McCracken v Verity [2013] NTSC 30

PARTIES:	**McCRACKEN, Jason**
	v
	VERITY, Brett
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 24 of 2013 (21315067) and JA 25 of 2013 (21315074)
DELIVERED:	24 June 2013
HEARING DATE:	18 June 2013
JUDGMENT OF:	BARR J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

APPEAL AGAINST SENTENCE – Error of fact – sentence quashed – appellant re-sentenced

APPEAL AGAINST SENTENCE AND CONVICTION – Error of law – period of time miscalculated – *Interpretation Act* 1978 (NT) applied – conviction and sentence quashed

CRIMINAL LAW – APPEAL AGAINST CONVICTION AND SENTENCE LEGISLATION – *Child Protection (Offender Reporting and Registration Act)* 2004 (NT) – interpretation – calculation of time

STATUTORY INTERPRETATION – *Child Protection (Offender Reporting and Registration Act)* 2004 (NT) – calculation of time – application of *Interpretation Act* 1978 (NT)

Child Protection (Offender Reporting and Registration) Act 2004 (NT)
Justices Act 1929 (NT)

Interpretation Act 1978 (NT)

Trespass Act 1987 (NT)

Segal v Young [2001] NSWCA 131; *House v The King* (1936) 55 CLR 499, applied.

R v Storey [1998] 1 VR 359; *R v Olbrich* (1999) 199 CLR 270, referred to.

REPRESENTATION:

Counsel:

Appellant:	J Anderson
Respondent:	S Ledek

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

McCracken v Verity [2013] NTSC 30
No. JA 24 of 2013 (21315067) and JA 25 of 2013 (21315074)

BETWEEN:

JASON McCRACKEN
Appellant

AND:

BRETT VERITY
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 24 June 2013)

[1] On 18 June 2013, I made the following orders:

1. On the appeal in file 21315067, pursuant to s 177(2)(c) *Justices Act*, an order that the finding of guilt, conviction and sentence on the charge contrary to s 48 *Child Protection (Offender Reporting and Registration) Act* be quashed.

2. On the appeal in file 21315074, pursuant s 177(2)(c) *Justice Act*, an order that the sentence of four months imprisonment be quashed and that the appellant be sentenced in lieu to a term of imprisonment of two months and 14 days to commence from 11 April 2013.

[2] I now provide my reasons.

[3] On 26 April 2013, the appellant, age 30, pleaded guilty in the Darwin Court of Summary Jurisdiction to a charge on information that, on 11 April 2013, he failed, without reasonable excuse, to comply with his reporting obligation, namely, to report to a Police Station within seven days of being released from prison, contrary to Section 48 *Child Protection (Offender Reporting and Registration) Act* ("the CPORR Act").

[4] The facts of offending were contained in a document which was tendered, and then read out in court, as follows:

> "On 12 January 2009 the Darwin Court of Summary Jurisdiction found the defendant guilty of aggravated assault. The defendant was sentenced to a period of imprisonment. As a result of the conviction the defendant was placed on a reportable offenders register pursuant to *Child Protection (Offender Reporting and Registration) Act* for 15 years.
>
> On 17 July 2009, prior to the defendant's release from the government custody, he was formally notified of the reportable offender status and his requirement to comply with the reporting obligations of the Act.
>
> On 13 January 2010, the defendant was initially registered as a reportable offender. The defendant was again notified of his obligations of which included the requirement for him to report within seven days of the release from his government custody.
>
> On 4 April 2013, he was again formally notified of his reportable offender status and his requirement to comply with the reporting obligations of the Child Protection Act.
>
> On 4 April 2013, the defendant was released from Berrimah Gaol. The defendant has since failed to attend to a police station by 4 pm within 7 days of his release from government custody.

> At 4:44 pm on 11 April 2013, the defendant was arrested by police in Palmerston in relation to other offences. At 11 am on 12 April 2013 after receiving legal advice, the defendant declined to participate in a record of interview with police and declined to give a reason to police for failing to report.
>
> The defendant did not offer a reasonable excuse for not reporting as required with his reporting obligations."

[5] The appellant's counsel informed the magistrate that the facts were agreed.

[6] Under s 14(6) of the CPORR Act, a person who becomes a Territory reportable offender[1] is required to make an initial report of his or her personal details to the Commissioner of Police within seven days after ceasing to be in government custody. Under s 19(4), a reportable offender who is in government custody for 14 or more consecutive days must report his personal details to the Commissioner within seven days after ceasing to be in government custody.

[7] On 6 March 2013, the appellant was sentenced to imprisonment for one month (backdated and deemed to have commenced on 5 March 2013) for a failure to comply with reporting conditions on 20 February 2013. When he was released from prison on 4 April 2013, he had spent more than 14 consecutive days in government custody. His statutory obligation to report was therefore triggered. It is common ground that he did not report at any time prior to his arrest at 4.44 pm on 11 April 2013.

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[1] A "Territory reportable offender" is a person whom a Territory court has, on or after the commencement date, sentenced for a reportable offence or who has been made the subject of an offender reporting order – see s 7 CPORR Act.

[8] It is unclear on the evidence as to the time of day on 4 April 2013 at which the appellant was released from Berrimah Gaol. However, that does not matter, since under s 28 *Interpretation Act* (NT), where in an Act "a period of time dating from a given day, act or event is prescribed, allowed or limited for any purpose, the time shall be reckoned exclusive of such day or of the day of such act or event." There is no provision as to reckoning of time in the CPORR Act, and therefore s 28 *Interpretation Act* applies.

[9] On a correct reckoning, the start time of the period of seven days within which the appellant was required to report was midnight on 4 April 2013, that is midnight occurring between 23:59 on 4 April 2013 and 00:01 on 5 April 2013. The appellant was entitled to the full seven day period within which to report. Anything less than that full period would result in the appellant not being granted the time allowed him by the CPORR Act.[2] That means that he had until midnight on 11 April 2013 (that is midnight occurring between 23:59 on 11April 2013 and 00:01 on 12 April 2013) to report his personal details.

[10] On the agreed facts, the appellant was arrested at 4.44 pm on 11 April 2013. At that time, the period within which he had to report still had seven hours and 16 minutes to run. Moreover, under s 35(2) of the Act, the appellant's

[2] see *Segal v Young* [2001] NSWCA 141, per Ipp AJA, at [19].

duty to report was suspended once he was arrested and taken into "government custody". Time did not run against him after his arrest.[3]

[11] As a matter of law, for the reasons explained in [8] to [10], no offence had been committed against s 48 of the CPORR by the appellant at the time he was arrested.[4]

[12] It would appear that the prosecutor, defence counsel and the learned magistrate were all unaware of the legal and/or evidentiary deficiencies giving rise to this ground of appeal.

[13] In the circumstances, there was an error of law and, as a result, I made an order to quash the finding of guilt, conviction and sentence on file 21315067.

[14] The appellant also pleaded guilty on 26 April 2013 to a charge on complaint that on 11 April 2013 he trespassed on premises (residential premises in Gray, a suburb of Palmerston), contrary to s 5 of the *Trespass Act*. The maximum penalty for that offence was a term of imprisonment of six months. The agreed facts for sentencing were as follows:

> "On Thursday 11 April 2013 the defendant was present in the suburb of Gray. At approximately 4.00 pm the defendant entered through the closed perimeter gate of a residence … in Gray.

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[3] Note, however, that under s 35(3) CPORR Act, the period for which a reportable offender's reporting obligations continue is extended by any length of time for which those obligations are suspended while he or she is in government custody.

[4] Additionally, it may be noted that the agreed facts (considered independently of the 'Information for Courts' document) did not establish the commission of an offence against s 48 CPORR Act, because the period spent by the appellant in prison was not stated, and the court therefore could not find that the appellant had spent 14 or more consecutive days in government custody when he was released from prison on 4 April 2013.

> At the time the sole occupant in the dwelling was the victim in this matter, MB, a fifteen year old female. The victim was alerted by the family dogs barking and went to investigate the cause of the disturbance. She exited the house via the side door. She observed that the front gates were open. She then checked the rear of the property and found nothing untoward.
>
> The victim re-entered the house and walked towards the bedroom. On entering the hallway, the victim located the defendant in her bedroom. The victim screamed at the defendant and told him to leave. The defendant stood momentarily, said nothing and then exited the property through the laundry door. He then ran exiting the property by the front gate and through an adjacent alleyway.
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> Police were subsequently called and located the defendant a short distance away from [the Gray residence]. When spoken to, he denied any knowledge of being at the address.
>
> The defendant and clothing matched the description supplied by the victim. He was arrested and conveyed to Darwin Watch House. On Friday 12 April 2013 the defendant was invited to participate in an electronic record of interview. The defendant declined to participate following legal advice.
>
> The defendant declined the opportunity to participate in a police line-up.
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> At the time of the offence, the Gray residence was a private residence not open to and used by the public. The perimeter gate was closed and secured by the latch. The defendant is not known to the victim or her family. At no time did the defendant have permission to trespass or to enter the premises.

[15] Although the appellant did not give evidence, counsel for the appellant provided the magistrate with an explanation for the trespass to the effect that the appellant had a family friend who had been living in the area and that, in his intoxicated state, the appellant thought that the house he entered belonged to his friend. It was submitted that he had gone inside looking for

somewhere to sleep. Counsel properly conceded on behalf of the appellant that the victim would have been scared. Counsel told the magistrate that the appellant was extremely sorry and asked the magistrate to take into account that he left the house as soon as he had seen the girl.

[16] The learned magistrate did not accept the explanation given by counsel, noting that the appellant had denied that he had been at the address when spoken to by police. His Honour later referred to the lack of detail as to the identity or correct residential address of the alleged friend. In my opinion, the magistrate was entitled to reject the appellant's explanation.

[17] On the agreed facts, the trespass offence took place at approximately 4.00 pm on 11 April 2013. In addition, the evidence before the court in relation to the other charge was that the defendant had been arrested at 4.44 pm that same day. However, in sentencing the appellant, the learned magistrate was under the misapprehension that the trespass offence had occurred late at night. Moreover, it appears that his Honour treated that incorrect fact as an aggravating factor in sentencing, as appears from the following extract from the sentencing remarks:

> In relation to the trespass on premises, for the reasons I have given, I have found the explanation provided – I disbelieve it, I do not accept it. No man who has been convicted of four previous counts of trespassing on enclosed premises[5] and then on this occasion, … the factors I have raised about the unreliability of the explanation, can expect to have been found in somebody else's home late at night treated as anything other than highly suspicious.

[5] In fact, there were five previous convictions for trespassing on enclosed premises.

[18] Notwithstanding the learned magistrate's high level of suspicion, there was no evidence that the appellant intended to commit any offence. The magistrate was entitled to reject the explanation provided to the court on the ground that he was not satisfied on the balance of probabilities as to the truth of the explanation.[6] However, that did not entitle his Honour to make any finding as to intent to commit any offence other than the offence of trespass itself. Although his Honour did not actually make such a finding, his speculation and reference to "highly suspicious", in the context of his unfortunate misunderstanding as to the time of day at which the offence was committed, led me to conclude that the learned magistrate had misapprehended the facts and thereby erred in the exercise of his sentencing discretion.

[19] In my judgment, given that his Honour mistook a relevant fact, the present case was an example of the circumstances discussed by the High Court in *House v The King*[7] in which an appeal court may properly exercise its own discretion in substitution for that of the court below.

[20] In re-sentencing, I took into account that the trespass was to a private dwelling, and that the appellant intruded into the bedroom of the fifteen year old female occupant, who was placed in a state of fear.[8] These are matters of concern. In terms of relative seriousness, however, the trespass occurred in daylight hours and for a very short period of time. The offender

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6 *R v Storey* [1998] 1 VR 359 at 369, per Winneke P, Brooking and Hayne JJA and Southwell AJA, approved by the majority (Gleeson CJ, Gaudron, Hayne and Callinan JJ) in *R v Olbrich* (1999) 199 CLR 270, at [27].

7 (1936) 55 CLR 499 at 504-505.

8 as conceded by counsel for the appellant in the Court of Summary Jurisdiction.

committed the offence alone, and not in company. Moreover, when his presence was detected, he left almost immediately, without resistance or any threatening behaviour.

[21] The appellant had a significant record for similar offending. He had five previous convictions for trespass on enclosed premises and 16 previous convictions for the unlawful entry of buildings. His previous sentences for trespass (where they could be separately identified from sentences for related offending imposed at the same time) had been in the order of one month imprisonment or less.[9]

[22] I took as my starting point in re-sentencing a term of imprisonment of three months, but after making due allowance for the plea of guilty I arrived at a sentence of two months and 14 days. The discount allowed was mainly for the utilitarian value of the plea, with allowance for some remorse.

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[9] Darwin CSJ sentences 15 August 2008 (14 days), 24 March 2010 (no penalty, in circumstances where he was given at the same time a 28-day sentence for stealing), 28 November 2012 (one month).