

Stephensen v Trenerry [2000] NTSC 92

PARTIES: STEPHENSEN, Marina
v
TRENERRY, Robin Laurence

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO: JA 76 of 1999 (9822669)

DELIVERED: 14 November 2000

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JUDGMENT OF: MARTIN CJ

CATCHWORDS:

Appeal – appeal against sentence – whether “exceptional circumstances exist” pursuant to s 78A(6C) of the *Sentencing Act* – whether “... the offender is otherwise of good character and that there were mitigating circumstances ...” to satisfy s 78A(6C)(c) of the Act.

Melbourne v R (1999) 164 ALR 465 at par 26, 33, 63-67, 105 and 108, applied.
Irving v Minister for Immigration, Local Government and Ethnic Affairs (1996) 139 ALR 84 at 87-88, applied.

Neal v The Queen (1982) 149 CLR 305 at 341, applied.
Woods v The Queen (1994) WAR 341 at 350-351, applied.

Criminal Code 1983 (NT), s 251(1)
Sentencing Act 1995 (NT), s 5(2), s 6, s 6(b), s 78A, s 78A(6C)(c) and s 78A(6B)

REPRESENTATION:

Counsel:

Appellant: P Strickland
Respondent: J Blokland

Solicitors:

Appellant: NAALAS
Respondent: DPP

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

Stephensen v Trenerry [2000] NTSC 92
No. JA 76 of 1999 (9822669)

BETWEEN:

MARINA STEPHENSEN
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 14 November 2000)

- [1] Appeal against sentence of 14 days imprisonment imposed under the mandatory sentencing provisions of the *Sentencing Act* 1995 (NT). Primarily it raises the question of what is meant by “good character” in s 78A(6C)(c) of the Act.
- [2] The appellant was found guilty on 31 August 1999, after trial, for unlawfully damaging property, namely, a glass door. The offence occurred on 6 September 1998 as a consequence of the appellant being asked to leave a hotel upon the grounds that she was intoxicated. Immediately after leaving the premises she turned and kicked the glass door through which she

had passed onto the footpath. That caused the glass to break leaving it shattered, but within the frame. It had to be replaced.

[3] Under the provisions of s 78A of the *Sentencing Act* the appellant stood to be convicted and sentenced to a term of actual imprisonment of not less than 14 days, unless the court found that exceptional circumstances for not doing so existed, in which case it could impose any other sentence or make any other order authorised by the *Sentencing Act* or any other Act (s 78A(6B)).

[4] The following is the whole of s 78A(6C):

“For the purposes of subsection (6B), exceptional circumstances will only exist if the offender is before the court to be sentenced in respect of a single property offence, the offender has not on any previous day been dealt with by a court under subsection (6B) and the court is satisfied of all of the following:

- (a) that the offence was trivial in nature;
- (b) that the offender has made, or has made reasonable efforts to make, full restitution;
- (c) that the offender is otherwise of good character and that there were mitigating circumstances (which it is noted do not include intoxication due to alcohol or the use of illegal drugs) that significantly reduce the extent to which the offender is to blame for the commission of the offence and demonstrate that the commission of the offence was an aberration from the offender’s usual behaviour;
- (d) that the offender co-operated with law enforcement agencies in the investigation of the offence,

the onus of proving the existence of the matters referred to in paragraphs (a), (b), (c) and (d) being on the offender.”

[5] It will be noted that some of the matters to be established by the offender are similar to those to which courts shall have regard in sentencing an

offender set out in s 5(2), such as the seriousness of the offence, the extent to which the offender is to blame for the offence, the presence of mitigating factors concerning the offender and how much assistance the offender gave to law enforcement agencies in the investigation of the offence. That the accused may unsuccessfully mount a defence to the prosecution is not to be taken into account in this context.

- [6] His Worship held that the offence was trivial in nature. Cooperation with law enforcement agencies in the investigation of the offence was conceded by the prosecutor before his Worship, notwithstanding that the appellant gave a version of events to the police which was not accepted upon trial.
- [7] On the question of character, reference should also be made to s 6 of the Act where it is provided that:

“In determining the character of an offender, a court may consider, amongst other things:

- (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender;
- (b) the general reputation of the offender; and
- (c) any significant contributions made by the offender to the community.”

- [8] The appellant was aged 38 at the time of the offence. She had been educated to about the age of 14 in Darwin schools. She then went with two of her sisters fruit picking, but on the journey she met a man who became the father of her daughter which she bore at the age of 17. She returned to Darwin and lived with her mother for an extended period. She was

described as having been in “pretty regular employment”, mainly casual, but is presently somewhat restricted in that regard by a medical condition. At the beginning of 1999 she enrolled in a general studies course at the Northern Territory University where her immediate aim is to qualify to year 10 level.

- [9] The appellant comes from a large family and was said to be supportive of them. In 1997, her mother was terminally ill with cancer and the appellant became her full time carer, moving into her mother’s house for that purpose and continuing in that role until her mother died.
- [10] Two references were tendered by consent. The referees were related to her and were aware that the appellant had been found guilty of the offence. They spoke highly of her involvement with family and her care of her mother. Both spoke of the appellant putting the needs of other people before her own. The death of the appellant’s mother, followed a few months later by that of her mother’s sister, created significant stress for the appellant and other members of the family.
- [11] Notwithstanding all that, his Worship found that the appellant was not a person of good character. In that regard he took into account that she had been convicted of possessing cannabis in 1982, for which she was fined \$75 and of a series of offences arising from the one incident in 1994. On that occasion the motor vehicle she was driving was without lights. She did not have a driver’s licence, the vehicle was unlicensed and uninsured, she gave

a false name to the police and failed to supply a sufficient sample of her breath for a breath analysis. She was penalised a total of \$1,400. It was put on her behalf, and not contested, that the giving of the false name was remedied very quickly thereafter by her, without intervention by the police.

[12] In dealing with this matter, his Worship expressly found that the conviction for possessing cannabis in 1982 would not have disqualified the appellant from being considered to be of good character, nor would the single offence of failure to supply a sufficient sample of breath, be a conviction which would, “in the Territory be regarded as an event which puts it as being beyond the pale”. The motor vehicle offences were not regarded as being terribly significant. However, he said that the offence of supplying a false name was more serious even if it was impulsive. It appears to me from the tenor of his Worships remarks in relation to those prior convictions that he did not regard any of them, taken alone, as depriving the appellant from a beneficial finding. However, he completed his remarks in these terms:

“and finally, of course, there is the finding of guilt in this matter in 1988. ... the sum and seriousness of all those offences together, clearly make it impossible for me to conclude that in the normal meaning that lawyers attach to the phrase, Ms Stephenson is of good character.”

[13] Notwithstanding the submissions made by counsel before this Court for the respondent that his Worship was simply talking chronologically in reference to offending, and did not include the conviction for the matter then before him as part of his assessment of good character, I think the plain meaning of

the words as they appear from the transcript show that he did include it. In that regard I consider that he erred. It may have been an unwitting mistake, but it was not corrected. The use of the word “otherwise” in relation to the assessment of good character is intended, in my view, to remove from the court’s consideration the finding of guilt for the present offence. It is therefore necessary that I consider the evidence in relation to the appellant’s character for myself.

[14] The first thing to be noted is that the question of the appellant’s character is to be considered as at the time the assessment is made, that is, after a finding of guilt for the offence in question. It is then necessary to determine what is meant by “good character” in the context of the *Sentencing Act*. Although *Melbourne v R* (1999) 164 ALR 465 has to do with good character evidence in the course of a criminal trial, observations by some of their Honours are, with respect, helpful here. (I omit detailed citations and references). At par 26 McHugh J quoted Lord Steyn describing “the equation of a lack of criminal record with evidence of good character as the “usual case”.” At par 33:

“In its strict sense character refers to the inherent moral qualities of a person or what the New Zealand Law Commission has called “disposition – which is something more intrinsic to the individual in question”.

[15] Generally good character is to be contrasted with reputation, which is the public estimation or repute of a person irrespective of the inherent moral qualities of that person, but see s 6(b) of the Act. At par 63, Gummow J

referred to the various shades of meaning as given in the Oxford English Dictionary where eleven uses of the term in a figurative sense are given:

“In that sense, “character” may identify (i) a trait which serves as an index to the essential or intrinsic nature of an individual (ii) the sum of such traits or (iii) the estimate put upon an individual as a matter of repute.”

At par 64:

“In the law, the notion of “character” takes varying significance and shades of meaning from particular fields of discourse and the particular fact in issue. It may be said that “character”, that which marks out an individual, may not correspond with the reputation attributed to that person. However, as will appear, the law does not always clearly distinguish between the two, nor indicate the probative force to be attributed to which of them is to be established as a fact in issue, nor specify the evidentiary means, including permissible inference, by which that fact in issue may be proved.”

[16] At par 65 his Honour quotes from a New Zealand Law Commission Preliminary Paper drawing attention to the distinction between public estimation and disposition, and quoting from Holmes JA in par 66, ““Good character” is not a summation of acts alone, but relates rather to the quality of a person”. At par 67, drawing upon Lord Denning: “A man’s “character”, it is sometimes said, is what he in fact is, whereas his “reputation” is what other people think he is.” Reference might also be made to Kirby J commencing at par 105, the concept of character referring to the “moral constitution” of a person. At par 108 his Honour rejects decisions that ““good character” is synonymous with the absence of prior criminal convictions”. Nowhere in that judgment can I find it suggested that the

presence of criminal convictions is necessarily determinative of the question.

[17] In *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 139 ALR 84 at pp 87-88 Davies J said: “It should also be observed that the term “good character” is not precise in its denotation. In one sense, it refers to the mental and moral qualities which an individual has. In another sense, it refers to the individual’s reputation or repute”, giving reference to the Oxford English Dictionary and the Mcquarie Dictionary. The question of character arose in the context of an immigration decision, and his Honour observed:

“... criminal convictions or the absence of them and character references are likely to be an important source of primary information. If there is a criminal conviction, the decision maker will have regard to the nature of the crime to determine whether or not it reflected adversely upon the character of the applicant”.

[18] The legislature clearly did not intend that prior criminal convictions would be determinative of the question of character. If that were intended, then it would have been clearly spelt out. Nor do I consider that the presence or absence of prior criminal convictions is the only factor to be taken into account, particularly given that the assessment is to be made as at the time of the finding of guilt for the property offence. The recent success in mapping of the human genome is likely to give rise to debate about the effects of inheritance and environment upon the development of character,

but in my present understanding of human knowledge, it is unlikely that it can be said of any person that his or her character is incapable of change.

[19] Leaving aside the present finding of guilt, I am firmly of the opinion that the appellant is of good character. Neither the individual offending, nor the combination of offences committed in 1982 and 1994, suggest that the appellant is not presently a person of good character. Furthermore, there is nothing in her personal circumstances which would deny to her a favourable finding on that account. The direct evidence, perhaps some of it by way of reputation, of her caring for members of her family, and in particular her caring for her mother, are positive indications of good character.

[20] But that is not enough to avail the appellant the benefit of the law as to exceptional circumstances. The question of good character does not stand alone. It must be coupled with further findings in favour of the appellant, that is, that there were mitigating circumstances that significantly reduced the extent to which the offender was to blame for the commission of the offence, and which demonstrate that the commission of the offence was an aberration from the offender's usual behaviour. (It will be noted that the Act provides that mitigating circumstances do not include intoxication due to alcohol or the use of illegal drugs, to which I would add, they rarely are. However, that provision does not acknowledge that offenders may have become so intoxicated involuntarily). His Worship made no finding as to whether this additional combination of factors had been established by the appellant.

- [21] Turning to the factors to be considered in determining the offender's character as specified in s 6, I have dealt with the previous findings of guilt and general reputation such as has been demonstrated. Although the question of significant contributions made by an offender to the community may have a much broader import as well, in my view significant contributions made by an offender to the maintenance and support of his or her family is a significant contribution made by him or her to the community.
- [22] Having determined that his Worship had erred in his findings as to good character, the parties were requested to indicate whether they wished the matter to be remitted to his Worship to complete his task or whether they wished to make submissions on the basis that I would deal with them upon the appeal. They adopted the latter course.
- [23] It was noted that his Worship had expressed views about the question of mitigating circumstances indicating that, in his view, the appellant probably would not have done what she had done had she been sober, but nevertheless adding that it seemed there were circumstances which might well be considered to be mitigating, namely that her action in kicking the door followed her being effectively evicted from the Karama Tavern. His Worship found:

“that was essentially because she had a ding dong stand up argument with one, Darryl Chin. That was not because she was drunk, although once again alcohol contributed to that, but because there was a long standing domestic dispute arising from the circumstances

attending upon the break up between Darryl Chin and the (appellant's) daughter.”

[24] It is plain from his Worship's findings and observations that the action of the appellant in kicking at the door was not premeditated, it was a reaction to a set of circumstances not engendered by her. Nowhere was it suggested that she intended to break the glass. Counsel for the appellant submitted that the offence was committed on the spur of the moment in the context of inflamed passions, the origin of which involved highly emotional subject matter. Such matters, it was put, have traditionally been seen as a significant matter of mitigation. Reliance was placed upon what fell from Murphy J in *Neal v The Queen* (1982) 149 CLR 305 at 341:

“Premeditated and deliberate acts will be treated more severely by the courts than those committed in moments of passion where the offender has acted impulsively.”

[25] In *Woods v The Queen* (1994) 14 WAR 341 at 350-351 Anderson J said:

“When emotional stress is put forward in mitigation, the court must be persuaded that the offending is connected to the emotional condition in a way that to some sensible degree lessens the offender's culpability or the criminality of her behaviour, or makes retribution less imperative, or positively indicates that the offending is out of character and therefore may not be repeated, so as to perhaps lead to the conclusion that there is no need, in the particular case, to place emphasis on personal deterrence or so as perhaps to lead to the conclusion that the case is not one in which it is appropriate to emphasise general deterrence.”

[26] I consider that this was such a case. The circumstances to which reference has been made significantly reduced the extent to which the appellant was to

blame for the commission of the offence, and certainly demonstrated that it was an aberration from her usual behaviour.

[27] As to restitution, the evidence upon appeal, at which time she stood to be sentenced again, is that the whole of the cost of the damage to the door had been paid.

[28] The appellant cooperated with law enforcement agencies in the investigation of the offence. She attended at the police station of her own free will when asked to do so, answered questions admitting that she was at the Tavern, that she was escorted out of it, that she was close to the front glass door and that she was intoxicated. She had denied damaging it and his Worship who heard and saw her give evidence said that he did not know whether that denial was a lie or her own honest reconstruction of events.

[29] It is always a matter of fact and degree whether a person has cooperated, and in this case I am satisfied that the required circumstance has been made out.

[30] All of that leads to the conclusion that it is not obligatory to impose a sentence of imprisonment upon the appellant in accordance with s 78A of the Sentencing Act.

[31] In all the circumstances, which are sufficiently detailed elsewhere in these reasons, the appellant is convicted of the offence and discharged.
