Ebatarinja v Westphal & Anor [2011] NTSC 106

PARTIES:	EBATARINJA, Julieanne v WESTPHAL, Lindsay And: EATON, Donald John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 42 of 2011 (21124830), JA 43 of 2011 (21126244) and JA 44 of 2011 (20944367)
DELIVERED:	19 December 2011
HEARING DATE:	15 August 2011
JUDGMENT OF:	BARR J
APPEAL FROM:	BORCHERS SM

CATCHWORDS:

APPEAL – Sentencing – fines – whether the learned Magistrate erred in failing to properly consider the appellant's 'financial circumstances' – whether the proper consideration of the offenders 'financial circumstances' required consideration of offender's overall asset position.

APPEAL –Re-sentencing – fines – whether the imposition of an aggregate fine was appropriate in the circumstances.

Justices Act s 177(2)(a), s 177(2)(f)
Sentencing Act s 17(1), s 18

Grant v Cornford [2010] NTSC 59; *Mill v The Queen* (1988) 166 CLR 59, considered

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondents:	J Tierney

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondents:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Bar1116
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ebatarinja v Westphal & Anor [2011] NTSC 106
Nos. JA 42 of 2011 (21124830), JA 43 of 2011 (21126244) and
JA 44 of 2011 (20944367)

BETWEEN:

JULIEANNE EBATARINJA
Appellant:

AND:

LINDSAY WESTPHAL and DONALD JOHN EATON
Respondents:

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 19 December 2011)

[1] The notices of appeal in each of the appeal files have in common as their first ground that the magistrate erred in failing to properly consider the appellant's financial circumstances pursuant to s 17(1) of the *Sentencing Act* in fixing the fines he imposed.

[2] In my oral decision delivered on 24 November 2011, I decided ground 1 in favour of the appellant in each appeal.

[3] I said, amongst other things:-

> "In determining the amount of the fine, the court is required to take into account, as far as practicable, the financial circumstances of the

offender and also the nature of the burden that payment of the fine would impose on the offender.

Under s17(2) a court is not prevented from fining an offender only because it has not been informed about these matters, but it is well settled that where possible the court should obtain information about the financial circumstances of offender before imposing a fine. It was pointed out by Martin CJ in *Grant v Cornford* [2010] NTSC 59 at [24] that the principle which underlies the statutory requirement is that fines imposed upon impecunious offenders run the risk of amounting to an unduly harsh penalty and, in some situations, might amount to a defacto term of imprisonment if imprisonment is a consequence of a failure to pay. .....

The learned magistrate decided, quite appropriately, to fine the appellant, and indeed he was invited to do so by defence counsel. Having made that decision, it was incumbent upon his Honour to take into account the factors referred to in s 17(1) of the *Sentencing Act*.

In my view that subsection required the learned magistrate to determine, as best he could, not only the income of the offender but also the outgoings from that income; also, the offender's asset position, both assets and liabilities. To take into account a person's "financial circumstances" would suggest that these matters must be looked at. It would be irrelevant to consider income without considering outgoings, and a proper consideration of a person's financial circumstances would ordinarily require a consideration of the overall asset position, that is, not only assets but also liabilities. For example, in general terms, although there may be no disposable weekly income remaining after necessary weekly expenses have been paid, a person's savings (if any) might enable a fine to be paid without a significant or unjust burden being imposed.

It is only when the financial circumstances of the offender are taken into account that a proper assessment can be made under s 17(1)(b) as to the nature of the burden which the proposed fine would impose on the offender.

In many cases before the Court of Summary Jurisdiction the exercise I refer to will be simple and straightforward, because of the simplicity of lifestyle, source of income and asset ownership of many offenders, but that would not always be the case."

[4] I went on to made a finding of error on the part of the magistrate in the exercise of his sentencing discretion which led to his failing to properly consider the appellant's financial circumstances in determining the amount of the fines he imposed in all matters, save for two offences of driving uninsured in respect of which there was a mandatory minimum (as conceded by the appellant).

[5] Notwithstanding that I decided ground 1 in each appeal in favour of the appellant, I adjourned the appeals under s 177(2)(a) *Justices Act* with a view to receiving evidence or a statement of agreed facts in relation to the financial circumstances of the appellant. I left open the possibility that the appeals might still be dismissed if I ultimately found that no substantial miscarriage of justice has actually occurred - see s 177(2)(f) *Justices Act*.

[6] The hearing of the appeals resumed on 9 December, at which time counsel for the appellant tendered, with the consent of the respondent, a document setting out a statement of the appellant's financial circumstances. The document includes all weekly income and an estimate or an approximation of weekly expenditure. The document also sets out details of the appellant's assets and liabilities. I was invited to treat the contents of the document as facts in evidence on the appeal.

[7] It is not necessary for me to refer to the document in detail but it emerges from an analysis of the appellant's financial circumstances that she has

limited discretionary income, approximately $90 per week only, available for expenditure on herself. She has very little by way of assets.

[8] The appellant is a 26-year old single parent supporting three children, all girls, aged 7, 6 and 4. In age order, the girls attend primary school, pre-school and day care.

[9] In October this year the appellant set up an automatic transfer of $100 per fortnight to the NT Fines Recovery Unit, by direct deduction from her Centrelink monies, in order to pay off outstanding fines of approximately $1,400. It will take the appellant some 28 weeks to discharge that indebtedness. That does not include the fines payable for the offending which is the subject of these appeals.

[10] The errors on the part of the magistrate identified in my earlier oral decision resulted in his Honour failing to properly consider the appellant's financial circumstances before fixing the fines he imposed. I am satisfied that a substantial miscarriage of justice occurred and I therefore propose to re-sentence the appellant to take into account her proven financial circumstances. In doing so, I have must have regard to the principle of totality.

[11] I note that the High Court in *Mill v The Queen* (1988) 166 CLR 59 at 62 - 63 pointed out that where a sentence has to be reduced on account of the application of the totality principle, the reduction can be achieved either by making sentences wholly or partly concurrent or by lowering an individual

sentence below that which would otherwise be appropriate in order to reflect the number of sentences being imposed. The former was said by the Court to be the preferred method, but the latter was recognised as legitimate, and the latter seems to me to be the only appropriate way where the sentence is a fine rather than a term of imprisonment.

[12] In relation to fines, the purpose for recognition of the principle of totality by the court is to ensure that the total of fines should be proportionate to the total offending conduct. In some cases the court will apply the principle of totality by imposing an aggregate fine under s 18 *Sentencing Act* rather than by reducing individual fines (see *Grant v Cornford* [2010] NTSC 59 at [30]). However, it is not reasonably possible or indeed useful in this case to impose aggregate fines under s 18 *Sentencing Act*, both because of the difficulty applying the 'statutory filters' for the application of the section to the facts and because of the need to separately identify and isolate the 'drive uninsured' matters in respect of which there is a mandatory minimum fine.

[13] I have decided pursuant to s 177(2)(b) of the *Justices Act* that I should mitigate the penalties imposed by the learned Magistrate, with the exception of the penalties imposed for driving uninsured and some others which I will mention. Because I have reduced fines on account of the application of the totality principle, the reduced amounts should not be seen as a tariff or indeed any guide to future sentencing.

[14] In light of the appellant's financial circumstances, and in order to achieve an appropriate sentencing outcome in terms of totality, I re-sentence the appellant and substitute the fines following in lieu of those imposed by the learned Magistrate:-

File 20944367 Offences committed 31 December 2009:

Drive with a low range blood alcohol level of 0.066 percent – a fine of $200 in lieu of the fine of $400, plus $40 victims' levy

Driver give false information – I affirm the fine of $100, plus $40 victims' levy

Drive unlicensed – a fine of $100 in lieu of the fine of $500, plus $40 victims' levy

Drive unregistered – I affirm the fine of $100, plus $40 victims' levy

Drive 'uninsured' – I affirm the fine of $1400, plus $40 victims' levy

File 21124830 Offences committed 31 July 2011:

Drive unlicensed – a fine of $100 in lieu of the fine of $500, plus $40 victims' levy

Drive unregistered – I affirm the fine of $100, plus $40 victims' levy

Drive 'uninsured' – I affirm the fine of $1400, plus $40 victims' levy

File 21126244 Offences committed 13 August 2011:

Unlicensed driver with blood alcohol 0.071 percent – a fine of $200 in lieu of the fine of $500, plus $40 victims' levy

Drive unlicensed – a fine of $100 in lieu of the fine of $500, plus $40 victims' levy

Drive with child no seat belt – I affirm the fine of $100 (no change) plus $40 victims' levy

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