

Fitzgerald v Balchin [2009] NTSC 29

PARTIES: FITZGERALD, Nikkita

v

BALCHIN, Viven Lynette

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: JA 22 of 2009 (20824299)

DELIVERED: 25 June 2009

HEARING DATES: 25 June 2009

JUDGMENT OF: RILEY J

APPEAL FROM: BRADLEY SM

REPRESENTATION:

Counsel:

Applicant: J Franz
Respondent: M Chalmers

Solicitors:

Applicant: Northern Territory Legal Aid
Commission
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

Fitzgerald v Balchin [2009] NTSC 29
No. JA 22 of 2009 (20824299)

BETWEEN:

NIKKITA FITZGERALD
Applicant:

AND:

VIVEN LYNNETTE BALCHIN
Respondent:

CORAM: RILEY J

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 25 June 2009)

- [1] On 13 March 2009 the applicant was convicted in the Youth Justice Court of two counts of assault. She was sentenced to detention for a period of six months on each count with the sentences made partially concurrent to provide an effective sentence of eight months detention suspended after 14 days.
- [2] A Notice of Appeal against the sentence was filed on the basis that the learned sentencing Magistrate "erred in imposing a sentence that was not duly proportionate to the objective gravity of the youth's involvement in the offence."

A preliminary issue

- [3] The applicant was sentenced under the *Youth Justice Act*. The right of appeal under that Act is governed by the provisions of the *Justices Act*. Section 171(1) of the *Justices Act* provides that an appeal shall be instituted by filing and serving a notice of appeal, by entering into a recognizance on appeal and by payment of the appropriate fee. The appeal shall be instituted within one month from the time of the order appealed against. In the present case the applicant has not entered into a recognizance on appeal and it is the submission of the respondent that the appeal is not competent.
- [4] The requirements of s 171(1) of the *Justices Act* are conditions precedent to the institution of the appeal. A failure to comply with the conditions precedent deprives the court of jurisdiction unless the power of dispensation under s 165 is exercised¹. Whilst s 171(2) of the Act allows for an extension of time by reason of remoteness from the seat of the Court of Appeal of the original court that proviso has no application in the circumstances of this matter.
- [5] Section 165 of the *Justices Act* permits the court to dispense with compliance with any condition precedent to the right of appeal if, in the opinion of the court, the applicant has done whatever is reasonably practicable to comply with the requirements of the Act. The onus rests upon the applicant to demonstrate that he or she has done whatever is reasonably practicable in the circumstances and to, thereby, justify the exercise by the

¹ *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 73 ALR 8.

court of the power to dispense with compliance. It is not necessary to show that compliance was impossible but it must at least be demonstrated as unreasonable to expect, in the particular circumstances, that exact compliance should be insisted upon². If such grounds are not shown and the court does not provide relief the proceedings remain inchoate and do not reach the stage of being an instituted appeal.

[6] In circumstances where an applicant, who is in custody, has reasonably left the matter in the hands of an apparently competent solicitor and where the instructions were given in ample time for the solicitors to comply with the provisions of the Act it has been held that the applicant has, within the meaning of s 165, done all that is reasonably practicable to comply with the provisions of the Act³.

[7] At the relevant time the applicant was aged 16 years. Her solicitor obtained instructions to appeal from the applicant through her mother with whom the applicant was living at the time of sentencing. The Notice of Appeal was filed on 14 April 2009. On 21 April 2009 the solicitor requested that the mother inform the applicant that she had to sign the recognizance to prosecute the appeal. Thereafter the solicitor made numerous attempts to contact the applicant directly by letter and telephone, through her mother and through her supervising officer at Casuarina Community Corrections. The solicitor left messages to be passed on to the applicant emphasising the

² *Edrick v Nayda* [1994] NTSC 219.

³ *Nottle v Trenerry* (1993) 89 NTR 7.

importance of her signing the recognizance and informing her that the appeal could not proceed if the document was not signed. Notwithstanding the diligent efforts of the solicitor the applicant did not attend to sign the recognizance.

[8] In the present case it appears that the applicant had been properly advised by her legal representative of the requirement to enter into a recognizance however she failed to do so. There is no explanation from the applicant as to why this may have been. She has not responded to the many requests for her to enter into the recognizance. She has shown no interest in pursuing the appeal. I bear in mind her personal circumstances in determining the outcome of the application. This is not a case where the applicant herself has done everything reasonably practicable to institute the appeal and the failure is attributable to her legal representative. She has done nothing to pursue an appeal. Any failure rests with the applicant.

[9] The applicant has failed to demonstrate a basis upon which I should dispense with the requirement that the applicant enter into the prescribed recognizance. The application to dispense with the requirement is dismissed.
