Konecny v Pryce [2000] NTSC 55

PARTIES:	MICHAEL JOHN KONECNY
	v
	LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA1 of 2000 (9917557)
DELIVERED:	12 July 2000
HEARING DATE:	18 May 2000
JUDGMENT OF:	Mildren J

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	C Roberts

Solicitors:

Appellant:	Northern Territory Legal Aid Service
Respondent:	Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Mil00232
Number of pages:	11

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Konecny v Pryce [2000] NTSC 55
No. JA1 of 2000 (9917557)

BETWEEN:

MICHAEL JOHN KONECNY
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 12 July 2000)

MILDREN J*:*

[1] This is an appeal against sentence.

[2] On 2 December 1999, the appellant pleaded guilty to the following charges:

Count	Date of Offence	Charge	Code Sections	Maximum Penalty
1.	Between 1 October and 30 November 1998	Obtained $721 cash by deception	s227	7 Years
2.	Between 1 October and 30 November 1998	Forged a receipt	s258	7 years
3.	Between 1 October and 30 November 1998	Uttering forged receipt	s260	7 Years

Count	Date of Offence	Charge	Code Section	Maximum Penalty
4.	Between 1 March and 31 March 1999	Stole a cheque valued at $1,500	s210	7 Years
7.	17 June 1999	Stole a cheque valued at $1,214	s210	7 Years
11.	26 July 1999	Stole a cheque valued at $1,460	s210	7 Years
15.	25 June 1999	Stole a cheque valued at $2,000	s210	7 Years
19.	Between 25 June and 7 July 1999	Stole a cheque valued at $2,000	s210	7 Years
22.	Between 7 July and 9 July 1999	Stole a cheque valued at $1,719:65	s210	7 Years
25.	Between 15 March 1999 and 30 July 1999	Stole 2 Makita Angle Grinders valued at $250	s210	7 Years

The other counts on the information were withdrawn.

[3] The facts in relation to Counts 1, 2 and 3 were as follows:

> On 22 October 1998 the defendant was employed by Big O True Value Hardware as the trade manager. As part of his employment conditions, the defendant was to be reimbursed up to $3,000 towards his relocation expenses on the proviso he supply reasonable receipts evidencing such expenses incurred.
>
> Due to the defendant's de-facto remaining in Adelaide, Big O allowed for the relocation expenses to cover furniture and effects purchased if the defendant decided to purchase new items instead of relocating existing items. The defendant purchased an Office Line cash receipt book and wrote a receipt out to himself, this being receipt 913805 for $1,030 for the purchase of a queen sized bed, a coffee table and a washing machine. The defendant did not purchase these items.

On 7 November 1998 the defendant supplied Big O True Value Hardware with receipts, including the receipt he had made in his own name for the relocation and purchase costs of personal effects. The defendant incurred legitimate relocation expenses of $2,279. The defendant then submitted the legitimate receipts and receipt for the $1,030 and was then paid $3,000 as per the agreement for the relocation expenses, thus obtaining $721 above his entitlement.

At no stage was the defendant given permission to claim for items not legitimately purchased or as a result of his relocation.

[4] The facts in relation to Count 4 are as follows:

The defendant in his position as trade manager for Big O True Value Hardware was responsible for attending building sites and obtaining orders from tradesmen and customers. Part of this process also included the defendant supplying quotes for materials and if a purchase was to take place, invoicing the appropriate tradesman for the materials and on certain occasions collecting the payment for same.

On 9 March 1999 the defendant issued a quote number 543 for $1,562:03 to Rocky, a customer of Big O, purporting the quote to be the invoice for materials which had been supplied upon which payment was due.

The defendant later attended at the customer's workplace and utilizing the customer's cheque book, wrote the cheque on behalf of the customer, making it payable to himself and not to Big O in the amount of $1,500. The customer, who overlooked the name of the payee, signed the cheque. The defendant took the cheque and on 18 March 1999 deposited it into his own Visa credit card account, National Australia Bank account. At no stage was the defendant given permission to place his name as payee on the cheque or deal with the proceeds of the cheque as if it was his own.

[5] The facts in relation to Count 7 are as follows:

On 13 May 1999 the defendant issued a quote number 624 for $1,214:50 to Mario Del Giacco, a trade customer of Big O, purporting it to be the invoice for materials which had been supplied

for which payment was due. On 17 June 1999 the defendant attended at Del Giacco's workplace.

Due to Del Giacco being busy, the defendant offered to write the cheque out. The defendant then wrote out cheque 300070 for the sum of $1,214:50 in his own name and not Big O, took the cheque and on the same day the defendant deposited the cheque into his own Visa credit card account, National Australia Bank. At no stage was the defendant given permission to place his name as the payee on the cheque or deal with the proceeds of the cheque as if they were his own.

[6] The facts in relation to Count 11 were as follows:

On 1 July 1999 the defendant issued quote number 662 for $1,460 to Del Giacco, again purporting it to be the invoice for materials which had been supplied for which payment was due. On 26 July 1999 the defendant went to De Giacco's workplace. Due to Del Giacco being busy, the defendant offered to write the cheque out.

The defendant wrote out cheque number 30003 for $1,460 in his own name and not Big O, whilst writing on the cheque stub "Big O TVH". The defendant then took the cheque and later deposited the cheque into his own Visa credit card account. At no stage was the defendant given permission to place his name as the payee on the cheque or deal with the proceeds of the cheque as if they were his own.

[7] The facts in relation to Counts 15 and 19 were as follows:

On 15 March 1999 the defendant issued quote numbers 557 for $828:15 and 558 for the value of $440:37 to a Joe Golotta, purporting them to be invoices for materials for which payment was due. On 1 June 1999 the defendant issued Golotta a further quote number 643 for $1,140:32.

He further issued a Greg Boaz quote number 640 for the value of $797:20 and quote 642 for $1,342:32. All quotes issued to Golotta and Boaz related to materials for two jobs for which they were in partnership. On 25 June 1999 the defendant attended at one of their job sites and requested payment on the quotes, stating that $4,000 would settle the account, being $2,000 each.

As Boaz was busy, the defendant offered to write his cheque out on his behalf. The defendant did this, writing on the cheque book butt the payee as Big O; however, writing the payee on the cheque as Michael Konecny. Boaz signed the cheque without noticing the payee. Golotta also wrote a cheque for $2,000 with the payee as TVH, True Value Hardware, and gave the cheque to the defendant.

The defendant later that same day deposited the cheque from Boaz into his own National Bank savings account. The defendant at a later stage altered the initials TVH on the cheque from Golotta, changing the payee to read M Konecny and crossing it "not negotiable" in order to further disguise the alteration. On 7 July 1999 the defendant deposited the altered cheque into his National savings bank account. At no stage was the defendant given permission from Boaz to place his name as the payee on the cheque or alter the payee on the cheque from Golotta.

[8] The facts in relation to Count 22 were as follows:

On 6 July 1999 the defendant issued quote number 664 for $1,719:65 to Native Art of Australia, purporting it to be the invoice for materials which had been supplied for which payment was due. On 7 July 1999 the defendant attended at the business address of the customer and the customer wrote out cheque number 1031 for that value, making it payable to Big O.

The defendant then took the cheque and later altered the payee to read Michael Konecny and not Big O. The defendant deposited the cheque on 9 July 1999 for that value into his own savings account at National Australia Bank. At no stage was the defendant given permission to place himself as the payee on the cheque.

[9] The facts in relation to Count 25 were as follows:

In order to cover his activities, the defendant also gave two Makita angle grinders away, one being to Golotta and one to Del Giacco, being the property of Big O and valued at $125 each. One of the angle grinders had been recovered in a used condition. At no time was the defendant given permission to deal with angle grinders in such a way.

[10] The total amount of money obtained through these charges amounts to $10,615:15, plus $250 for the angle grinders. At no stage did the defendant have permission to deposit any of the cheques into his own accounts and not that of Big O. The defendant also has never had permission to give away the grinders, the property of Big O, or deal with them as if they were his own.

[11] The appellant was born on 16 November 1968 and was therefore thirty years of age at the time of the offending. He had no prior convictions. He co-operated with police enquiries and admitted to committing the offences. He pleaded guilty. As at the time of his sentence, no restitution had been made. The prosecutor sought an order for restitution in the full amount of the loss, viz. $10,865:15. There had been a substantial delay in having the matter dealt with because, so it was submitted, the appellant had attempted to raise sufficient money to make full restitution by selling his car.

[12] Evidence was led from a psychologist, Mr Tyrrell, on behalf of the appellant. The appellant married at the age of twenty-three years to an older woman who was accustomed to there being available a substantial amount of money and he tried to keep up to her expectations. There are no children. The appellant came from a large family. He left school midway through Year 12 and has been in consistent employment, graduating from a sheet metal worker to sales manager. The appellant arrived in Alice Springs in October 1998 to take-up his position with the Big O. Before leaving Adelaide, he had borrowed $15,000 from a finance company - why, is not

clear. At this stage his marriage was not successful. His wife was then unemployed. He needed to send her money for her own support. He travelled to Adelaide from time to time to keep in touch. He was finding it difficult to manage financially. Through loneliness, he began to gamble at the Casino. It appears that most of the money stolen (except in relation to the first three counts) was related to his gambling problems. The learned Magistrate accepted that the appellant's financial and gambling problems were also related to a perceived need to send money to his wife in Adelaide with a view to impressing upon her his success in his new job. She also accepted that in August 1999 the appellant had stopped gambling and recognised the error of what he had been doing; that he had a strong sense of guilt and self-criticism; feelings of worthlessness and a concern that he had had suicidal tendencies. The appellant's wife was not immediately made aware of the charges. When she ultimately was told of them, it appears that what little was left of the relationship came to an end. The learned Magistrate imposed a sentence of imprisonment for six months, which she declined to suspend either in whole or in part.

[13] A number of grounds of appeal are relied upon, as set out in the Further Amended Grounds of Appeal:

1. That the learned Magistrate failed to have regard, or failed to have sufficient regard, to sentencing principles applicable to the imposition of a suspended term of imprisonment.

2. That the learned Magistrate erred in not giving sufficient weight to the circumstances of mitigation relied on by the appellant, including:

   i) The plea of guilty.
   ii) His co-operation with police.
   iii) His prior good record.
   iv) His rehabilitation since the offences.
   v) His remorse and contrition.

3. That the learned Magistrate erred in that she gave no, or insufficient, weight to the principles of rehabilitation.

4. That the learned Magistrate failed to have regard to the abolition of remissions contrary to section 58 of the *Sentencing Act*.

5. That the learned Magistrate erred in giving undue weight to the principle of general deterrence.

6. That the sentence imposed was in all the circumstances of the case manifestly excessive.

7. That the learned Magistrate erred in that she failed to have regard, or failed to have sufficient regard, to the imposition of a restitution Order under section 88 of the *Sentencing Act*.

[14] So far as Ground l is concerned, her Worship considered whether or not the sentence should be suspended in whole or in part. She concluded that it should not, bearing in mind the period of time over which the offences were committed, the breach of trust involved and the amount involved. She did not specifically refer to the fact that no restitution had been made in that context, but she referred elsewhere to that fact and the fact that the appellant had made efforts to sell his car in order to make restitution. I consider that no error is disclosed. Where there has been a series of offences involving a breach of trust committed over a period of time, absent special

circumstances, a sentencing court does not err by failing to suspend any part of a relatively short sentence, even if the offender has no prior convictions, is remorseful and pleads guilty: see for example, *Napper v Samuels* (1972) 4 SASR 63; *R v Bird* (1988) 56 NTR 17 at 33. There are cases which show that the courts have on occasions imposed fully suspended sentences for this type of offence where, for example, the accused is a single parent and can make reparation over time (*The Queen & Ors v Maria Pia Jeffree & Anor*, [1998] WASCA 22), or where there has been full reparation made and unexplained delay in prosecution (*R v Schwabegger*, Court of Criminal Appeal, Victoria, 11 December 1997). There are no special circumstances of this kind in this case, except the possibility that given more time, the appellant may have been able to make reparation if his sentence had been suspended.

[15] As to the decision not to make a reparation order, there was no evidence that the appellant was in a position to make restitution. The evidence showed only that he had unsuccessfully attempted to sell his car. The appellant owed money to a finance company and it was not clear that the vehicle was unencumbered or what the value of the appellant's interest in the car may be, except that he apparently needed $28,000 to clear both liabilities and the appellant had tried to sell the car for less, unsuccessfully. It does not appear that the appellant was in employment or had other means to make restitution. In those circumstances, it is not surprising that no restitution order was made. It is well established that compensation orders will not be

made if the court is of the opinion that there is no realistic likelihood that the order will be complied with: see *Makin* (1982) Cr.App.R (S) Vol 4 at p 180. Nor should orders be made requiring repayments over a period of many years: *Makin, supra; Daley* [1974] 1 WLR 133. Reparation orders are enforced by imprisonment and do not affect civil remedies: *Sentencing Act,* ss93 and 97. To order reparation in these circumstances would be to set up the appellant to fail, resulting in his further imprisonment. Whilst I accept that, if an order had been made, this would have been a further mitigating factor, I do not think the material before Her Worship was sufficient to show that she erred in not making an order.

[16] As to the matters raised in Grounds 2, 3 and 5, the learned Magistrate considered each of the matters referred to in those Grounds. No error has been shown. I do not consider that she gave any of those matters inappropriate weight.

[17] As to Ground 4, whilst the learned Magistrate did not specifically refer to the provisions of s58 of the *Sentencing Act,* there is nothing to show that she failed to take the abolition of remissions into account. The mere fact that that matter is not mentioned is not in itself enough to show error.

[18] As to Ground 6, the learned Magistrate must have had in mind a sentence of nine months' imprisonment, which she reduced to six months having regard to s58. I do not consider that such a sentence is manifestly excessive in the circumstances of this case.

[19] It follows from the above that the appellant has not persuaded me that her Worship erred in any respect. Accordingly the appeal is dismissed.
