Swann v Mosel [2014] NTSC 43

PARTIES:	**SWANN, Tara-Clare**
	v
	MOSEL, Jeffrey
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 2 of 2014 (21229490)
DELIVERED:	6 October 2014
HEARING DATES:	24 April 2014 and 8 May 2014
JUDGMENT OF:	BARR J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW

Appeal – sentence - failure of applicant to lodge appeal within time – power of the Supreme Court to dispense with compliance with any condition precedent to the right of appeal – relevant considerations – applicant did what was reasonably practicable in her circumstances – application allowed.

Justices Act 1928 (NT) s 165, s 171(2)

Sentencing Act 1995 (NT) s 40(6), s 43

Workmen's Compensation Act 1923 (NSW)

Murray v Baxter (1914) 18 CLR 622, applied.

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8; *Fry v Williams* (1985) 2 NTJ 396; *R v Holley, ex parte Attorney-General* [1997] 2 Qd R 407; *Lawrie v Stokes* (1951) NTJ 65; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290; *Nottle v Trenerry* (1993) 3 NTLR 68; *Pushenjack v Owens* (1972) 20 FLR 190; *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32; *Ward v Williams* (1955) 92 CLR 496; *Reid v Reid* [2007] NTSC 7, referred to.

Alympic v Burgoyne [2003] NTSC 43, distinguished.

REPRESENTATION:

Counsel:

Appellant:	J Brock
Respondent:	S Geary

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

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

Swann v Mosel [2014] NTSC 43
No. JA 2 of 2014 (21229490)

BETWEEN:

TARA-CLARE SWANN
Appellant

AND:

JEFFREY MOSEL
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 6 October 2014)

[1] On 21 February 2013, the applicant appeared before the Court of Summary Jurisdiction and entered a plea of guilty to the charge of stealing a quantity of meat from Woolworths on 9 August 2012. On 22 February, she was sentenced to a term of imprisonment of two months, backdated to 20 February to reflect time spent in custody on remand, and partially suspended with effect from 22 February. Multiple conditions were imposed in connection with the suspended sentence, including supervision, acceptance of counselling and treatment, and a condition that the applicant

remain in the Northern Territory. An operational period of two years was fixed.[1]

[2] The applicant wishes to appeal against the severity of her sentence. She is well out of time, and has applied for an order pursuant to s 165 *Justices Act* that the Supreme Court dispense with compliance with the one month time limit created by s 171(2) *Justices Act* for the filing of an appeal.

[3] Satisfaction of the requirement of s 171(2) *Justices Act* - that an appeal must be instituted within one month (from the time of the relevant conviction, order or adjudication appealed against) - has been held for many years to be a 'condition precedent' to the right of appeal.[2]

[4] Failure to comply with a condition precedent deprives the Supreme Court of jurisdiction unless the power of dispensation under s 165 *Justices Act* is exercised in favour of an intending appellant. Under s 165 *Justices Act* the Supreme Court has power to dispense with compliance with any condition precedent to the right of appeal if an applicant satisfies the Court that he or she has done whatever is reasonably practicable to comply with the Act.

[5] In my opinion, the relevant period in respect of which an intending appellant must so satisfy the court is the period of one month from the time of the conviction, order or adjudication (in this case the sentence). As a matter of

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1 Under s 40(6) *Sentencing Act*, the court must specify a period during which an offender is not to commit another offence punishable by imprisonment if the offender is to avoid being dealt with under s 43 *Sentencing Act* for breach of the suspended sentence.

2 *Lawrie v Stokes* (1951) NTJ 65; *Pushenjack v Owens* (1972) 20 FLR 190; *Fry v Williams* (1985) 2 NTJ 396; *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8.

statutory interpretation, that first month is the only period in which he or she can do what is required to comply with the appeal provisions of the Act. If an appeal is not duly instituted within that month, the intending appellant has not complied with the Act. From the end of that first month, the intending appellant is in a 'non-compliance' situation and cannot do anything "reasonably practicable" to comply with the Act.

[6] The legal position is to some extent analogous to that under the NSW *Workmen's Compensation Act*, considered by the High Court in *Murray v Baxter*.[3] The legislation there provided that proceedings for recovery of compensation would not be maintainable unless notice of the accident were given as soon as practicable, and unless the proceedings were commenced within six months after the accident. However, an applicant who did not commence proceedings within the six-month period could be excused if the failure to commence proceedings within the period was occasioned by "mistake … or other reasonable cause." Isaacs and Gavan Duffy JJ (Griffith CJ dissenting) held[4] that the period for which the excuse of mistake or other reasonable cause was required was the 6-month period, and that delay after that time did not have to be excused or explained.

[7] I turn to consider whether the applicant in the present case did whatever was reasonably practicable to comply with the appeal provisions of the *Justices Act* in the period 22 February 2013 to 21 March 2013.

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3 *Murray v Baxter* (1914) 18 CLR 622. See also *Tracy Village Sports and Social Club v Walker* (1992) 111 FLR 32.
4 18 CLR 622 at 632 – 3.

[8] In fact she did very little or nothing, for reasons I now explain.

[9] The applicant failed to attend court on 30 January 2013 to answer the stealing charge referred to in [1], and thus breached her bail. A warrant was issued for her arrest. At the time her life was in turmoil. As a makeshift arrangement, she was living on a boat at the Duckpond, an artificial boat harbour at Frances Bay, some one or two kilometres from the Darwin CBD. Her youngest child had been taken into care in 2011, and that was a source of stress for her. Her other children had also been taken into care, but they had been placed with the applicant's mother and stepfather in Queensland. The applicant was "self-medicating with prescription drugs" at the time of her arrest on 20 February 2013. After her arrest, she started to experience withdrawal symptoms. She remembers having a seizure when in police custody but says she was not given medical attention. When she appeared in court on 21 February (in custody) she was distressed, physically ill and not thinking clearly "having anxiety and feeling the symptoms of post-traumatic stress disorder".[5]

[10] There was an objective basis for the applicant's health complaints. On 17 May 2000, the applicant's son Blake, who was six months old, suffered fatal burns when a tourist cabin at the Kulgera Roadhouse caught fire. The applicant suffered post-traumatic stress disorder, which was not diagnosed

[5] Affidavit Tara-Clare Swann sworn 30 January 2014, par 7.

until 2007, and which became chronic.[6] The applicant herself suffered severe burns to her feet in the fire which caused the death of her son.[7] She was treated with strong, opiate-based painkillers. She became addicted. She also became addicted to cannabis which, she said, helped her cope with night terrors and panic attacks. She battled with her addictions for many years.

[11] On 22 February 2013, the day she was sentenced, the applicant was feeling very ill. She had spent the previous night in custody. When she was assessed at court that morning by Kellie O'Donnell, Probation and Parole Officer, she was vomiting into a bucket. Ms O'Donnell recorded the following observations in an email sent on 22 February 2013:–

> "Half way through the interview, TS complained of suffering severe stomach pains and started dry retching. I asked cell staff for a bowl in which she could use to be sick, they don't have such a thing so I asked if I could have the dust bin. Cell officer placed the bin in with TS in her holding cell and [s*he*] commenced vomiting. Tara had already stated she was supposed to be taking prescribed opiates for treatment of her addiction and had not taken any medication in four days."[8]

[12] There is no doubt that the applicant was very ill while at court on 22 February 2013. After the applicant had been sentenced, Ms O'Donnell arranged for an ambulance to take the applicant to Royal Darwin Hospital for treatment.

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6 Report Mr E P Millikan, psychologist, 24 February 2014, p. 2, annexure "D" to the affidavit of Joshua Brock affirmed 4 March 2014.
7 Northern Territory Coroner's Decision: *Inquest into the death of Blake Neil Victor Harvey* [2001] NTMC 56 at [11].
8 Memo Kellie O'Donnell, 22 February 2013, annexure "E" to the affidavit of Joshua Brock affirmed 4 March 2014.

[13] In her first affidavit in support of the application,[9] the applicant deposed as follows:

> "After the sentence the duty lawyer came and saw me. I was still in the interview cells before my release. I recall her telling me she did not expect a sentence like that. I told her I wanted to appeal. She gave me some legal aid forms. She told me to ring her office when I felt better. I was feeling so sick that I took the form but could not think about it straight away. I cannot remember if she told me there was a time limit to appeal.
>
> I was released shortly after that and taken straight up to the office in Corrective Services. I remember being on the floor there and the worker, Kelly, called me an ambulance. I was then taken to the Emergency Department at Royal Darwin Hospital. The medical team stabilised me. During my admission I was seen by Alcohol and Other Drugs Program. At that time I applied to enter into their program.
>
> I do not recall receiving a letter or any other follow-up from the Legal Aid Commission about the sentence.
>
> My memory of the time straight after my sentence is not great. It took a long time, like about five or six weeks, for me to be confirmed to be in the program with Alcohol and Other Drugs. It was a day to day struggle to live during that time. My housing situation was unsatisfactory. I was also dealing with an application from my sister-in-law to take custody of my daughter. I represented myself in a contested hearing about that application in late July 2013. To make sure I could be there on time each day I stayed at the Air Raid Lodge in town … . I was still having problems with the Department of Housing. I remember applying to Somerville for supported accommodation.
>
> Although I cannot say exactly when it was, it was not until after I had stabilised and gotten into the Alcohol and Other Drugs Program that I had the opportunity to consider my sentence. I went in person to the Northern Territory Legal Aid Commission. They told me someone would contact me. I cannot say exactly when that would have been.

[9] Affidavit Tara-Clare Swann sworn 30 January 2014, par 16 to par 22.

> After one week, no one had called so I called back. I was told to make an appointment with their crime clinic. I cannot tell you the date but it was about 2 to 3 weeks before an appointment was available.
>
> I was given an appointment with a lawyer …. When I saw him he told me it was more than a month from the sentence and there was no way I could appeal. He did say that I may be able to go to Court to change conditions."

[14] There was no challenge to the evidence of the applicant set out above. She was not required to attend for cross-examination. In the circumstances, I accept the applicant's evidence, notwithstanding the absence of supporting evidence.

[15] The applicant did not provide much detail in her first affidavit as to her state of mind in the first month after 22 February 2013, nor as to the events which occurred in that month. However, in her second affidavit,[10] she explained that she remained a patient in the Emergency Department for several days after her court appearance, in which time she was prescribed Endone[11] which relieved her symptoms to an extent - she was no longer vomiting - but which made her feel weak and lethargic, and which also affected her ability to think clearly. After being discharged from the Emergency Department she returned to her cramped living arrangements aboard a de-commissioned prawn trawler at the Duckpond, where she lived with her partner and another person. The applicant was experiencing relationship difficulties with her partner, who was physically abusive to her. The applicant's life and lifestyle

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[10] Affidavit Tara-Clare Swann sworn 20 May 2014.

[11] Endone is a particular trade name for oxycodone, a semi-synthetic opioid.

were upsetting and depressing for her. In this context, she was focused on two things: making a physical recovery and entering the Alcohol and Other Drugs program. Although her doctor prescribed Endone, the medication did no more than keep symptoms at bay until she was able to start the AOD program and she was still left feeling weak and depressed. She had problems with her appetite and organising to eat properly, with the result that she lost a lot of weight. She also suffered endometriosis, a painful and debilitating long-term condition. Her efforts to enter the AOD program required her to attend appointments at the Royal Darwin Hospital which took considerable effort and organising on the applicant's part. By way of example, she had to walk from the Duckpond to the bus station, uphill, which took her about 20 minutes. The applicant succeeded in getting into the program and, although the program proved a challenge, she then started to feel better.

[16] In brief summary, the applicant says that for the first 5 to 6 weeks after the sentence she was "taking each day as it came". She was ill and weak. She did not have time to properly reflect on her sentence and the implications of her sentence. Her efforts to get treatment consumed all her time and energy.

[17] The applicant's evidence is supported to a significant extent by the evidence of Mr Milliken, psychologist.[12] I extract the following from his report:-

> " … both PTSD and an opiate medication addiction were operating in February to May 2013 to reduce significantly the ability to handle the exigencies of daily living. …

[12] Report Mr E P Millikan, psychologist, 24 February 2014, annexure "D" to the affidavit of Joshua Brock affirmed 4 March 2014, p 2.5 - 3 (extracts).

> From 21 February 2013 and for the next couple of days, Ms Swann was distressingly physically ill from and further mnestically reduced[13] by withdrawal effects. She was shocked at having been 'handed' a custodial sentence, despite its being suspended. Her 'executive', organisational and emotional control systems were already in a chronically reduced state by way of PTSD and opiates. In addition, at the time that she was arrested in February she was under heavy stress coming from a need to find suitable accommodation and a need to take Court action to protect one of her children.
>
> Impact on ability: The thought, energy and time demands of the above plus the imperative need to keep out of jail by meeting all the 'immediate' requirements of the sentence would leave her no time or thought space to entertain a thought of an appeal. Moreover, emotionally, because of her perceived ignominy of a gaol term, it was impossible for her, in those early weeks, to think seriously if at all, of anything else.
>
> The first stress relief came when she actually began her anti-addiction programme in late April early May. When by way of having the 'immediates' under control, she enquired about appealing her sentence, she was informed by a lawyer that it was too late to do that. ….".

[18] In *Nottle v Trenerry*,[14] Mildren J referred to the situation where an incarcerated intending appellant had instructed a solicitor to appeal against sentence, but where the appeal had not been lodged in time because of a communications breakdown within the office of the solicitor. His Honour made the following statement:

> "… The appellant's solicitors, and not the appellant, were therefore at fault. In cases such as this, where the appellant is in custody and can do little more than trust an apparently competent solicitor to do that which was necessary to put his appeal on foot, and where the instructions to appeal were given in ample time for the solicitors to comply with the provisions of the Act, it is well established that the

[13] "Mnestic" means pertaining to memory; "mnestically reduced" signifies reduced memory.
[14] (1993) 3 NTLR 68 at 69.9.

> appellant has done all that is reasonably practicable by him to comply with the provisions of the Act and that accordingly it is appropriate to make an order, pursuant to s 165, dispensing with compliance with the condition precedent imposed by s 171(2) that the appeal should be instituted within 28 days."

[19] In the present case, the applicant did not instruct her solicitor to appeal on her behalf; she simply informed her solicitor that she wished to appeal.

[20] Notwithstanding that the applicant did not give actual instructions to appeal, I have come to the conclusion that, with reference to s 165 of the Act, and to the period 22 February 2013 to 21 March 2013, there was nothing 'reasonably practicable' which she could have done to comply with the Act, because of her physical and emotional health and her living circumstances. In this most unusual case, I am satisfied that the applicant could not reasonably have been expected to complete and lodge legal aid forms, or do anything else to advance her appeal.[15] I therefore conclude that, although the applicant did nothing within the relevant period, she nonetheless satisfies the s 165 requirement because she did what was reasonably practicable *for her* to comply with the Act.

[21] Because of the conclusion reached by me in [20], s 165 permits this Court to dispense with the condition precedent, referred to in s 171(2) *Justices Act*, that the appeal be instituted within one month. I interpret the expression "may dispense" in s 165 as permissive or facultative; it logically imports an

[15] The situation may be contrasted with the facts considered in *Alympic v Burgoyne* [2003] NTSC 43 at [9], where Martin CJ noted that the applicant received advice but failed to act as advised for his own reasons.

element of discretion on the part of the court.[16] The court must consider whether or not to dispense with the condition precedent, but has a discretion, which must be exercised judicially, as to whether or not it does so.

[22] The Act does not state the matters to be taken into account by the Supreme Court in the exercise of its discretion. The discretion is unfettered. In some cases it may be relevant to consider in detail the applicant's personal situation and conduct throughout the entire period from the end of the one-month period specified in s 171(2) of the Act, to the date when the application was made.[17] In some cases it may be relevant to consider prospects of success of the appeal, as well as the consequences of a successful appeal.

[23] In *Alympic v Burgoyne*[18] Martin CJ ruled that it was not relevant to consider the prospects of success of a proposed appeal. His Honour said of s 165:

> This is not a general enabling provision for extension of time on grounds which raise for consideration the wider concepts of justice or injustice should the applicant not have the opportunity to pursue the appeal. The enabling provision is limited by its express words.

[24] With respect, I disagree with his Honour's ruling, although I partly agree with the proposition he stated in support. It is true that the enabling

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16 *Ward v Williams* (1955) 92 CLR 496 at 504-8; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 546.7; *R v Holley, ex parte Attorney-General* (1997) 2 Qd R 407 at 430.3; *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at [33], per McHugh J. See also Pearce and Geddes *Statutory Intepretation in Australia* (LexisNexis Butterworths, 8th Ed'n, 2014) 11.10 - 11.11.

17 See, for example, *Reid v Reid* [2007] NTSC 7 at [5] - [10], per Southwood J.

18 [2003] NTSC 43 at [11] .

provision is limited by its express words; however, once the Supreme Court's discretion is enlivened, it is not limited by any express words.

[25] In the present case, because of the significant time lapse from 21 March 2013 to the date of the application, I consider that it is relevant to consider both the applicant's situation and conduct after 21 March 2013, and the prospects of success of her proposed appeal, the latter at least to exclude the possibility that the appeal is hopeless.

[26] In July 2013 the applicant was preoccupied with court proceedings brought by her sister-in-law to obtain custody of the applicant's daughter. It would appear that those proceedings were concluded in late July 2013. At about that time, she attended at the Northern Territory Legal Aid Commission for advice in relation to her sentence. She was told that someone would contact her. After a week, she contacted the Legal Aid Commission by phone and was told to make an appointment. She made an appointment with a senior lawyer and subsequently attended on him, only to be told that, because more than a month had elapsed from the time of sentencing, "there was no way" she could appeal. The applicant was advised that she may be able to seek a variation of the conditions of her suspended sentence, to enable her to leave the Northern Territory to see those of her children who were living in Queensland.[19]

[19] Affidavit Tara-Clare Swann sworn 30 January 2014, par 19 to par 23.

[27] In October 2013 the applicant was served with a summons for alleged breaches of the suspended sentence referred to in [1] above. In the course of her dealings with the North Australian Aboriginal Justice Agency, she was advised that it might be possible to commence an appeal under the *Justices Act* in respect of her sentence. She then immediately instructed her lawyers that she wished to appeal.[20]

[28] In relation to the prospects of success of the proposed appeal, counsel for the respondent does not concede that the sentence was manifestly excessive, but nonetheless acknowledges that, given all factors before the Court of Summary Jurisdiction, the sentence imposed on the applicant was "towards the higher end" both in the length of the sentence of suspended imprisonment and the operational period fixed. I do not consider that the proposed appeal is hopeless; rather, it is arguable, with at least reasonable prospects of success. It would be inappropriate for me to say anything further about the merits at this stage.

Conclusion

[29] I have determined that I should exercise my discretion in favour of the applicant to dispense with compliance with the time limit for institution of an appeal.

[30] I make an order pursuant to s 165 *Justices Act* dispensing with compliance with the condition precedent to the right of appeal contained in s 171(2)

[20] Affidavit Tara-Clare Swann sworn 30 January 2014, par 24.

Justices Act to enable the applicant to appeal against severity of the sentence imposed by the Court of Summary Jurisdiction on 22 February 2013.
