Wheeder v Verity [2015] NTSC 34

PARTIES:	WHEEDER, George v VERITY, Brett
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 69 of 2014 (21320581)
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HEARING DATES:	15 MAY 2015
JUDGMENT OF:	MILDREN AJ
APPEAL FROM:	NEILL SM

CATCHWORDS:

APPEALS – Appeal against sentence – Procedural fairness – Whether unrepresented defendant was given the opportunity to obtain legal advice prior to sentencing – Appeal dismissed

APPEALS – Appeal against sentence – Procedural fairness – Magistrate aware of matters in mitigation in favour of unrepresented defendant – Appeal dismissed

APPEALS – Appeal against sentence – Alternative to a suspended sentence – Whether magistrate properly took into account an alternative disposition of a home detention order – No evidence that a lesser sentence would have been imposed – Appeal dismissed

APPEALS – In general and right of appeal – Proviso requires that respondent demonstrates no substantial miscarriage of justice – Proviso applicable to appeals against sentence – No substantial miscarriage of justice demonstrated

Justices Act s 177(2)
Misuse of Drugs Act s 37
Sentencing Act s 7(h), 7(g), 7(j)

Adams v The Queen [2003] WASCA 91; *Bates v Haymon* (1988) 90 FLR 55; *Bhagwanani v Martin* [1999] SASC 406; *Browne v Smith* (1994) 4 ALR 114; *Caston v SA Police* (2002) 132 A Crim R 11; *Cooling v Steel* (1971) 2 SASR 249; *Gumurdul v Reinke* (2006) 161 A Crim R 87; *Hatzimihal v Westphal* [2011] NTSC 61; *MacPherson v The Queen* (1981) 147 CLR 512; *Millar v Brown* [2012] NTSC 23; *O'Rourke v Hales* [1999] NTSC 47; *R v Bird* (1988) 91 FLR 116; *R v Gazepis* (1997) 70 SASR 121; *R v Gidley* (1984) 3 NSWLR 168; *Ross v Peach* [2002] NTSC 19; *Saylor v Shephard* [2010] WASC 94; *The Queen v Bird* (1988) 19 FLR 116; *Thomas v The Queen (No 2)* [1960] WAR 129; *Turner v Trennery* [1997] 1 NTSC 21; *Wilde v The Queen* (1988) 164 CLR 365; *Wood v Marsh* [2003] WASCA 95; referred to

Baiada Poultry Pty Ltd v The Queen (2012) 246 CLR 92; *Gable v Nardini* [2010] WASC 32; *Weiss v The Queen* (2005) 224 CLR 300; applied

REPRESENTATION:

Counsel:

Appellant:	M Burrows
Respondent:	T Grealy

Solicitors:

Appellant:	Maley & Burrows Barristers & Solicitors
Respondent:	Director of Public Prosecutions

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

Wheeder v Verity [2015] NTSC 34
No. JA 69 of 2014(21320581)

BETWEEN:

GEORGE WHEEDER
Appellant

AND:

BRETT VERITY
Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 5 June 2015)

Facts of the Offending

[1] This is an appeal against a sentence imposed by the Court of Summary Jurisdiction. The appellant was charged with two counts of obtaining by deception a benefit for another from his employer, the Darwin City Council. The amount involved in count 1 was $3,000; and in count 3 on the information $8,150.00. Counts 2 and 4 were not proceeded with. The appellant pleaded not guilty. After a three day trial at which the appellant was self-represented, the appellant was found guilty on both counts. The learned magistrate convicted the appellant on both counts and sentenced him to imprisonment for eight months on each count and ordered six months of the sentence in relation to count 3 to be served concurrently with the

sentence on count 1 making a total effective sentence of 10 months imprisonment. His Honour ordered that the total sentence of 10 months be suspended after two months and fixed an operative period of two years.

The facts as found by the learned magistrate

[2] The learned magistrate found the appellant was at all relevant times employed by the City of Darwin as a Capital Works Supervisor. In that capacity he received quotations for capital works, he allocated jobs to contractors, and he authorised payments for such jobs. On 19 September 2012 the City of Darwin processed through its books a tax invoice from Ollie's Lawn Mowing and Home Maintenance for the amount of $3,000. This tax invoice identified a Commonwealth Bank account for payment. Payment of the $3,000 was made by the City of Darwin into that account on 4 October 2012.

[3] On or about 19 October 2012 the City of Darwin processed through its books a second tax invoice for $8,150 from Ollie's Lawn Mowing and Home Maintenance which identified the same Commonwealth Bank account to which payment should be made. Payment was made into that bank account on 15 November 2012.

[4] On or about 16 November 2012 Mr Cardosa, otherwise known as Ollie, telephoned the City of Darwin and spoke to a Ms Sherry. Ms Sherry was the team leader of the accounts payable team employed by the City of Darwin. Mr Cardosa is the sole owner and operator of a small gardening business

known as Ollie's Lawn Mowing and Home Maintenance. Mr Cardosa had rendered an account to the City of Darwin for a small job relocating an irrigation system at the intersection of Ross Smith Avenue and Dick Ward Drive in Fannie Bay on 2 September 2012 for $695. This was for work which the appellant who personally knew Mr Cardosa had authorised. Mr Cardosa did not receive the $695 but instead received a remittance advice, that is to say an advice that payment had been made to his business from the City of Darwin in the amount of $8,150.

[5] At some time prior to receiving the remittance advice Mr Cardosa had spoken with the appellant about the fact that his tax invoice had not been paid. He was told by the appellant that the tax invoice was in the wrong format. Mr Cardosa was not proficient with computers and in any event his computer was not operating. The appellant explained to him the steps that needed to be taken to set up a tax invoice template for the purpose of enabling him to receive payment from the City of Darwin system. The appellant set up a template for Mr Cardosa's business showing the bank account details which were said to be for Ollie's Lawn Mowing and Home Maintenance but in fact the bank account details were those of the appellant's house mate, Ms Leasy Poe.

[6] The appellant gave evidence that the incorrect bank details were put on the template by mistake because he expected to have to make some payment into Ms Poe's account relating to sharing a bond and rent with her. The learned magistrate rejected the appellant's evidence on this and other matters.

[7] Ms Poe gave evidence that the appellant had never said anything to her about the payments that were sent to her, that she saw them as a wind-fall and criminally took them out for her own benefit. She had previously been convicted and sentenced in relation to that. However the learned magistrate noted that Ms Poe's bank records show that the $3,000 paid into her account on 4 October was withdrawn in full on 5 October and that the amount of $8,150 paid into her account on 15 November was withdrawn in two lots, $1,000 on the same date and the further $7,000 on the following day. No explanation was provided as to how Ms Poe might have known that those payments had been made into her account on those dates. Ms Poe's banking records indicated small payments in and out of her account on regular dates, none of those dates being either 4 October, 5 October, 15 November or 16 November.

[8] As to the tax invoice created for the sum of $8,150 this was for work done on a drain in Waratah Circuit. It turned out that this work had in fact been carried out by contractors known as ACCROM Group. The evidence from the managing director of the ACCROM Group, Mr Fordelious, was that the appellant had accepted his quotation for the work and that ACCROM had rendered a tax invoice dated 6 November for that work for a total amount of $6,360 which had not been paid. Mr Fordelious's evidence was that he made enquiries of the appellant as to when his account would be paid and was told that the appellant would get it sorted out.

[9] The learned magistrate found that the appellant raised a purchase order in relation to the work at Waratah Circuit being carried by ACCROM Group in the name of Ollie's Lawn Mowing and Home Maintenance. The appellant in his evidence claimed that he believed that the work had been carried out by Mr Cardosa. The appellant's evidence was not accepted. The learned magistrate found that Ollie's Lawn Mowing and Home Maintenance did not do the work at the intersection of Ross Smith Avenue and Dick Ward Drive other than as claimed in the tax invoice rendered for $695 and that the appellant at all times knew this. The learned magistrate also found that Mr Cardosa did not attend at the site of any proposed works at Waratah Circuit and did not verbally quote for that work but that the work was quoted by Mr Fordelious of ACCROM Group which carried out the works and rendered tax invoices for that work and that the appellant knew this at all times.

[10] His Honour also found that the appellant, either himself or with assistance from someone else outside of the City of Darwin, set up a tax invoice template for Ollie's Lawn Mowing and Home Maintenance but the bank details in that tax invoice template were not the details of Ollie's Lawn Mowing and Home Maintenance or of Olympio Cardosa but rather were the bank details of Ms Poe and the appellant at all times knew this. His Honour also found that the appellant issued each of the tax invoices knowingly for the purpose of deceiving the City of Darwin into making those payments for the benefit of another.

The sentencing remarks

[11] When it came to sentencing the appellant his Honour mentioned the following matters:

- During the trial the appellant gave evidence that Mr Cardosa and Mr Fordelious were liars. The appellant claimed that he did not do anything intentional and that he was remorseful which the learned magistrate did not accept.

- The actions were not opportunistic but were a carefully planned series of deliberate steps which completely under-cut the trust and faith in which any employer must be able to have in its employees especially when it is a large civic group such as the City of Darwin.

- That this was an outrageous deliberate defalcation of the City of Darwin.

- A clear message needed to be sent to the community as well as to the appellant that this sort of behaviour is regarded as the most serious type of behaviour which a person can embark upon.

- That the appellant was a man who came from poor beginnings and a poor part of Africa and who had had to battle to make his way in the world. The appellant's wife was in Melbourne suffering from cancer and the appellant had to care for their seven year old son who was with him in Darwin.

- The appellant had recently commenced work or was about to commence work with Inpex.

- The appellant's only previous criminal record was a charge of assault where the court saw fit not to record a conviction. The appellant had been released on a good behaviour bond for a period of 12 months which had not been breached.

- No discount could be given because there was no plea of guilty given. Instead the appellant had put the prosecution to proof and had gone into evidence on his own behalf telling lies and casting aspersions upon the character of two hard working tradesmen.

- The amount involved, $11,150, is significant but as far as this kind of offending goes it was towards the lower end of the scale.

- The circumstances of the defendant were not exceptional.

- Although there was no evidence of the impact of his offending upon any fellow employees, his Honour felt that the people with whom he worked closely would have been shocked by his offending.

- Whilst the City of Darwin was investigating the matter no work had been given to the ACCROM Group.

- The appellant was not a young person for sentencing purposes at the age of 34.

- His Honour was unable to say what the motive was for the offending.

- The appellant was of previous good character and he reduced the sentence on each count from 12 months to eight months because of the appellant's good character and because he accepted that the appellant was unlikely to reoffend in the same way and had prospects of rehabilitation.

- At the end of the sentencing process the learned magistrate, who was aware of the fact that the appellant's seven year old son was at school and appropriate arrangements may need to be taken to collect the son and look after him, made arrangements for a solicitor from the Legal Aid Commission to speak to the appellant about that matter and as well indicated that if the appellant wished to appeal against his sentence and seek bail pending a hearing of the appeal, his Honour would list the bail application for the following day.

The grounds of the appeal

[12] At the commencement of the hearing of the appeal the notice of appeal was amended to delete all of the grounds and to substitute the following:

(1) That the magistrate erred in not allowing the unrepresented appellant procedural fairness in the sentencing process.

(2) That the appellant was deprived of a proper opportunity to place matters in mitigation before the sentencing magistrate.

(3) The court erred in failing to properly take into account alternative sentencing dispositions, namely home detention, which was a clear alternative to immediate imprisonment.

Ground 1

[13] Counsel for the appellant, Mr Burrows, submitted that the appellant was obviously unprepared to deal with the sentencing hearing. The transcript revealed that the appellant was quite flustered and at times at a loss for words in relation to matters that should have been put before the court in mitigation. The submissions he made were only very brief, and were disjointed and did not address the key issues for consideration in cases of this nature. In all of the circumstances, so it was put, the appellant should have been afforded a proper opportunity to place matters in mitigation before the court. He should have been informed by the magistrate that he could seek an adjournment of the proceedings in order to obtain legal representation in relation to the sentence if he so desired. He should have been advised that there was a likelihood of imprisonment. The transcript shows that immediately after delivering oral reasons for judgment his Honour immediately proceeded with the sentencing hearing. Nothing was then said to the appellant about seeking an adjournment to get legal assistance nor that the appellant was likely to be given an actual custodial sentence.

[14] I was referred to a number of authorities which discuss the obligations of courts to ensure that unrepresented litigants are accorded procedural fairness at sentencing hearings. The duty arises from the responsibility of every juridical officer to ensure that an unrepresented defendant receives a fair hearing.[1] One of the leading authorities in this area is *Cooling v Steel*[2] where Wells J discussed in some detail the responsibilities of magistrates and justices when dealing with an unrepresented defendant who desires to plead guilty. In this case, the appellant had not pleaded guilty, but the principles are nevertheless apposite. In particular, the court should remind the defendant that he is entitled to legal representation and to seek an adjournment to seek advice or representation before the court embarks on the sentencing hearing. If the defendant is facing a possible immediate prison term this should also be pointed out.[3] *Cooling v Steel* has been followed in this court on many occasions.[4] In *Browne v Smith*[5] Muirhead J, after referring to *Cooling v Steel* and other cases added that the accused should be told of his right to apply for legal aid, and that if the matter still proceeds without legal representation, the court should be "painstaking to obtain from both prosecution and the accused those facts and background matters which may be pertinent to sentence."[6] However, there is a limit to

[1] *MacPherson v The Queen* (1981) 147 CLR 512 at 524-525 per Gibbs CJ and Wilson J; at 534 per Mason J; at 537 per Aiken J; at 547 per Brennan J.
[2] (1971) 2 SASR 249
[3] *Caston v SA Police* (2002) 132 A Crim R 11 at [18]; *Wood v Marsh* [2003] WASCA 95; *Saylor v Shephard* [2010] WASC 94 at [26]-[27] per Mazza J
[4] *Browne v Smith* (1994) 4 ALR 114; *Bates v Haymon* (1988) 90 FLR 55 at 64-66 per Martin J; *O'Rourke v Hales* [1999] NTSC 47 at [16]-[23] per Thomas J; *Ross v Peach* [2002] NTSC 19 at [15] –[19] per BF Martin CJ
[5] *Browne v Smith* (1994) 4 ALR 114 at 119-121.
[6] At 121

the assistance which the court is required to give. It is no part of the Court's function to provide legal advice to the defendant beyond apprising the defendant of his rights in order that he may determine how to conduct his case.[7]

[15] Ms Grealy submitted that the appellant was well aware of his rights, and that there was no necessity for the learned magistrate to remind him of them again. I do not think that this fact, if it were true, is a complete answer, although it may well have a bearing on whether or not there was in all the circumstances a substantial miscarriage of justice. I will discuss that further below.

Ground 2

[16] In cases of this kind, it is well established that significant weight is given to general deterrence, which substantially prevails over factors such as prior good character. In general, unless the circumstances are very exceptional, or the amount of the money involved is small, a sentence of immediate imprisonment is the usual and expected penalty. The sentence must be sufficient to indicate to the public the gravity of the particular offence.[8] Mr Burrows submitted that the appellant was deprived of a proper opportunity to place matters in mitigation before the sentencing magistrate. He referred to such matters as character references, details relating to his

[7] *Bhagwanani v Martin* [1999] SASC 406 at [23] per Bleby J; *MacPherson v The Queen* (1981) 147 CLR 512 at 547 per Brennan J; *R v Gidley* (1984) 3 NSWLR 168 at 180-181 per Hunt J; Mahoney JA and Carruthers J concurring).
[8] *R v Bird* (1988) 91 FLR 116 at 131-132.

wife's illness and his work history. However, as Ms Grealy submitted, the learned magistrate already knew of these matters because the appellant had given evidence about them during the trial, and it is plain from his Honour's sentencing remarks that he took them fully into account. In any event, they did not amount to very exceptional circumstances and nor could it be suggested that either the objective facts of the offending or of the appellant's personal circumstances warranted anything less than an actual term of imprisonment.

[17] Mr Burrows also submitted that the appellant was deprived of procedural fairness because the learned magistrate should have directed his attention to the fact that the appellant needed to address the court on whether there were very exceptional circumstances in this case. Mr Burrows referred to the decision of this court in *Ross v Peach*.[9] In that case the appellant had pleaded guilty to cultivating a trafficable quantity of cannabis. Under the provisions of s 37(2) and (3) of the *Misuse of Drugs Act* there was a mandatory minimum penalty of actual imprisonment of not less than 28 days unless there were "particular circumstances of the offence or of the offender" which warranted a lesser penalty. Martin CJ held that the unrepresented appellant did not get a fair hearing because the sentencing magistrate had failed to explain to the appellant the mandatory nature of those provisions and did not direct the appellant's mind to the crucial considerations upon which his liberty depended because he had failed to

[9] [2002] NTSC 19

explain what was meant by "particular circumstances." If Martin CJ was suggesting that the sentencing magistrate should have given the appellant a lecture on the law as to how that phrase had been determined by the courts, I respectfully disagree, but I take his Honour to have meant that he should have drawn the appellant's attention to the kind of matters which the court needed to consider in deciding that question. However, that is very different from the present case. There is no statutory mandatory minimum penalty in this case. Nor is there a recognised category of factors which amount to "very exceptional circumstances." The most that the learned Magistrate could have done is to repeat what had already been said by the prosecutor in submissions, namely that an actual sentence of imprisonment was the expected punishment unless there were very exceptional circumstances and invited the appellant to address the court on what was very exceptional in his case. I will consider whether the failure to do that amounted to a substantial miscarriage of justice later.

Ground 3

[18] I do not think that just because the learned magistrate did not mention that he had discounted the possibility of a sentence fully suspended on entering into a home detention order that this possibility did not cross his mind.[10]

[19] Ms Grealy submitted that in any event, a home detention order is a more serious outcome than a partially suspended sentence of imprisonment.

[10] *Millar v Brown* [2012] NTSC 23 at [19] per Kelly J.

Section 7 of the *Sentencing Act* sets out the dispositions available to a sentencer in ascending order of gravity.[11] A home detention order is provided for by s 7(h) which falls between a sentence which is wholly or partly suspended (s 7(g)) and an actual term of imprisonment (s 7(j)). Therefore, so it was put, the learned magistrate did not need to consider it. Mr Burrows submitted that home detention is a less severe penalty than a partially suspended sentence. I do not think that either submission can be accepted in absolute terms. In most cases a home detention order, which is in itself a form of imprisonment, is more serious than a fully suspended sentence. This is because the consequences of a breach of the conditions of the order can be very significant and may result in the court revoking the order and committing the offender to serve the whole of the sentence under suspension with no consideration being given to the time which the offender complied with the order, whereas there is considerably more flexibility in the case of a breach of a suspended sentence. On the other hand a partially suspended sentence can be imposed in any case where the head sentence is five years or less. It is difficult to see how a sentence of say, four years suspended after 18 months is less severe than a sentence wholly suspended on a home detention order for the maximum allowable period of 12 months. Moreover, a partially suspended sentence carries with it the shame and disgrace of having spent time in a prison, as well as the strictly controlled regimen of the prison environment which are not consequences of a home

[11] *Turner v Trennery* [1997] 1 NTSC 21 at 38 per Kearney J; *Gumurdul v Reinke* (2006) 161 A Crim R 87 at 92 [30]-[31]; per Olsson AJ.

detention order. On the other hand, a partly suspended sentence which is back-dated to take into account time spent in custody but with an immediate release date is likely to be seen as less severe than a home detention order.

[20] However, for reasons which I will come to explain, in my opinion the actual sentences imposed by the learned magistrate were very lenient. I would dismiss ground 3.

The Proviso

[21] Section 177(2) of the *Justices Act* contains a proviso that, notwithstanding that the court is of the opinion that a point raised in the appeal might be decided in favour of the appellant, the court might dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[22] Section 177(2)(f) is in similar terms to the proviso to the common form criminal appeals statutes and it has application to either an appeal against conviction or an appeal against sentence. The common form proviso has been authoritively considered by the High Court in *Weiss v The Queen*[12] and in *Baiada Poultry Pty Ltd v The Queen*.[13] It is true that the common form proviso applies only to appeals against conviction but in my view the guidance which the High Court has offered in both *Weiss* and *Baiada Poultry* is applicable to the proper interpretation to be given to s 177(2)(f).

[12] (2005) 224 CLR 300
[13] (2012) 246 CLR 92

[23] The High Court has emphasised that questions about the application of the proviso are questions of statutory construction:

> "It is the words of the statute that ultimately govern, not the many subsequent judicial expressions of that meaning which have sought to express the operation of the proviso … by using other words".[14]

[24] What needs to be shown is that there was no substantial miscarriage of justice. There is no single universally applicable criterion which can be formulated which identifies cases in which it would be proper for the appellate court not to dismiss the appeal even where the court was satisfied that there was no substantial miscarriage of justice which actually occurred. Further, the High Court said that it is neither possible nor useful to attempt to argue about the application of the proviso by reference to some supposed category of "fundamental defects" in a trial.[15] Similarly, in my opinion the same may be said about fundamental defects in a sentencing hearing. As the High Court explained in *Weiss v The Queen*, the history of the proviso indicates that its purpose, amongst other things, was to get rid of what was formerly known as the *Exchequer* rule the effect of which was to require the court to order a retrial for even the slightest departure from the requirements of a fair trial or error in the course of the trial. The secondary purpose of the proviso was to avoid the necessity of a useless retrial, or for that matter, in my opinion, a resentencing hearing.

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[14] *Weiss v The Queen* (2005) 224 CLR 300 at 305 [9]; *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 102 [21]

[15] *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 103 [23]

[25] That is not to say that one can easily overlook a significant denial of procedural fairness. As the High Court accepted in *Baiada Poultry Pty Ltd v The Queen*,[16] where there has been a significant denial of procedural fairness, this may provide an example of a case of a kind where an appellate court should hold that the proviso has not been engaged. It is important in my view that s 177(1)(f) be interpreted in a way which is consistently able to be applied to both appeals against conviction as well as appeals against sentence because the proviso is directed at both those kinds of appeals. For that reason a court should not necessarily dismiss an appeal against sentence when there has been a significant departure from the rules of procedural fairness even if the court is persuaded that on the facts as known to the court the sentence which actually was imposed was a proper one. This is because, it will often be the case, where a court is dealing with an appeal against sentence that the court is unable to say with any degree of certainty whether or not, if the rules of procedural fairness had been properly complied with, a lesser sentence might have been imposed. On the other hand, there may be a rare case, where, having regard to all of the circumstances including the sentence actually imposed, the court is satisfied that the possibility of some other lesser sentence being imposed is so remote that it can reach the conclusion that there was no substantial miscarriage of justice which actually occurred.

[16] (2012) 246 CLR 92 at 102 [22]

[26] The circumstances under which there has been a breach of the requirements of a fair sentencing hearing are many and varied. They include, for example, the failure to provide an interpreter to an accused person who does not understand the language of the court, or if an interpreter is provided the failure of the interpreter to properly carry out his or her functions, or the failure to properly observe the requirement that the accused be present at all stages of the hearing unless properly excused by the court, as well as other procedural matters which need to be carefully observed whenever the accused is unrepresented by counsel. This is not a full list of all of the circumstances which may arise where there has been a denial of procedural fairness. There are many cases where appellate courts have held there has been no substantial miscarriage of justice even though there were errors made by an interpreter or a part of the hearing has proceeded in the accused's absence. For example, in the case of *R v Gazepis,*[17] during the defendant's cross examination questions were put to him about the reasons he had given them for borrowing money from a bank. Counsel for the defendant interjected during or immediately after an answer from the defendant in a manner which would have reminded the defendant of his earlier evidence on the point in question. The prosecutor and counsel for the defence then began to argue about that earlier evidence. The magistrate asked the defendant to leave the court and in the absence of the defendant the magistrate rebuked the defendant's counsel for interjecting in this

[17] (1997) 70 SASR 121; 98 A Crim R 259

manner. The time during which the defendant was absent was very brief. The transcript of what was said during his absence occupied just over one page. The Full Court of the Supreme Court of South Australia held that in all the circumstances this irregularity, whilst it should not have occurred, did not amount in the circumstances to a miscarriage of justice. In that case the Full Court referred to the decision of *Wilde v The Queen*[18] where the majority (Brennan, Dawson and Toohey JJ) said:

> There was no rigid formula to determine what constitutes such a radical or fundamental error. It may go either to the form of the trial or the manner in which it was conducted. There are those cases which identify irregularities which are sufficient to vitiate a trial … They are concerned more with the form of the trial but even in that area they provide no real touchstone for determining when an irregularity is so serious as to cause a mistrial. … But the wording of the proviso is quite general and it is clear that it may be applied notwithstanding a misdirection concerning the law or the wrongful admissions of evidence. In the end no mechanical approach can be adopted and each case must be determined upon its own circumstances.

[27] Similarly, in the case of *Thomas v The Queen (No 2),*[19] the Court of Criminal Appeal of Western Australia took the view that the wrongful exclusion of an accused person from his trial did not inevitably lead to the conclusion that the trial had miscarried, and in that particular case, the court considered the circumstances as to whether there was any possibility that the accused's defence could have been prejudiced or his chances of conviction increased and decided that the proviso should be applied because the

[18] (1988) 164 CLR 365 at 373
[19] [1960] WAR 129

accused's absence for a few minutes could not have affected the result of the trial in the slightest.

[28] In *Gable v Nardini*,[20] EM Hennan J said:

> In a number of cases where appeals have been undertaken by persons who initially were unrepresented, but who then submitted that their lack of representation exposed them to some disadvantageous consequence which could have been avoided had their attention been drawn to the impending peril, the response of the appeal court has been that nothing which might have been said or advanced on behalf of the unrepresented person would have led to any different outcome. That is not an answer to a failure to ensure that the litigant is aware of the risks which he or she may be facing and of the opportunities of obtaining legal representation or an adjournment but, rather, amounts to a conclusion that there has been no miscarriage of justice notwithstanding the course of events followed.

[29] The ultimate question, therefore, is whether in the light of all of the circumstances I can be satisfied, the burden of proof being on the respondent, that no substantial injustice actually occurred. The argument of the respondent was that the appellant was for a long time represented by counsel and well knew that he had the right to apply for an adjournment on proper grounds. The appellant was present in court on a number of occasions where his case was mentioned and further hearing dates were listed. When the matter first came up for hearing before Mr Maley SM he was unrepresented and indicated that he wished to plead guilty. Mr Maley SM explained that he could apply for an adjournment to seek legal advice before he was sentenced. He was also told that he had a right to apply for legal aid for the sentencing hearing even when aid had been refused for a

[20] [2010] WASC 32 at [56]

trial and that he could apply for an adjournment in order to obtain legal advice. He was also told that he if he was found guilty the sentence would almost certainly result in a sentence of actual imprisonment. The appellant was then arraigned, pleaded not guilty and the matter was adjourned. Thereafter the appellant was represented during the numerous mentions which took place before the trial date. Without evidence to the contrary it could also be inferred that the appellant had received appropriate advice from his previous legal representatives as to the likely penalty that he was facing and he could not have been surprised by the sentence. In this case, the appellant had been legally represented for in excess of 8 months before the trial both by the Northern Territory Legal Aid Commission and by a private firm of solicitors. It beggars belief that he was unaware that if he were found guilty he was facing an immediate sentence of imprisonment. Further, as the prosecutor articulated the sentencing principles discussed in *The Queen v Bird*[21] and quoted from a passage in *Hatzimihal v Westphal*[22] which summarised those principles, the appellant knew what the legal principles were which were likely to be applied by the learned magistrate and having been so informed he had an opportunity to address the learned magistrate accordingly. Further, the learned magistrate having heard the trial, there was nothing that could have been put in relation to the facts, and the learned magistrate already knew from the evidence given by the appellant during the trial about matters that were relevant to his personal

[21] (1988) 19 FLR 116
[22] [2011] NTSC 61

circumstances. The learned magistrate accepted that the appellant was a person of prior good character and already knew about the situation concerning his wife and child and also the appellant's background. So far as prior good character is concerned, this is a common feature of most offenders who commit defalcations from their employers, and little weight can be given to it. There is no complaint that the sentences imposed were manifestly excessive nor is it complained that the magistrate failed to take into account any relevant consideration or took into account matters that were irrelevant.

[30] Mr Burrow's principal submission was that in the circumstances the failures of the learned magistrate were such that the application of the proviso did not arise.

[31] However, nothing has been put by way of affidavit or otherwise that shows that there were other matters of relevance which could have affected the sentence, other than if the appellant had been represented by counsel, the submissions could have been put more eloquently. I do not consider that the appellant became flustered. The transcript reveals that he had some difficulty with the English language but it is not markedly different from what appears when he gave evidence at the trial, and it was plainly intelligible.

[32] As I have previously indicated, the sentences actually imposed were extremely lenient. The learned magistrate did not infer that the appellant

had set up the template with the bank details showing Ollie's Lawn Mowing and Home Maintenance, which was contrary to the appellant's own evidence. The magistrate fell short of finding that the appellant had conspired with Ms Poe to defraud the Council when all of the circumstances pointed to exactly that. In my opinion, there is no real possibility of a lesser sentence. The learned magistrate plainly made allowance for the fact that the appellant was temporarily in the position of being effectively a sole parent, that his seven year old son would need to be looked after whilst the appellant was in prison, and took appropriate measures to ensure the child's safety. There is no suggestion now that this was inappropriate. Whilst it is a mitigating factor that a young child will be left without parental care, that does not necessarily mean that the whole sentence must be suspended, although the period of actual custody may be shortened.[23] This may explain why only two months of the sentence was ordered to be served in this case. There is nothing to suggest that if the appellant were to be resentenced now that the child is unable to be cared for by the mother or close family member or friend. I am satisfied that no substantial miscarriage of justice has actually occurred.

[33] The order of the Court is that the appeal is dismissed.

[23] See *Adams v The Queen* [2003] WASCA 91.