

The Queen v Williams [2010] NTSC 74

PARTIES: THE QUEEN

v

CRAIG LEE WILLIAMS

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 20831335

DELIVERED: 21 December 2010

HEARING DATE: 16 November 2010

JUDGMENT OF: BARR J

CATCHWORDS:

CRIMINAL LAW – Sentencing – notice to show cause – failure to comply with Court order – restitution and compensation – non-payment of monies – whether to be dealt with pursuant to s 93(3) of the *Sentencing Act* – notice dismissed.

Fines and Penalties (Recovery) Act (NT) s 3, s 23, s 25, s 27, s 105, s 106 and s 107

Sentencing Act (NT) s 40, s 88, s 92, s 94, s 103, s 105 and s 106

Lalara v Day [2003] NTSC 90, cited

Schnitzer v Burgoyne [2003] NTSC 48, referred

Fox and Freiberg, *Sentencing – State and Federal Law in Victoria* (2nd ed 1999)

REPRESENTATION:

Counsel:

Crown: S Ozolins

Defence: S Musk

Solicitors:

CrownPlaintiff: Office of the Director of Public
Prosecutions

Defence: North Australian Aboriginal Justice
Agency

Judgment category classification: B

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

The Queen v Williams [2010] NTSC 74
No 20831335

BETWEEN:

THE QUEEN
Plaintiff

AND:

CRAIG LEE WILLIAMS
Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 21 December 2010)

- [1] This matter came before the Court on 16 November 2010 after issue of a notice to Craig Lee Williams ("the offender") to show cause pursuant to s 93(3) *Sentencing Act* why he should not be dealt with under that section for his failure to comply with an order of this Court for payment of monies by way of restitution and compensation.

Background

- [2] On 7 July 2009 the offender was sentenced by Martin CJ to a term of imprisonment for 5 years after he pleaded guilty to the offence of robbery of \$120, circumstances of aggravation being that he was armed with an offensive weapon (a beer bottle) and that he caused harm to the victim. An

order was made that the sentence be suspended after the offender had served two years, commencing 25 April 2009. An operational period of three years from the date of the offender's release was set for the purposes of s 40(6) *Sentencing Act*.

- [3] The matter had been before the Court on at least two occasions prior to formal sentencing on 7 July 2009.
- [4] On 20 April 2009 Martin CJ ordered a pre-sentence report under s 105 and s 106 *Sentencing Act* and a report under s 103 of the Act as to the suitability or otherwise of the offender to be under the supervision of a probation officer.
- [5] On 25 June 2009, after hearing facts and submissions, Martin CJ made an order pursuant to s 88 *Sentencing Act* that the offender pay to the victim restitution of \$120 stolen in the robbery (see s 88(b) of the Act) and a further order that the offender pay compensation of \$930, being \$30 for the damage to the victim's shirt (see s 88(c) of the Act) and \$900 representing the victim's loss of income as a result of injury suffered in the robbery (see s 88(a) of the Act). The total of those amounts was \$1,050.
- [6] Under s 92 *Sentencing Act*, an order for restitution or compensation "may specify ... the time within which restitution is to be made or compensation is ... to be paid". Martin CJ did not specify in the orders of 25 June 2009 any date on or before which monies were to be paid. Under the civil law, judgment monies are payable immediately the judgment is made or given,

unless the court otherwise orders. However, that is not the case with respect to orders for restitution and compensation made under s 88 *Sentencing Act*, because of the effect of the *Fines and Penalties (Recovery) Act* ("the FPRA").

Ancillary money orders

- [7] The FPRA applies to "monies payable to a person under an order of a court in proceedings for an offence" - see s 3(1)(d).
- [8] Part 7 FPRA deals with the enforcement of payment of what are described as "ancillary money orders", and which include, under s 105(1)(c): "any ... monetary compensation made or awarded by a court in proceedings for an offence (including an order under s 88 ... of the *Sentencing Act*)".
- [9] In my opinion, the reference to "monetary compensation" in s 105(1)(c) FPRA is intended to include both compensation ordered under s 88(a) and (c) *Sentencing Act* and restitution ordered under s 88(b) of the Act, provided that the restitution ordered is monetary. In the present case, restitution was quantified in the sum of \$120, and hence it is properly characterised as "monetary compensation".
- [10] The consequence of characterization of all the amounts ordered to be paid by Martin CJ on 25 June 2009 as "ancillary money orders" is that Pt 3 FPRA applies to their payment as though they were fines – see s 106(1)(a) FPRA.

[11] Within Pt 3 FPRA, s 23(1) provides that a fine imposed by a court is to be paid within 28 days after it is imposed.¹

[12] It follows that the amounts the subject of the ancillary money orders in the present case were payable by operation of law, as though they were fines, within 28 days of 25 June 2009. There was no need for Martin CJ to specify a date on or before which restitution was to be made or compensation paid.

Proceedings in court and arguments of counsel

[13] When this matter came before the Court on 16 November 2010, the offender was still in custody. I noted that he would be in custody until suspension of his sentence in April 2011, and was minded to utilise s 94 *Sentencing Act* to extend the time, to a date three months or thereabouts after his release, within which restitution should be made and compensation paid.

[14] However, Ms Ozolins, who appeared for the Crown, pointed out that the power to extend time under s 94 is conditioned on the court's original order stating a time for making restitution or paying compensation, which time is able to be extended. That submission is consistent with the literal and (arguably) commonsense interpretation of s 94(1), which reads as follows:-

¹ An application for further time to pay a fine may be made to the Fines Recovery Unit, and the Fines Recovery Unit may allow further time to pay if it appears expedient to do so, and may also allow the fine to be paid by instalments – see s 25 and s 26 FPRA.

“94 Extension of time of order

A court which makes an order under this Division, may extend the time stated in the order within which the restitution is to be made or the compensation is, or costs are, to be paid.”

[15] I accept the submission of Ms Ozolins. In circumstances where this Court’s original order has not specified or stated the time for payment under s 92(c) *Sentencing Act*, I should not readily interpret the power to extend time in s 94 as a power to set time.

[16] Both Ms Ozolins and Ms Musk, who appeared for the offender, submitted that because the order made by Martin CJ had not specified a time within which monies were to be paid, the offender had not breached the order and ought not to have been the subject of the ‘show cause’ notice. I reject that submission on the basis of my conclusion in par [12] above that the amounts the subject of the ancillary money orders were payable by operation of law within 28 days of 25 June 2009.

[17] Ms Musk referred me to the provisions of the FPRA and to two decisions of Martin CJ which referred to that Act: *Schnitzer v Burgoyne*² and *Lalara v Day*.³ She submitted that enforcement of the restitution and compensation orders in this matter should be left to the executive to follow up. I assume that the reference to “the executive” was to the Fines Recovery Unit, although I note that the Unit is established under s 27 FPRA as a registry of the Local Court and hence may not be within the executive arm of

² [2003] NTSC 48 at [18].

³ [2003] NTSC 90 at [8].

government as such. The real problem with the submission, however, is that although the Fines Recovery Unit is permitted to act for the Northern Territory to enforce payment of an ancillary money order made in favour of the Territory, it cannot act to enforce payment of an ancillary money order “in any other case” – see s 106(5) FPRA. I conclude that the Fines Recovery Unit could not act for the victim in the present case.

- [18] Ms Musk also submitted that the victim could enforce the ancillary money order through execution proceedings in the Local Court, as provided for in s 107 FPRA. That may well be the most appropriate remedy for the victim in this matter, although it is unlikely to be fruitful until after the offender is released from gaol on his suspended sentence and resumes employment. Moreover, it is possible or at least arguable (and I express no conclusion in relation to this) that the offender could make an application for further time to pay under s 25 FPRA which, if allowed, would delay enforcement of the ancillary money orders as a Local Court civil judgment.

Consequences - failure to comply with ancillary money orders

- [19] The offender has failed to comply with the orders made by Martin CJ on 25 June 2009. The monies were to be paid within 28 days of the orders, that is, on or before 23 July 2009.
- [20] Notwithstanding the enactment of the FPRA and its commencement on 1 January 2002, s 93 *Sentencing Act* is still law, and the court retains the power to order an offender to be imprisoned for up to 12 months if the

offender fails to comply with orders such as those made in the present case for restitution and compensation.

[21] Whether the court would make an order for imprisonment in a given case might depend on whether the court has taken into account, in sentencing, an offender's offer or stated willingness to make restitution and pay compensation. In such a circumstance, the failure by an offender to comply with an order for restitution or compensation might be seen as 'cheating' after achieving a favourable outcome, and so the court may be more inclined to make an order for imprisonment in the event of failure to comply with the court's order.

[22] In *Lalara*⁴ Martin CJ expressed the view that awards of compensation are additional to the sentencing process and not a substitute for punishment. His Honour added: "To combine these two separate aspects of sentencing seems to me to be erroneous." It should be borne in mind, however, that his Honour was there considering a ground of appeal that the magistrate had made payment of restitution a condition attaching to the suspension of the offender's sentence.

[23] There are conflicting policy considerations as to whether restitution should be a basis for mitigation in sentencing. Courts are reluctant to reward offenders who make restitution in case it is seen as a means for offenders, and particularly wealthy offenders, to buy their way out of deserved

⁴ [2003] NTSC 48 at [17].

sentences. On the other hand, the making of restitution may be a genuine indication of remorse and rehabilitation. Some courts have taken the pragmatic view that restitution to victims ought to be encouraged, and that one way to do that is to offer some inducement in the form of a lesser penalty.⁵

[24] I have read the sentencing remarks of Martin CJ in this matter and note that his Honour referred to the order for restitution at the time of sentencing. I quote from the bottom of p 5 of the transcript of his Honour's remarks: -

"You are convicted.

"I previously made an order for restitution. In arriving at a sentence I have considered the option of home detention in the form of or coupled with a residential rehabilitation program. However, notwithstanding the matters of mitigation urged by your counsel, I have decided that in all the circumstances such a disposition would be inappropriate, particularly in view of the gravity of your criminal conduct.

"Had it not been for your plea of guilty, I would have imposed a sentence of seven years imprisonment. After making allowance for your plea of guilty, I impose a sentence of five years commencing on 25 April 2009 to take into account the time you have already spent in custody."

[25] Although the order for restitution was mentioned in his Honour's sentencing considerations, it is unclear as to what extent it was taken into account, if at all. By way of comparison, the plea of guilty was taken into account and

⁵ See the discussion in Fox and Freiberg, *Sentencing - State and Federal Law in Victoria* (2nd ed, 1999) at par 3.809.

specific reference made to the discount allowed for that plea. In the circumstances, I am unable to draw any conclusion as to whether the orders for payment of compensation and restitution had any favourable effect on the sentencing outcome.

[26] Another factor which might impact on the court's discretion to order imprisonment under s 93 is the reason for an offender's failure to comply with orders for restitution and compensation, and as to whether any inference might be drawn as to lack of remorse. The obvious explanation for non-payment in the present case is that the offender has been in gaol since he was sentenced on 7 July 2009. That fact suggests that lack of remorse is not the reason and that further imprisonment of the offender would be inappropriate from a sentencing perspective, as counterproductive to the offender's rehabilitation.

[27] Another possible consideration is that s 93 may simply be an enforcement provision, having no connection with general sentencing principles such as rehabilitation. The threat of imprisonment in s 93 might then be legitimately used as a "big stick" to enforce orders where Local Court enforcement proceedings have proved unsuccessful. My preliminary view is that a court in its criminal jurisdiction would need to exercise caution in using s 93 in that way, but it remains a possible consideration so long as s 93 co-exists with the FPRA.

Conclusion and orders

[28] Given the circumstances in which the offender has failed to comply with the orders for restitution and compensation made against him, and the existence of an appropriate alternative civil remedy available to the victim under s 107 FPRA, I make no order against the offender under s 93(1) *Sentencing Act*.

[29] The Notice to Show Cause dated 2 November 2010 is dismissed.
