary to s 24(1) of the Financial Transaction Reports Act;

(c) one count of operating an account with a cash dealer in a false name contrary to s 24(2) of the Financial Transaction Reports Act; and

(d) one count of hinder a Commonwealth public official in the performance of her functions as a public official contrary to s 149(1) of the Criminal Code (Cth).

[2] The circumstances of the offending were not in dispute. The appellant made a dual claim for benefits from Centrelink in the period between 27 March 2001 and 9 August 2001. Through his offending he obtained $2981.20 to which he was not entitled. Whilst in receipt of a New Start Allowance in the name of Geiszler, he applied for and obtained a second grant of that allowance in the name of John Peter Marshall. He achieved that by creating a false story that he was John Peter Marshall and had left Adelaide in a hurry due to "violence". He therefore had no documents of identification. Centrelink gave him an identification card in the name of Marshall. At first he received counter cheques in the name of Marshall and then he asked that the benefit be paid into a bank account which was in the name of Geiszler. Subsequently, through deception, he obtained further identification in the name of John Peter Marshall from the North Australian Aboriginal Legal Aid Service and, using that identification and the Centrelink card, opened a bank account in the name of John Peter Marshall.

[3] The offending occurred over a period of about four months and was brought to an end by the appellant's arrest for having breached bail in relation to an unrelated matter. The present matter was investigated whilst he was in custody serving a sentence for an unrelated offence. He was interviewed by police but did not make any admissions or provide any assistance to investigating officers. Eventually expert evidence was called upon to establish his involvement in the offence.

[4] He was charged with these offences after his release from prison and, subsequent to being charged, he was bailed. He failed to attend court as required and a warrant was issued for his arrest. Eventually he was located and when a member of the Australian Federal Police approached him to execute the warrant and showed him identification, he ran across a street to elude police. He was quickly apprehended. He said he ran because he did not want to go back to gaol. He did not cause any further hindrance once apprehended.

[5] The matter came before the Court of Summary Jurisdiction in Darwin on 13 February 2003 and the appellant was sentenced to a total of six months imprisonment. The sentencing Magistrate declined to suspend any part of that sentence. The sentence was backdated to 30 January 2003 to reflect time in custody.

[6] The appellant appeals against the sentence complaining that the overall sentence was manifestly excessive. He also appeals on the following additional grounds that were added on the morning of the hearing:

> "(1) that the learned Magistrate did not adequately address the question of totality;
>
> (2) the learned Magistrate failed to properly take into account the matters raised relating to rehabilitation, in particular the matters raised in the report of Doctor Walton and the material relating to suitability of the appellant to a drug rehabilitation program;
>
> (3) that the sentence imposed on the offences of open a false account and using a false account are both manifestly excessive and are disproportionate to the principal offending;
>
> (4) the sentence imposed on the charge of hindering a Commonwealth official was disproportionate to the level of criminality involved."

[7] During the course of submissions ground (2) was expressly abandoned.

[8] At the time of sentence the criminal history of the appellant was placed before the learned Magistrate. The history included offences of dishonesty going back to 1990. The appellant has previously been convicted of stealing, unlawful possession, unlawful entry, unlawful use of a motor vehicle, criminal deception, and the serious offence of armed robbery. In relation to the offence of armed robbery the appellant was imprisoned for a period of three years, such sentence being suspended after he had served a period of 12 months imprisonment. The sentence was imposed on 9 December 2001 and related to an offence which occurred in April 2001.

Prior to that sentence of imprisonment the appellant had been sentenced to other periods of imprisonment, he had been given the benefit of community service orders, fines and release without penalty.

[9] It is to be noted that the armed robbery offence was committed on 30 April 2001 which is during the period of the offending with which his Worship was concerned. The authorities sought to interview the appellant in relation to those matters whilst he was in custody but he declined to co-operate. As a consequence he was not dealt with for these offences until 13 February 2002, at which time he had served the 12 month sentence and had been at large under supervision for some months.

[10] It is convenient to set out the sentencing remarks of his Worship in full:

> "The defendant has pleaded guilty to three separate files before me. The two main files, the dishonesty files, relate to offending during the period 27 March 2001 to 17 September 2001. In relation to those various matters, the defendant deliberately set about to defraud the Social Security system.
>
> He made an application in a false name. He spun a story to evoke sympathy, obviously, from the Social Security office in that he supposedly fled South Australia to escape violence, and therefore the explanation for not having any documents with him. He used that false story to obtain an ID from Social Security.
>
> He then somehow obtained some NAALAS photo ID card. I have no idea what that is or why it exists or why it would be necessary to have such a thing. It should never have been issued to this man and not in a false name. Whatever procedures they might have in place should be reviewed. That card was instrumental in this defendant being able to open a bank account in a false name.

He did so deliberately. He was double-dipping into the Social Security system, that money which is there for people who need it. He was doing it to support a drug habit. While that was all happening, he also, on 30 April 2001, committed a robbery. He tried to steal drugs with a knife.

Thereafter he appears to have left the jurisdiction and went to Mount Isa. He was bailed in relation to the robbery charges and presumably it was a condition that he not leave. But he didn't answer his bail, he went to Mount Isa, and he transferred his payment records over to Mount Isa. He was eventually apprehended in Mount Isa, according to Doctor Walton's report, and brought back in custody. He appears to have been kept in custody, probably from about 20 August 2001.

It would've been as a result of that and the fact that no further forms would've been put in that his payments were ceased. By that stage he had received almost $3000 of money that was not payable to him. He made no attempt to stop the payments. It was not his change of heart or suddenly becoming honest that stopped payments.

He was spoken to by the Federal Police on 11 March 2002. At that stage he was a serving prisoner in presumably Berrimah. He declined to speak to Australian Federal Police. If he had spoken to them and if he had made full admissions, it could well have been the case that charges could've been quickly laid and the matters might've been dealt with whilst he was still in custody. It was his declining to do a record of interview, declining to co-operate, that led to the delay.

The matters then had to be investigated. They had to do handwriting comparisons of the various forms and get expert opinions on that. They had to search documents for fingerprints and get expert evidence on that. I therefore don't attribute any fault on the prosecuting authorities for the delay. The delay was brought about primarily by the defendant.

I turn my mind to whether, if these matters had been dealt with at the same time, whether the penalties would've been concurrent with each other. They wouldn't have been if I had dealt with them. They are completely different and separate types of offending and I would've imposed a fixed sentence in relation to existing matters and then a further sentence in relation to the robbery and then with a non-parole period probably in relation to the overall sentence.

The defendant was released from prison in August last year. He had warrants issued in relation to two of these files. On 30 January Federal Police became aware that he was at a Centrelink office and went to apprehend him and he fled from them. He was therefore clearly reluctant to deal with these matters.

In my view, because of the seriousness of the matters, clearly for people who steal from Social Security a sentence of imprisonment is the starting point. The period over which the dishonesty has occurred and the amount involved would determine the amount of imprisonment to serve.

In some cases it is appropriate to move away from imprisonment where there are some unusual circumstances. I did not impose imprisonment for a person who had committed a Social Security fraud in circumstances where the amount was about $1000 or so, from memory, where he had actually turned himself in, well after he'd stopped the payments voluntarily and, out of guilt, he turned himself in and made full admissions and he had turned his life around.

Circumstances such as that call for some leniency from the courts. No such factors operate in Mr Geiszler's favour. He is still a young man, that's in his favour. He is not a person of previously good character. He can't call on a previous good record in his favour to obtain a reduction in his sentence. His record of offending is such that he gets no discount for his background.

He has served periods of imprisonment in the past for dishonesty matters. In 1997 breaching a community service order, in December '97 also went to gaol. Further dishonesty matters in December 1997. He received a total of two years' imprisonment with a non-parole period of 12 months and again the other matter I've referred to. He's a person who's not unfamiliar with the prison system.

Looking at his offending overall, I consider that, taking into account his plea of guilty which has been entered, he's entitled to some discount for that. I consider that the appropriate disposition for all of his matters is six months' imprisonment. I have considered whether it should be suspended and, if so, how much of it should be.

In my view, clearly a wholly suspended sentence would be totally inappropriate given his level of dishonesty. Given that he created

> double identities and double-dipped the system, in my view he may not be a candidate for a wholly suspended sentence.
>
> In my view, given his background of offending and other matters, I don't consider that I will suspend any of his sentence. On this occasion he will serve it all. According to the report from Doctor Walton, he has had a somewhat disadvantaged childhood and upbringing, but far better than many that I have seen and heard of. Many people with far worse backgrounds have not come to the courts as Mr Geiszler has.
>
> In relation to file 20214873, on the two charges on that file he'll be found guilty of each and convicted of each. The sentence will be imprisonment for six months on each from 30 January 2003, concurrent with each other. On file 20214871, on the single charge on that file he's found guilty, convicted and sentenced to be imprisoned for four months from 30 January 2003, concurrent with the other sentence.
>
> In addition, on that file, I order that the defendant make reparation to the Commonwealth in the sum of $2981.20. In relation to file 20302135, he's found guilty, convicted and sentenced to be imprisoned for one month from 30 January 2003, concurrent with the other sentences.
>
> As I have said, I considered whether the sentences should be wholly or partly suspended, and, in the exercise of my discretion, they will not be."

[11] In sentencing the appellant his Worship imposed sentences in relation to the individual offences. He considered those sentences in the light of a global approach to the appropriate disposition. He looked at the offending as a whole and concluded that: "the appropriate disposition for all of his matters is six months' imprisonment". Through a process of declaring that the individual sentences should be served concurrently he then imposed a total term of imprisonment of six months.

[12] The appellant complains that in imposing the individual sentences the learned Magistrate incorrectly characterised the offending and, in so doing, was led into error. It was submitted that in imposing a sentence of four months' imprisonment for the offence of obtaining payment by means of a fraudulent device and imposing sentences of six months' imprisonment in respect of the offences of opening and operating an account contrary to the provisions of the Financial Transactions Reports Act, his Worship gave a greater penalty to the less serious offences.

[13] It was submitted that his Worship should have regarded the gravamen of the offending as the dual claim for benefits made against Centrelink. He should therefore have imposed the most significant penalty in relation to that offence and a lesser penalty in relation to the other offending. Further it was submitted that he should have regarded the other offending as merely matters that aggravated the principal offence rather than being significant offences in their own right. Viewed in that way, it was said that his Worship erred in imposing a greater sentence for the offences against the Financial Transaction Reports Act than what the appellant regarded as the principal offence.

[14] Whilst the approach to sentencing in this matter suggested by the appellant may be open, it is necessary to consider whether his Worship erred in adopting a different approach.

[15] The three offences with which we are here concerned are different offences involving different elements. In the circumstances of this matter, the offence of obtaining the New Start Allowance was effected by creating the fictitious entity John Peter Marshall. That occurred by the simple ruse of making up a story of a rapid and unscheduled departure from Adelaide. A claim for a separate allowance was then made and the benefit received. The benefits were paid for the period 23 March 2001 to 9 August 2001 and totalled $2981.20.

[16] The establishment of the bank account in the name of John Peter Marshall involved separate deceits. That occurred on or about 18 June 2001, some three months after he began to receive the benefits in the name of Marshall. It involved him attending at the offices of NAALAS and, by means not disclosed, obtaining from that service a photographic identification in the false name of John Peter Marshall. He then attended at the Commonwealth Bank with the identity certificate issued by Centrelink and the photographic identification issued by NAALAS and there, again by deceit, managed to open an account.

[17] The remaining offence involved the operation of the account that the appellant had opened in the name of Marshall. That offence occurred between 23 July 2001 and 17 September 2001. During that period the appellant used the account to receive and withdraw the funds he unlawfully obtained from Centrelink.

[18] The maximum penalty for each of the offences against the Financial Transaction Reports Act is imprisonment for two years. As to the offence against the Social Security (Administration) Act the maximum penalty is imprisonment for one year.

[19] In relation to the offences under the Financial Transaction Reports Act it is to be noted that an element of fraud is not necessary for the commission of such an offence. The presence of a fraudulent intent, as was the case here, is an aggravating factor. The opening and operating of the account was deliberately and carefully undertaken and was designed to hide unlawful conduct on the part of the appellant. It cannot be said that the offending was at the lower end of the scale given that it involved the obtaining of identification by deceitful methods and the further deceit involved in opening and operating the account. The offending did not come to an end by virtue of any act of the appellant but rather because of the interference of the authorities with his ongoing operation.

[20] The purposes of the Financial Transaction Reports Act include the object of facilitating the administration and enforcement of taxation laws and other laws of the Commonwealth, Territories and States. It forbids the opening and operating of false bank accounts and calls for penalties that deter people from the opening and operating of false bank accounts. His Worship obviously took a serious view of this aspect of the offending and he was entitled so to do. It was an offence which called for both specific and general deterrence.

[21] Whilst the sentence of six months' imprisonment in relation to each of the offences against the Financial Transaction Reports Act may be seen to be stern the sentences are, in my opinion, within the range available to his Worship. They are not manifestly excessive.

[22] The offence against the Social Security (Administration) Act is a serious example of its kind. General deterrence is a significant sentencing consideration for offending against the Social Security system and sustained and deliberate fraud such as existed here will ordinarily warrant a term of actual imprisonment. So much was conceded on behalf of the appellant. In this case the offences included the creation of a fictitious entity and that serves to make the offending more serious than other offending against the Social Security law. Offending of this kind is more difficult to detect. As was observed by King CJ in *The Queen v Vasin* (1985) 39 SASR 45 at 46:

> "But the invention of a fictitious personality is a particularly flagrant type of offence and places these offences in a more serious category than much offending against the Social Security laws. It involves a degree of deliberation, cunning and flagrant criminality which exceeds that involved in many cases of simply suppressing some modest additional income which enables the applicant to provide for himself a somewhat better living standard or to pay debts which have been incurred or of concealing the fact that the applicant is undergoing a course of study for the purpose of facilitating his obtaining of employment. The appellant engaged in a systematic course of fraudulent conduct involving frequent conscious decisions to continue with the fraud and to fill out the false claim and forge the signature for that purpose".

[23] In my view the sentence imposed in relation to this offence was comfortably within the range available to his Worship.

[24] In determining the total effective sentence to be imposed the learned Magistrate took into account the fact that the offences were closely related and that they shared a common factual substratum. In order to accommodate this factor his Worship directed that the sentences be served concurrently. He thereby avoided any unfairness that may have resulted from the offences arising out of the same or similar sets of circumstances.

[25] In my view his Worship was entitled to take the view of the offending that he did and, whilst another approach may have been open, he did not err in proceeding as he did.

[26] In relation to the complaint that his Worship did not adequately address the issue of totality, it was the submission of the appellant that inadequate regard was had to the sentence imposed upon the appellant for the armed robbery. It was argued that had the appellant been sentenced for all offences at the same time a sentencing court would have been required to have ordered some part of the sentence to be served concurrently. It was submitted that the overall sentence would have been less than the sum of the sentences for the robbery and the offending, the subject of this appeal.

[27] Reference to the sentencing remarks of his Worship reveals that he made specific reference to this issue. For reasons set out in those remarks he concluded that, had the matter been dealt with at the same time, he would not have made the sentences concurrent because they are “completely different and separate types of offending”.

[28] In *Mill v The Queen* (1988) 166 CLR 59 the High Court dealt with a situation in which the appellant was sentenced in relation to offences committed in different States over a short period of time in 1979 and 1980. In September 1980 he was sentenced in respect of Victorian offences to 10 years' imprisonment with a non-parole period of 8 years. Upon his release he returned to Queensland where he was sentenced to a further period of imprisonment of 8 years. In that case the court said, in a joint judgment (at 66):

> "In our opinion, the proper approach which his Honour should have taken was to ask what would have been likely to have been the effective head sentence imposed if the applicant had committed all three offences of armed robbery in one jurisdiction and had been sentenced at one time."

[29] Although the circumstances of this case are quite different, the learned sentencing Magistrate adopted the same approach. He considered what the head sentence would have been had the matters been dealt with at the same time. He determined an appropriate sentence for the offending before him and then, considered in light of the earlier offending and the earlier sentence, determined that no concurrency would have been warranted.

[30] In my view no error in the approach adopted by his Worship has been identified. The offence of armed robbery was of a quite different character from the offences now before the court. The only concern was that the two episodes of offending occurred within the same period of time and possibly were motivated on each occasion by a desire to obtain drugs. However, a

consideration of the combined total of the sentences does not reveal a period of imprisonment "so crushing as to call for the merciful intervention of the court by way of reducing the total effect"; *Kelly* (1992) 33 FCR 536 at 541.

[31] The sentence in relation to the offence of hindering the police is in a different category. It was acknowledged by counsel for the appellant that this offence was discrete and any error which may have arisen in imposing the sentence did not impact upon the remainder of the sentences. When analysed the offending in this regard was, as the appellant submits, minor. The appellant evaded police by crossing the road where he was promptly detained. There was no physical contact between himself and the Commonwealth officials, there was no confrontation, or rudeness, nor was there any offensive conduct on his behalf. It was an uneventful arrest. The appellant has no prior history for such offending. In my opinion the sentence of imprisonment of one month was manifestly excessive. Counsel for the respondent did not present any argument to the contrary.

[32] In the circumstances the appeal in relation to this sentence must be allowed. The sentence will be set aside. The appellant will be convicted and fined the sum of $500.

[33] In all other respects the appeal is dismissed.

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