Bukulaptji v The Queen [2009] NTCCA 7

PARTIES:	**KEVIN BUKULAPTJI**
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 13 of 2008 (20507179)
DELIVERED:	5 June 2009
HEARING DATES:	24 April 2009
JUDGMENT OF:	MARTIN (BR) CJ, THOMAS AND RILEY JJ
APPEALED FROM:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST RESTORATION OF SENTENCE

Requirement of s 43(7) of *Sentencing Act* – whether full restoration was unjust – breach of conditions – no new offending – disparity between nature of breach and time to be served – appeal allowed – new offence subsequent to breach proceedings – full restoration

Criminal Code s 69; *Sentencing Act* (NT) s 40, s 43, s 43(7)

Baird v R (1991) 104 FLR 113; *Buckman* (1988) 47 SASR 303; *Davies v Deverell* (1992) 1 Tas R 214; *Marston* (1993) 60 SASR 320; *Palliaer* (1983) 35 SASR 569; *R v Percy* [1975] Tas SR 62; *Wilson v Taylor* (1997) 113 NTR 1, referred to

R v Fernando [2002] NSWCCA 28; *Lawrie v R* (1992) 59 SASR 400; *R v Vranic* (NSWCCA, 7 May 1991, unreported), discussed

REPRESENTATION:

Counsel:

Appellant:	S Perera
Respondent:	J Karczewski QC

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Ril0906
Number of pages:	20

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Bukulaptji v The Queen [2009] NTCCA 7
No. CA 13 of 2008 (20507179)

BETWEEN:

KEVIN BUKULAPTJI
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, THOMAS AND RILEY JJ

REASONS FOR JUDGMENT

(Delivered 5 June 2009)

Martin (BR) CJ:

[1] On 2 January 2008 the appellant was sentenced to four years imprisonment, backdated to 22 February 2007, for the crime of unlawfully causing grievous harm. That sentence was suspended after the appellant had served 15 months on conditions involving supervision.

[2] The appellant was released from prison on 22 May 2008 with a balance of the sentence of two years and nine months imprisonment yet to be served. He immediately breached conditions of the suspension. On 10 November 2008 the learned sentencing Judge restored the balance of the sentence and fixed a non-parole period of one year and five months.

[3] The appellant accepts that part of the outstanding balance of two years and nine months should have been restored, but appeals against the restoration of the entire balance on the basis that the sentencing Judge erred in not finding that it was unjust to do so.

[4] The facts are set out in detail in the judgment of Riley J. Section 43(7) of the *Sentencing Act* required that the Judge restore the entire balance and order that the appellant serve it unless the Judge was "of the opinion that it would be unjust to do so" in view of all the circumstances that had arisen since the suspended sentence was imposed. In the absence of an identifiable error by the Judge, in order to succeed the appellant must persuade this Court that the only reasonable conclusion available to the Judge was that, by reason of circumstances which have arisen since the suspended sentence was imposed, it was unjust to restore the entire balance. In other words, the appellant must persuade this Court that it was not open to the Judge to reach the conclusion that it would not be unjust to restore the entire balance of the sentence held in suspense.

[5] As Riley J has pointed out, there is a clear legislative policy underlying the provisions relating to suspended sentences and the consequences of breaches of the conditions of suspension. I agree with his Honour's observation that it is important that the Court uphold the policy and not undermine the integrity of the sentencing regime by failing to respond appropriately to breaches of conditions of suspension.

[6] The appellant was well aware of his obligations and of the existence of sanctions for failure to comply with those obligations. Against the background of the appellant's previous disregard for court orders, upon release the appellant made no effort whatsoever to comply with the conditions of suspension. Immediately upon his release, the appellant flagrantly ignored the requirement to report and reside on Goulburn Island. It would have been a simple matter to report and obtain permission to leave Goulburn Island for the purpose of attending the funeral of his mother. In addition, the appellant could have reported from Milingimbi or returned to Goulburn Island after an appropriate period of mourning at Milingimbi.

[7] Against this background, there were only two factors which the appellant could reasonably call in aid of his claim that it was unjust to restore the entire balance of the sentence, namely, the fact that the breach did not involve the commission of a further offence and the disparity between the nature of the breach and the length of the balance to be served. While the breach did not involve the commission of a further offence, it occurred immediately the appellant was released from custody and without any prior attempt to comply with the conditions of suspension. As the Judge found, it was a "contumelious" and persistent breach.

[8] As to the question of disparity, there was, undoubtedly, significant disparity between the nature of the breach and the period restored. However, viewed in the context of all the circumstances, I am unable to agree with the conclusion that this disparity was such as to place restoration of the entire

balance beyond the range of the sentencing discretion. While the result of full restoration may seem to be a severe consequence, it is necessary to bear in mind the policy of the statutory scheme and the fact that the appellant breached his obligations immediately upon release in circumstances where compliance with his obligations would not have interfered with his wish to attend the funeral of his mother. Furthermore, the appellant made no subsequent efforts to rectify his ongoing default. The appellant simply continued a previous pattern of disobedience of court orders.

[9] It follows from these reasons that I would not allow the appeal. It also follows that as the majority would allow the appeal, by reason of the matters to which Riley J has referred, I agree that on re-sentencing this Court should restore the balance of two years and nine months. I also agree that a non-parole period of one year and five months should be fixed.

Thomas J:

[10] I have read the Reasons for Judgment prepared by Riley J. For the reasons he has expressed I agree the appeal should be allowed.

[11] The re-sentencing of the appellant is complicated by the fact that the appellant had, in fact, committed a further offence. This had not been brought to the attention of the Judge at first instance.

[12] The circumstances of the re-offending are outlined in the judgment of Riley J. Whilst it is certainly not a trivial offence, the level of offending is considerably less serious than the offence of unlawfully cause grievous harm

which resulted in the original sentence of four years imprisonment suspended after 15 months.

[13] The magistrate who dealt with the further offending imposed a fine of $1,000. The fact the matter was dealt with by way of a fine rather than a prison sentence is a reflection of the level of seriousness of the offence. In particular, there was no actual physical harm inflicted on anyone. There was also a reference to the possible need for some psychological or psychiatric counselling.

[14] In his reasons for sentence, the learned stipendiary Magistrate made the following comments:

> "Anyhow, Mr Bukulaptji, you are a person who had something to get off your chest; you got it off your chest in a really scary fashion. You waved this hammer around, you seemed to have uttered threats. Certainly the people at the store were worried about you, and some brave person was brave enough to take you on, take you outside, take the hammer off you, give that hammer back to the store, which made things a lot safer, and then that person or others were brave enough to talk you down and get you home again.
>
> I've got no reason to believe you ever really wanted to hit anyone with that hammer. You certainly wanted to make a big scene. And as Sergeant Marinov says, it's really a high grade disorderly conduct. What makes the conduct of whoever it was who took this hammer off you particularly brave, is that you've got these convictions for assault, including a grievous harm charge and if these people know you well, they would know about that case and they'd know that you are potentially a very dangerous guy. But nothing happened on this occasion.
>
> These offences are always a nuisance for the community. They set a bad example, but I don't think you're the sort of man who can be used as an example. In return I can't lock you up just to show other people they mustn't do this sort of thing, and I can't do that because

> – for that reason, because you're a man who suffers at least some psychiatric disturbances, perhaps depression when you're in gaol, but perhaps other mental disorders that have you hearing voices that other people don't hear.
>
> I don't know if any of that played a part in your crazy behaviour, but it's not the behaviour of an ordinary sober person. There's no suggestion you were drunk or intoxicated, stoned or anything like that, so maybe something was going on in your mind that's not quite normal."

[15] The appellant does appear to have underlying problems with anger management and depression that may need addressing.

[16] I consider it would be unjust to restore the full sentence which is, in effect, the maximum penalty for the three breaches. Together they do not fall into the worst category of a breach. There are factors in his favour. It is now over four years since the commission of the previous offence of cause grievous harm. The sentencing Judge accepted that he was genuinely remorseful for his offending on that occasion, he had apologised to his victim and as the sentencing Judge noted "as between the offender and the victim, matters are now resolved, they are finished". A condition of his suspended sentence was that "for a period of 12 months following his release from prison the offender is not to consume or use alcohol or cannabis and he is not to sniff petrol or use any other volatile substance". He was not affected by any substance at the time of the commission of the re-offending. There is no evidence he had breached this condition.

[17] Whilst it is important not to undermine the requirement that persons who are sentenced comply with court orders, I consider that could adequately be

done by restoring 15 months of the sentence and fixing a non parole period of eight months. This could be accompanied by recommendations that a condition of his parole be an assessment as to his need for counselling and, if so, making appropriate conditions of his parole the undertaking of such counselling.

Riley J:

[18] The appellant has been granted leave to appeal against an order restoring a partially suspended prison sentence previously imposed upon him.

[19] On 2 January 2008 the appellant was convicted of the offence of having unlawfully caused grievous harm to his victim, a male relative. The offending occurred on 25 March 2005 when the appellant and his victim were together at Milingimbi. They had been drinking kava, smoking cannabis and sniffing petrol. During the course of the night the victim acted in a manner which caused the appellant to become frightened. An argument developed and the victim hit the appellant. The appellant then took a pair of scissors which had been used for cutting the cannabis and chased after the victim. He delivered a series of stab wounds to the victim with the scissors. Others intervened but the appellant continued to chase after the victim and stab him with the scissors. Eventually the two were separated and the victim was taken to the local clinic where it was found that he had received multiple stab wounds to the left and right middle back, to the left and right shoulder area, to the rear of the left arm and left and right abdomen. He

also suffered a small laceration to the left cheek. The wounds were such that had he not been provided medical assistance he would have died. As it was, the victim was expected to make a full recovery.

[20] At the time of the plea it was noted that the appellant and the victim had reconciled.

[21] In sentencing the appellant the learned sentencing Judge described the attack as a "grossly disproportionate response to the victim's conduct" involving "the use of a weapon at night and it was a savage, sustained and unrelenting attack and the victim has sustained very serious injuries." His Honour went on to sentence the appellant to imprisonment for a period of four years to be suspended upon conditions after he had served 15 months in prison. The conditions of the suspension included that the appellant place himself under the supervision of the Director of Correctional Services, that he obey the directions of the Director and that "for a period of 12 months following his release from prison [the appellant] is to reside on Goulburn Island and he is not to leave Goulburn Island without the permission of the Director of Correctional Services or his delegate."

[22] In concluding his sentencing remarks the learned sentencing Judge informed the appellant that it was important that he not reoffend. His Honour said that if there was anything the appellant did not understand then his counsel should explain those matters to him.

[23] On 14 May 2008 the appellant was visited by a Community Corrections Officer at the prison and was advised of his obligations under the terms of the Order. He indicated that he understood what was required of him. He was provided with a toll-free telephone number and directed to report on 27 May 2008. Following his release from prison on 22 May 2008 he failed to report as required. The appellant says, by way of explanation, that he lost the telephone number. However it was not suggested that he made any effort to ascertain the telephone number or to communicate with his Parole Officer in any way.

[24] It was admitted that the appellant also breached the order by failing to reside at Goulburn Island. In submissions placed before the learned sentencing Judge it was explained that the appellant received news that his mother had passed away at Milingimbi and he travelled to Milingimbi for funeral preparations and the funeral proceedings. There was a traditional ceremony in which he played a role. He did not obtain approval to travel to Milingimbi and he did not return to reside at Goulburn Island as required by the terms of his suspended sentence. At the time of his arrest on 5 November 2008, the appellant was still at Milingimbi with no apparent intention of returning to Goulburn Island and having made no attempt to communicate with his supervising officer.

[25] In support of the appellant submissions were made to his Honour that this was the first breach of a suspended sentence on the part of the appellant and

that "there seems to be a genuine misunderstanding as to conditions." The learned sentencing Judge was advised:

> "If one looks back on the sentencing remarks when he appeared in court for this matter he was warned not to commit any further trouble, and those were the main words that stuck out to him. He tells me that he hasn't been drinking at all. He hasn't been smoking any cannabis. ... He tells me that he stayed quiet, he was with family, and to this day, your Honour, he is still in a state of grief as to the death of his mother it really wasn't that long ago."

[26] On the basis of the information before the learned sentencing Judge it was accepted that he did "stay quiet". There was no suggestion at that time that the appellant had reoffended in any way.

[27] It was not disputed that in addition to the explanation and warning provided to the appellant by his Honour, and in addition to any further explanation or advice that may have been provided by his counsel, the appellant had, shortly prior to his release from prison, received the benefit of advice as to the terms and conditions of his suspended sentence from the Community Corrections Officer. It was not submitted that this advice was in any way deficient or that it did not address the requirement that the appellant stay at Goulburn Island and that he report as directed. Whilst the appellant was said to have limited education and was a person who lived a semi-traditional life, the advice to the Court from the Corrections Officer that the appellant understood what was required of him was not challenged.

[28] In restoring the sentence the learned sentencing Judge noted that the appellant had resided at Milingimbi in breach of the order from the time of

his release at the end of May 2008 until 5 November 2008. His Honour described the breach as both persistent and contumelious and directed that the unserved part of the suspended sentence, being a term of two years and nine months, be restored. His Honour fixed a non-parole period of one year and five months.

[29] It was not submitted that his Honour applied the wrong test. The appellant was unable to identify any particular error on the part of the learned sentencing Judge. The principal submission was that on a proper consideration his Honour should have formed the view that it would have been unjust to restore the full sentence. The effect of the submission was that the restoration of the whole of the unserved part of the sentence was a grossly disproportionate response to the breaches.

[30] The issue now to be determined is whether his Honour erred in failing to conclude that the restoration of the whole of the sentence would be unjust in all the circumstances.

The imposition of a suspended sentence

[31] There has been no challenge to the original sentence imposed by his Honour. The sentence of imprisonment for a period of four years is to be regarded as an appropriate and proportionate response to the original offending in the circumstances which then prevailed. The sentence was partially suspended pursuant to the provisions of s 40 of the *Sentencing Act*. That section permits a court to make such an order "where it is satisfied that it is

desirable to do so in the circumstances". However, the court is not to impose a suspended sentence unless the sentence of imprisonment (in this case the sentence of imprisonment of four years) if unsuspended would be the appropriate sentence in the circumstances having regard to the provisions of the Act. In such a case the court proceeds by determining what is the proper term of imprisonment to be imposed and then deciding whether it would be appropriate or inappropriate to suspend the term of imprisonment in whole or in part.[1] A principal aim in suspending service of a sentence of imprisonment is to provide an inducement to the offender to reform.[2]

The consequences of a breach

[32] In the event of a breach of the terms of an order suspending a sentence of imprisonment the powers of the court are to be found in s 43 of the *Sentencing Act*. The section provides the court with the power to:

(a) restore the unserved part of the sentence;

(b) restore part of that sentence;

(c) extend the operational period; or

(d) make no order with respect to the suspended sentence.

By operation of s 43(7) of the Act the court is to make an order restoring the sentence or part sentence held in suspense and order the offender to serve it

[1] *R v Palliaer* (1983) 35 SASR 569 at 571.
[2] *Wilson v Taylor* (1997) 113 NTR 1 at 9; *R v Perry* [1975] Tas SR 62 at 75; *Davies v Deverell* (1992) 1 Tas R 214 at 218-220.

"unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence and, if it is of that opinion, the court shall state its reasons."

[33] Section 43(7) discloses a clear legislative policy that the starting point for a court dealing with a breach of a condition of a suspended sentence is that the offender should serve the sentence which was suspended. The fact that the sentence is suspended and hangs over the head of the offender provides an inducement to the offender to comply with the terms of the order and maintain a law-abiding life. The sanction for failure is the restoration of the obligation to serve the suspended term of imprisonment. That being so a court "will not lightly interfere with the ordinary consequence of a breach".[3] For a court to fail to respond appropriately to breaches would be to undermine the integrity of the sentencing regime and reduce the deterrent impact of such sentences upon others.[4]

[34] In *R v Fernando*[5] Spigelman CJ cited with approval the following passage from the judgment of Lee J (with whom Gleeson CJ and Abadee J agreed) in *R v Vranic*[6]:

> "The commission of offences on parole demonstrates that the expectation of rehabilitation of the prisoner has not been realised and

[3] *R v Buckman* (1988) 47 SASR 303 per King CJ at 304.
[4] *Marston v The* Queen (1993) 60 SASR 320 per King CJ at 322; *Lawrie v R* (1992) 59 SASR 400 per Perry J at 403.
[5] [2002] NSWCCA 28 at (42).
[6] (Unreported, New South Wales Court of Criminal Appeal, Gleeson CJ, Lee and Abadee JJ, 7 May 1991).

> that through his own conduct the substantial mechanism designed for rehabilitation, ie parole has failed to achieve its purpose. The Court in such circumstances cannot proceed on the same expectation of rehabilitation that is open in other circumstances."

[35] Over the years there has been discussion in many cases of factors that may be considered relevant in determining whether it would be unjust to make an order restoring the sentence or part sentence held in suspense in a particular case. Discussion of earlier legislation is to be found in *Baird v The Queen*[7]. Some of the factors for consideration identified in that case and subsequent cases include:

(a) the nature and terms of the order suspending the sentence;

(b) the nature and gravity of the breach and, particularly, whether the breach may be regarded as trivial;

(c) whether the breach evinces an intention to disregard the obligation to be of good behaviour or to abandon any intention to be of good behaviour;

(d) whether the breach demonstrates a continuing attitude of disobedience of the law;

(e) whether the breach amounted to the commission of another offence of the same nature as that which gave rise to the suspended sentence;

(f) the length of time during which the offender observed the conditions;

(g) the circumstances surrounding or leading to the breach;

(h) whether there is a gross disparity between the conduct constituting the breach and the sentence to be restored;

[7] (1991) 104 FLR 113.

(i) whether the offender had been warned of the consequences of a breach; and

(j) the level of understanding of the offender of his obligations under the terms of the order suspending the sentence and of the consequences of a breach.

[36] In the present case it would seem that the appellant had a warning from the learned sentencing Judge and also from a Corrections Officer as to the consequences of a breach. The warning from the Corrections Officer came shortly before the appellant was released from prison and must have been fresh in his mind. The evidence suggests that he understood his obligations; however he did nothing to fulfil those obligations at any time. His breaches commenced soon after his release from prison. He did not make the initial report and he travelled from Goulburn Island without approval. The reason for leaving Goulburn Island may have been to attend the funeral of his mother but he did not have to breach the conditions of the order to attend the funeral. He merely had to seek permission. He chose not to do so. For a period in excess of five months leading up to his arrest he did not return to Goulburn Island. For the same period he did not report and he made no effort to report.

[37] The appellant was aware of the consequences of failing to comply with orders of the courts. He had received the warnings to which I have referred. In addition his criminal history reveals that he had previously been dealt with for similar failures. In 2003 he was fined for breaching his bail

conditions. Later that year he was imprisoned for failing to comply with the terms of a restraining order. In 2004 he was again fined for breaching his bail conditions. In 2007 he was yet again fined for breaching his bail conditions. It is apparent that on this occasion he simply ignored the terms of the order. His conduct reflected a continuing attitude of disobedience of the law.

[38] On the other hand the breach was a conditional breach rather than a breach constituted by reoffending. Whilst the nature of the breach evinced an intention on the part of the appellant to disregard his obligations there was no suggestion before the learned sentencing Judge that he had been other than of good behaviour in the intervening period. He had not been involved in any conduct of a violent kind and it was not suggested that he had been a threat to the community.

[39] Of significance in the present case is the length of the term of imprisonment that was restored, being for two years and nine months with a non-parole period of one year and five months. In my view, there is a gross disparity between the conduct which constituted the breach and the term of imprisonment to be restored. The disparity is such as to make the full restoration of the suspended term of the sentence unjust in all the circumstances. The appeal should be allowed.

Resentence

[40] The appeal having been allowed it is necessary for this Court to resentence on the basis of the circumstances as they exist at this time. Although some of the following information relates to events which occurred prior to the matter coming before the Supreme Court, the information was not placed before the learned sentencing Judge. The Court has now been informed, and it is not disputed, that on 6 November 2008 the appellant appeared in the Court of Summary Jurisdiction at Darwin in relation to the offence of having gone armed in public with a hammer without lawful occasion and in such a manner as to cause fear to a person of reasonable firmness and courage contrary to s 69 of the *Criminal Code*. The fresh offending occurred on 24 October 2008 in a store at Milingimbi. The appellant became angry, took a hammer from a shelf in the store and walked around the store waving the hammer and yelling at the staff. He threatened to hit staff members with the hammer. He refused to leave the premises and the store manager was forced to close the store.

[41] There was nothing in the material placed before the Court of Summary Jurisdiction to suggest that the appellant was under the influence of alcohol or any other intoxicating substance at the time of this offending. Prior to being sentenced the appellant underwent a psychological assessment as a result of which it was concluded that he did not suffer from a mental illness. However, it was suggested by the psychologist that the appellant should be

reviewed by a psychiatrist at a later time. On 14 January 2009 the appellant pleaded guilty to the offence and he was fined $1000.

[42] As the respondent submits, the recent offending is another example of the appellant resorting to the use of weapons as a means of conflict resolution. It is, in that sense, another offence of a similar nature to that which gave rise to the suspended sentence. Fortunately on this occasion his conduct did not degenerate into actual violence. The offending occurred just over five months into the operational period of the original sentence and is conduct cumulative upon the earlier breaches dealt with by the learned sentencing Judge. Although the penalty imposed was a fine it could not be said that the offending was trivial. The breach occurred in circumstances where the appellant acknowledged that, by reason of the warning from the learned sentencing Judge, he was fully aware of the consequences of reoffending. Viewed in that light the offending was serious and provided further confirmation that the appellant was disregarding his obligation to be of good behaviour. It demonstrated a continuing attitude of disobedience of the law. Consistent with failures recorded in his criminal history his actions on this occasion constituted yet another failure to honour the obligations he owed to the courts.

[43] In summary, the appellant is before the court in relation to three separate breaches of the terms of his suspended sentence. The first of those was the failure to report, a condition with which he has never complied. The second was leaving Goulburn Island without permission and failing to return. Both

of those breaches occurred very shortly after his release from prison and shortly after he had been warned of the consequences of breaching the orders. The final breach came just five months into the term of supervision which was to last for two years and nine months. No acceptable explanation for the breaches has been provided. The instructions of the appellant to his counsel seeking to explain his conduct have been both inconsistent and unacceptable.

[44] In my opinion, in all of the circumstances, it is now appropriate to proceed in the manner originally proposed by the learned sentencing Judge. It is appropriate and not unjust to restore the unserved part of the suspended sentence, being the term of two years and nine months. To fail to do so would be to undermine the integrity of the sentencing regime.

[45] I would restore the unserved part sentence and I would set a non-parole period of one year and five months. The sentence should be deemed to have been restored as at the date upon which the appellant was taken into custody.

[46] Orders:

(1) The appeal is allowed.

(2) The appellant is re-sentenced by this Court as follows:

Restore the part of the sentence held in suspense and order the appellant to serve it. We fix a non-parole period of one year and five months. The

restoration of the sentence is backdated to the day the appellant was taken into custody for the breach of suspended sentence.
