

Krucible Metals Ltd v Department of Mines and Energy [2015] NTSC 71

PARTIES: Krucible Metals Ltd
v
Department of Mines and Energy

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: JA 48 of 2015 (21530623)

DELIVERED: 22 October 2015

HEARING DATES: 13 October 2015

JUDGMENT OF: RILEY CJ

APPEAL FROM: DR J LOWNDES CM

CATCHWORDS:

CRIMINAL LAW – Justice’s Appeal – Appeal against conviction – s 8(1) considerations – impact on corporate offender – serious offending required the imposition of a conviction

CRIMINAL LAW – Justice’s Appeal – Appeal against sentence – manifestly excessive – mitigating circumstances – no comparative sentences – Appellant resentenced

McInerney (1986) 28 A Crim R 318, *Semrad v Habiburahman* [2013] NTCA 06, *Toohey v Peach* (2003) 141 A Crim R 437, *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616, *Veen (No 2) v The Queen* (1988) 164 CLR 465, referred to

Mining Management Act 2001 (NT), s 35(1) and (4), s 36, s 3(b)(i)
Sentencing Act 1995 (NT), s 7(a), s 8(1), s 17(1)
Justices Act 1929 (NT), s 163

REPRESENTATION:

Counsel:

Appellant: A Wyvill SC
Respondent: R Jobson

Solicitors:

Appellant: Ward Keller
Respondent: Solicitor for the Northern Territory

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

Krucible Metals Ltd v Department of Mines and Energy [2015] NTSC 71
No. JA 48 of 2015 (21530623)

BETWEEN:

Krucible Metals Ltd

Appellant

AND:

Department of Mines and Energy

Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 22 October 2015)

- [1] On 25 August 2015 the Chief Magistrate sentenced the appellant for a single offence of carrying out mining activities on an Exploration Licence without authorisation contrary to s 35(4) of the *Mining Management Act 2001* (NT). His Honour recorded a conviction and fined the appellant \$300,000.
- [2] The appeal is a rehearing pursuant to s 163 of the *Justices Act 1929* (NT). The grounds of appeal, in summary form, are that his Honour erred:
- (a) in refusing to exercise his discretion to proceed pursuant to s 7(a) and s 8(1) of the *Sentencing Act 1995* (NT) to dismiss the charge without recording a conviction;

(b) by imposing a fine of \$300,000 which was, in all the circumstances, manifestly excessive.

The offending

- [3] The appellant is a public company listed on the Australian Stock Exchange. At the time of the offending Mr Alan Branch was the managing director. Between 23 September 2014 and 31 October 2014 the appellant drilled twelve reverse circulation percussion drill holes on Exploration Licence 28170 on Tobermory Station, which is situated east of Alice Springs on the Queensland border of the Northern Territory. The Exploration Licence had been granted to the appellant on 4 April 2011 for the purpose of exploring for lead, zinc and silver.
- [4] Section 35(1) of the *Mining Management Act* provides that an operator of a mining site “may carry out mining activities on the site only if the Minister has granted the operator an Authorisation to do so”. Section 36 of the Act requires that the application for an authorisation be accompanied by the Mining Management Plan for the site. In this case the necessary authorisation was not in place at the time of the drilling and the appellant therefore committed an offence against s 35(4) of the Act. The maximum penalty for the offence is a fine of \$3,750,000.00.
- [5] The information provided to the Chief Magistrate included that Mr Branch signed an application for the relevant authorisation which was forwarded to the Department early in October 2014 along with a draft Mining Management Plan. The Department rejected the draft plan as being deficient.

The draft plan was not settled at the start of the drilling program nor by the completion of the program on 31 October 2014. It was agreed that the appellant commenced and completed its drilling without having an approved Mining Management Plan, without having paid the requisite mining security, and before being granted authorisation under the *Mining Management Act*.

- [6] The appellant made public announcements in the ASX magazine that it was undertaking the drilling and also provided some drilling results which turned out to be incorrect. On 11 November 2014 shareholder dissatisfaction with the conduct of the appellant's business under the leadership of Mr Branch led to the replacement of Mr Branch and the rest of the then Board with the new Board. On 11 December 2014 the appellant informed the Department of the unauthorised activity on Exploration Licence 28170. The new Board cooperated fully with the Department and worked with that Department to successfully rectify the damage done in the course of the unauthorised work. The appellant surrendered Exploration Licence 28170.

Appeal against conviction

- [7] The Chief Magistrate determined that, in the circumstances of this matter, it was appropriate to impose a conviction upon the appellant. His Honour commenced by noting that the seriousness of the offending is to be assessed by reference to the objectives of the *Mining Management Act* which include

protecting the environment by the authorisation and monitoring of mining activities.¹ His Honour observed:²

When dealing with the objective seriousness of this matter in my opinion it is important to bear in mind that it is the defendant company that is before the court today, that is the legal entity that committed the offence, and the person before the court is not any individual or individuals that make up the controlling mind and will of the company.

... the objective seriousness of the offence must be assessed by reference to the conduct of those natural persons who are in control of the corporation at the relevant time which led to the contravention...

And later:³

It is clear in this case that the offence was committed deliberately through the conduct of Mr Branch who was the controlling mind and will of the company at the time: deliberately committed in full knowledge that the company had not been authorised to commence mining operations, the deliberate nature of the offences and matter that goes to the gravity or objective seriousness of the offence.

...

In this case it was also significant that the contravention arose out of the conduct of senior management rather than occurring at a lower level. Indeed, here the misconduct on the part of the managing director.

That is also a matter that is relevant to assessing the objective seriousness of the offence. The higher the level of management involved in a corporate offence the more serious the offence is generally regarded.

¹ *Mining Management Act*, s 3(b)(i).

² CSJ Transcript dated 25 August 2015, p 3-4.

³ CSJ Transcript dated 25 August 2015, p 4.

- [8] The Chief Magistrate expressed the view that there was a “serious deficiency” in the management of the company that permitted the managing director to proceed as he did.⁴
- [9] As his Honour observed, the court must ensure proportionality between the wrong doing and the sentencing response of the court and “a conviction is really an important part of the sentencing process of ensuring a proportionate sentence”.⁵ The recording of a conviction is “a formal and solemn act marking the court’s, and society’s, disapproval of a defendant’s wrongdoing”.⁶ It is, of course, a component of the sentence and is to be accorded weight in seeking to achieve a proportionate sentence in all the circumstances.⁷
- [10] Counsel for the appellant in the court below referred the Chief Magistrate to s 8(1) of the *Sentencing Act* which deals with the decision whether or not to record a conviction. That section is in the following terms:

- (1) In deciding whether or not to record a conviction, a court must have regard to the circumstances of the case including:
 - (a) the character, antecedents, age, health or mental condition of the offender; and
 - (b) the extent, if any, to which the offence is of a trivial nature; and

⁴ CSJ Transcript dated 25 August 2015, p 5.

⁵ CSJ Transcript dated 25 August 2015, p 5-6.

⁶ *McInerney* (1986) 28 A Crim R 318 at 329 (Cox J).

⁷ *Semrad v Habiburrahman* [2013] NTCA 06 at par [31]; citing *Carnese v The Queen* [2009] NTCCA 8 at par [16]; *Lanham v Brake* (1983) 34 SASR 578 at 585.

- (c) the extent, if any, to which the offence was committed under extenuating circumstances.

[11] It is apparent from the wording of the section that the listed matters are not exhaustive of the matters to be considered in deciding whether or not to record a conviction. It is necessary to have regard to all of the relevant circumstances of the case including those matters.⁸

[12] In this case counsel advised the Chief Magistrate that subsection 8(1)(a) of the Act was the only provision of those listed upon which it relied and confirmed that it did not “say the offence is trivial and we certainly don’t say that Mr Branch was acting under extenuating circumstances at the time that he did this”.⁹

[13] The Chief Magistrate did not confine his consideration to the listed matters. His Honour noted that there were many matters of mitigation which had been raised by counsel in the course of detailed written submissions and then in oral submissions and confirmed all of those matters had been taken into account.¹⁰ His Honour accepted that the appellant had been of prior good character and went on to consider other relevant matters including the possible impact of a conviction upon the appellant, the need for general deterrence and “public policy” considerations. His Honour separately addressed some of the identified mitigating factors including the actions of the new Board in first identifying and then responding to the problem, the

⁸ *Toohey v Peach* (2003) 141 A Crim R 437 at par [11].

⁹ CSJ Transcript dated 19 August 2015, p 25.

¹⁰ CSJ Transcript dated 25 August 2015, p 8.

significant and successful remedial action taken by the appellant, the early guilty plea, the remorse or contrition of the appellant and its prior good corporate character.

[14] In relation to the submission that the recording of a conviction would have a detrimental effect on the company itself in terms of loss of reputation and share value his Honour addressed the evidence and went on to conclude:¹¹

At the end of the day I do not consider that to be a factor that would weigh against the court recording a conviction. If companies misbehave as this one did it inevitably as a by-product (sic) they are likely to suffer loss of reputation and it may have an effect on share value. However, in this particular case I do not believe that I have sufficient cogent evidence that a conviction would have such a detrimental effect.

...

I have been told a whole lot about the new Board and they are people whom I consider to have impeccable credentials and I doubt very much that this contravention when viewed in its proper context is likely to have substantial detrimental impact on the company.

[15] Having weighed the competing considerations the Chief Magistrate concluded that he should record a conviction. In so doing his Honour observed that the court must deter companies like the appellant, under the control of a person such as the former managing director, from embarking upon mining operations without authorisation.

¹¹ CSJ Transcript dated 25 August 2015, p 7.

[16] The appellant complained that the Chief Magistrate erred in concluding that “a conviction would not have a detrimental effect”¹² on the appellant and by according predominant weight to general deterrence.

[17] The submission regarding the detrimental effect of a conviction upon the appellant does not fairly reflect the sentencing remarks including those set out at par [14] above. Having already observed that the recording of a conviction “is really an important part of that sentencing process of ensuring a proportionate sentence”¹³ his Honour made the point that if companies misbehave in this deliberate and serious manner, this will have an effect on the reputation of the company and may have an impact on the share value. His Honour went on to say that, in this case, nevertheless there was not sufficient cogent evidence that a conviction would have such a detrimental effect.¹⁴ Reasons were given for this conclusion including that the appellant had changed its name and, inter alia, had installed a new and reputable Board which worked to remedy the damage. This was a conclusion open on the evidence. I see no error on the part of his Honour.

[18] The appellant further complained that the Chief Magistrate concluded that there was a deficiency in the management of the appellant in that there appeared to be an absence of any effective compliance programme to prevent a contravention of the type that occurred in this case.¹⁵ The appellant submitted that it had been denied procedural fairness because there

¹² CSJ Transcript dated 25 August 2015, p 7.

¹³ CSJ Transcript dated 25 August 2015, p 6

¹⁴ CSJ Transcript dated 25 August 2015, p 7.

¹⁵ CSJ Transcript dated 25 August 2015, p 5.

was no evidence before the court as to what, if any, systems were present. In fact the Chief Magistrate had the agreed statement of facts setting out the circumstances of the offending, his Honour received evidence from one of the members of the new Board providing information as to the circumstances of the appellant, had a statement from the Senior Geologist for the appellant describing how the decision to proceed was taken, and had the detailed submissions of the parties as to the circumstances of the offending. In my opinion the conclusion of his Honour was an unexceptional statement reflecting the information placed before the court.

[19] The appellant complained that the Chief Magistrate placed exclusive or excessive weight on general deterrence. Reference was made to the observations of his Honour regarding the application of s 8 of the *Sentencing Act* that:¹⁶

It is not necessary for all three of the criteria in s 8 to be activated in order to trigger that discretion: one is sufficient and in this particular case it is the character and antecedents of the company that is said to trigger the exercise of the discretion.

This observation simply reflected the submissions made by counsel for the appellant in the court below and is unexceptional. The submission unfairly took the remarks of the Chief Magistrate out of context. In the course of dealing with this issue his Honour referred to the detailed submissions made by counsel for the appellant in the court below which, he said:¹⁷

¹⁶ CSJ Transcript dated 25 August 2015, p 6.

¹⁷ CSJ Transcript dated 25 August 2015, p 6.

... were replete with ... mitigating circumstances ... that relates to s 8 which of course provides that in considering the exercise of discretion the court must have regard to circumstances of the case.

[20] His Honour went on to say that he had read those submissions several times and “I have taken all of the things that he has raised into account today”.¹⁸

The remarks on sentence do not suggest that general deterrence was the only factor considered by his Honour, indeed that was not the case. However the sentencing remarks make it clear that general deterrence was an important consideration. This approach was clearly correct.

[21] I am not satisfied that the Chief Magistrate erred in determining whether or not to impose a conviction and I dismiss the appeal against conviction.

[22] Even if his Honour did err this Court may give such judgment on appeal as ought to be given if the case came before the Court of Summary Jurisdiction at the time of hearing the appeal.¹⁹ In my opinion this is a case in which it is necessary to impose a conviction. This is so notwithstanding the significant matters of mitigation which I identify at par [25]. The appellant has acknowledged the offending was contumelious, having been undertaken with full knowledge that the appellant had not been authorised to commence mining operations. It was a blatant breach of the requirements of the legislation and was deliberately committed. There was no excuse for the illegal conduct. The conduct was a direct and deliberate breach of the protective mechanisms provided by the legislation.

¹⁸ CSJ Transcript dated 25 August 2015, p 8.

¹⁹ *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 620.

Appeal against the fine

[23] The appellant made a number of complaints regarding the imposition of the fine of \$300,000. However, it is convenient to first deal with the claim that the fine was manifestly excessive in all the circumstances. The principles applicable to such an appeal are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error and the appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. It must show that the sentence was clearly and obviously and not just arguably excessive.

[24] The maximum fine provided for the offence is \$3,725,000²⁰ and the maximum penalty prescribed is, of course, intended for the worst category of cases for which that penalty is prescribed.²¹

[25] Whilst the unlawful conduct of the appellant amounted to serious offending for the reasons set out above in par [22] and, in my opinion, required the

²⁰ *Mining Management Act*, s 35(4).

²¹ *Veen (No 2) v The Queen* (1988) 164 CLR 465 at 478.

recording of a conviction, this was offending at the lower end of the scale of seriousness for this category of cases. There were significant matters of mitigation to be taken into account regarding the decision to record a conviction and those matters were also relevant to determining the nature of any further penalty, including the size of any fine to be imposed. The mitigating factors include the following:

- (a) the offending occurred when the appellant was under a management regime which was subsequently replaced, partially as a consequence of the offending;
- (b) upon the new management becoming aware of the offending conduct the appellant investigated the matter and then voluntarily reported the illegal conduct to the Department;
- (c) the appellant voluntarily conducted all necessary remedial work at significant cost to itself;
- (d) the remedial work was to the satisfaction of both the Department and the relevant landowner;
- (e) the appellant fully co-operated with the authorities at all times after reporting the offending conduct;
- (f) the appellant entered a plea of guilty at the first available opportunity and accepted responsibility for its conduct;
- (g) through its conduct the appellant demonstrated contrition;
- (h) the appellant did not gain any benefit as a consequence of the unlawful conduct but, rather, suffered significant losses;
- (i) before the offending the appellant had been of good corporate character; and

- (j) by virtue of the changed management regime it was unlikely that the appellant would reoffend.

[26] I accept and adopt the finding of his Honour that the appellant has the capacity to pay a substantial fine. There was a clear evidentiary basis for such a finding. Nevertheless a fine of \$300,000 is a significant impost on a company the size of the appellant.²² I do not agree with his Honour's conclusion that such a fine would have no impact upon the appellant or an impact which is "pretty minimal".²³

[27] In all the circumstances of the offending and of the appellant a conviction and a fine of \$300,000 was, in my opinion, a penalty which was manifestly excessive. The appeal is allowed on this ground.

Resentencing

[28] I resentence the appellant. In determining an appropriate sentence I note that counsel did not draw my attention to any comparative sentences. My understanding is that the researches of both counsel have not identified any useful comparative sentences. There is no assistance or guidance to be obtained by reference to similar matters.

[29] For the reasons discussed above, I regard the recording of a conviction as appropriate and I convict the appellant. I impose a fine of \$150,000.

²² *Sentencing Act*, s 17(1).

²³ CSJ Transcript dated 25 August 2015, p 9.