Shannon v Cassidy [2012] NTSC 27

PARTIES:	SHANNON, Ezekial
	v
	CASSIDY, Craig
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	21036081 & 21143492
DELIVERED:	27 APRIL 2012
HEARING DATES:	12 APRIL 2012
JUDGMENT OF:	RILEY CJ
APPEAL FROM:	NEILL SM

CATCHWORDS:

CRIMINAL LAW – *Youth Justice Act* - sentencing - defence appeal against restoration of a suspended sentence – whether s 121(6) of the *Youth Justice Act* contains the power to restore a suspended sentence - appeal allowed.

Youth Justice Act (NT) s 4, s 6, s 69, s 81, s 83, s 98(2) and s 121(6); *Sentencing Act* (NT) s 43(5) and (7).

Ingram v Littman; Ingram v Verity (2009) NTSC 70, followed.

REPRESENTATION:

Counsel:

Appellant:	Ms Craven
Respondent:	Mr McMinn

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	A
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Shannon v Cassidy [2012] NTSC 27
No. 21036081 & 21143492

BETWEEN:

EZEKIAL SHANNON
Appellant

AND:

CRAIG CASSIDY
Respondent

CORAM: RILEY CJ

REASONS FOR JUDGMENT

(Delivered 27 April 2012)

[1] This is an appeal against sentence which raises questions regarding the operation of s 121(6) of the *Youth Justice Act*.

[2] The appellant has a criminal history relevant to the appeal and it is necessary to set that history out in some detail.

[3] The appellant, who was then aged 17 years and two months, appeared in the Youth Justice Court at Tennant Creek and pleaded guilty to a charge of unlawfully causing serious harm to a young woman. On 10 August 2011 he was convicted and sentenced to a period of detention of four months suspended forthwith on conditions including that he undertake a

rehabilitation program and that he accept supervision. The operational period of the suspended term of detention was set at 14 months.

[4] On 6 October 2011 the appellant again appeared before the Youth Justice Court at Tennant Creek in relation to a conditional breach of the order imposed on 10 August 2011. The breach was constituted by the failure of the appellant to undertake the identified rehabilitation course. The presiding magistrate found the breach proven and, pursuant to s 121 of the *Youth Justice Act,* varied the order by deleting all of the conditions including the requirement that the appellant undertake a rehabilitation program. Why that path was followed by the then presiding magistrate was not explained at the subsequent hearing.

[5] On 6 and 8 December 2011 the appellant appeared before the Court of Summary Jurisdiction in Tennant Creek in relation to fresh charges of assaulting police and disorderly behaviour in a public place. He was then aged 18 years and no longer a "youth" for the purposes of the *Youth Justice Act*. The matter was adjourned and the appellant was granted bail. On 20 December 2011 the appellant was found intoxicated in a public street with a blood alcohol reading of 0.124%. The consumption of alcohol was in breach of the terms of his bail and he was arrested for breaching bail and remanded in custody.

[6] On 22 December 2011 the appellant was dealt with by a different magistrate for the offence of having breached bail and also for the breach, by way of

reoffending, of the suspended sentence imposed in the Youth Justice Court on 10 August 2011. In relation to the breach of the order his Honour varied the sentence by restoring three weeks of the suspended sentence. In relation to the bail offence the appellant was convicted and sentenced to imprisonment for seven days to be served concurrently with the restored sentence.

[7] It is convenient to deal with the grounds of appeal by addressing ground 2 first.

Ground 2:The learned magistrate erred in his Honour's interpretation of s 121(6)(a)(i) of the *Youth Justice Act* in finding that a "variation" of an order for a fully suspended period of detention could include restoration of the whole or part of that period of detention and further that the learned magistrate erred in the application of the principles enunciated in *Bukulaptji v The Queen* (2009) 24 NTLR 210 to breaches of Youth Court orders to the exclusion of sections 4, 81 and 121 of the *Youth Justice Act.*

[8] The appellant was born on 17 August 1993. At the time of the original offending he was aged 17 years and, at the time of the conditional breach and the reoffending, he was aged 18 years. For the purposes of the *Youth Justice Act* a "youth" is defined to be a person under the age of 18 years or "if the context requires, a youth includes a person who committed an offence as a youth but has since turned 18 years of age".[1] In the present case the context requires that the appellant be regarded as a youth for the purposes of dealing with the breaches of the order made when he was a youth notwithstanding that he has subsequently turned 18 years of age. In relation

[1] S 6 of the *Youth Justice Act.*

to the imposition of a penalty for the fresh offending (as distinct from that offending constituting a breach of the original order) he was to be dealt with as an adult.

The relevant provisions and the approach of the Magistrate

[9] The sentencing options available under the *Youth Justice Act* are to be found in s 83 of the Act and include the power to order that a youth serve a term of detention or imprisonment that is suspended wholly or partly.[2] Section 98(2) of the Act then permits the court to suspend all or part of a sentence of detention or imprisonment on the conditions it considers appropriate.

[10] Section 121(1) of the Act deals with breaches of an order and provides:

> (1) A youth breaches an order if the youth:
>
> (a) fails, without reasonable excuse, to comply with a term or condition of the order; or
>
> (b) fails to comply with the Regulations relating to the order; or
>
> (c) commits an offence against a law in force in the Territory or elsewhere while he or she is subject to the order; or
>
> (d) does an act, or omits to do an act, that comprises a breach under another provision of this Act.

[11] In this case there was no dispute that the appellant had breached the order suspending his sentence by failing to comply with a term or condition of the order that he not consume alcohol and, further, by committing an offence

[2] S 83(1)(i) of the *Youth Justice Act.*

against a law in force in the Territory namely the offence of breaching bail pursuant to s 37B of the *Bail Act*.

[12] In dealing with the breaches his Honour made it clear that he was proceeding pursuant to s 121(6)(a) of the *Youth Justice Act* which provides:

> (6) If the Court is satisfied by evidence on oath or by affidavit, or by the admission of a youth, that the youth has breached an order, the Court may:
>
> (a) if the order is still in force:
>
> (i) confirm or vary the order; or
>
> (ii) revoke the order and deal with the youth under section 83 as if it had just found him or her guilty of the relevant offence or offences; and
>
> (b) if the order is no longer in force – deal with the youth under section 83 as if it had just found him or her guilty of the relevant offence or offences.

[13] The learned magistrate expressed the opinion that s 121(6)(a)(i) of the Act enabled him to vary the original order by "restoring all or any part of the period of sentence held in suspension". The appellant submits that in so doing his Honour fell into error. It was submitted that if the magistrate was of the view that a term of detention or imprisonment was the appropriate penalty for the breach, the only way in which such a result could be given effect was to revoke the order and resentence the appellant pursuant to s 121(6)(a)(ii) of the *Youth Justice Act*. It was further submitted that

proceeding in this way would require the magistrate to take into account the protections afforded the youth by ss 4, 69 and 81 of the *Youth Justice Act*.

[14] Section 4 of the Act sets out a series of principles which "must be taken into account" in the administration of the Act. The sentencing magistrate expressly acknowledged that these principles had been taken into account in determining that partial restoration of the sentence should occur.

[15] Section 81 of the Act sets out a further series of principles and considerations to which the court must have regard when "sentencing a youth who has been found guilty of an offence." These principles and considerations were not referred to by his Honour in the remarks.

[16] Section 69 of the Act is in the following terms:

> Court must require pre-sentence report
>
> (1) If a youth has been found guilty of an offence and the Court is considering imposing a sentence of detention or imprisonment, the Court must ensure that it is informed as to the circumstances of the youth.
>
> (2) In order to be informed, the Court must require a pre-sentence report to be provided to it.
>
> (3) However, if the Court is satisfied that it has the information necessary to determine an appropriate sentence, the Court may dispense with the need for a report.
>
> (4) The Court may require the report to address specific matters in relation to the youth that the Court wishes to be informed about.

[17] The sentencing magistrate was invited to obtain a presentence report by counsel who appeared for the appellant but his Honour failed to do so. His Honour referred to various reports that had been placed before the original sentencing magistrate in August 2011 and drew upon that information. However no information concerning the period between August 2011 and 22 December 2011 was provided to the court. It was submitted on behalf of the appellant that, in those circumstances, the magistrate was not appropriately informed as to the circumstances of the youth and could not have been satisfied that the information necessary to determine an appropriate sentence was before the court. In particular it was said that his Honour did not have information as to:

a) the reasons for the appellant having been discharged from the rehabilitation unit;

b) the reasons of the relevant magistrate in deleting the conditions in October 2011;

c) the level of compliance of the appellant with other terms of the suspended sentence;

d) the circumstances of the appellant over the intervening four months; or

e) the merits or otherwise of the proposal put to the court that the appellant move to different living circumstances in Katherine.

It was submitted that, in the circumstances, his Honour erred in not obtaining a presentence report.

Section 121(6) of the Act

[18] As an aid to interpretation, the wording of s 121 of the *Youth Justice Act* may be contrasted with the wording of s 43 of the *Sentencing Act*. The legislature has provided different regimes in those Acts for dealing with breaches of orders suspending sentences. The *Sentencing Act* provides a range of options including the express power to "restore the sentence or part sentence held in suspense". The *Youth Justice Act* does not contain such a provision. In the event of a breach of an existing order under the *Youth Justice Act* the court is permitted to "confirm or vary" the order or, alternatively, revoke the order and then deal with the youth as if it had just found him guilty of the relevant offence or offences.

[19] Section 43 (5) of the *Sentencing Act* provides that where a court is satisfied that during the operational period of a suspended sentence the offender committed another offence or that the offender had breached a condition of the order the court may:

> (c) subject to subsection (7), restore the sentence or part sentence held in suspense and order the offender to serve it; or
>
> (d) restore part of the sentence or part sentence held in suspense and order the offender to serve it; or
>
> (e) for a wholly suspended sentence, extend the operational period to a date after the date of the order suspending the sentence; or

> (ea) for a partially suspended sentence – extend the operational period to a date after the date specified in the order suspending the sentence; or
>
> (f) make no order with respect to the suspended sentence.

[20] Subsection 43(7) of the *Sentencing Act* makes it clear that the response to a breach under that regime is to restore the unserved part of the sentence unless it would be unjust to do so. The subsection provides that:

> (7) A court must make an order under subsection (5)(c) 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 must state its reasons.

[21] These provisions are not reflected in the *Youth Justice Act*. It is apparent that a different approach was intended in relation to youth offenders. The nature of that approach is informed by the special provisions of *Youth Justice Act*.

[22] By way of distinction from the *Sentencing Act,* the *Youth Justice Act* makes special provision in relation to youths who have committed offences. The application of s 121 of the *Youth Justice Act* must be considered in light of the underlying objects and the remaining provisions of the Act. As noted[3] the Act sets out principles and considerations to which courts dealing with youth offenders must have regard. Where the court is considering imposing a period of detention or imprisonment, it must ensure that it is informed as to the circumstances of the youth. The Court must require a presentence

[3] Paragraphs [14], [15], and [16] above.

report unless it is satisfied that it has the information necessary to determine an appropriate sentence. The applicable principles require that a youth should only be kept in custody for an offence as a last resort and for the shortest period of time.

[23] If the power to "vary" the order suspending the sentence provided for in the *Youth Justice Act* included a power to restore a sentence of imprisonment this would have the effect of avoiding the identified and fundamental protections provided to youths under the provisions of the *Youth Justice Act*. Such an approach would be inconsistent with the approach adopted throughout the *Youth Justice Act*. Clear words would be required to achieve such a result and those words are not present.

[24] The power to confirm or vary an order suspending a sentence as provided by s 121(6)(a)(i) of the *Youth Justice Act* permits the confirmation or variation of terms and conditions imposed pursuant to s 98(2) of the Act in such an order. In my opinion, and as the respondent conceded, the power to vary does not include a power to restore part of a suspended sentence. Had that been the intention words similar to those found in s 43 of the *Sentencing Act* would be expected to have been employed. The power to impose a term of detention or imprisonment where there has been a breach of an order by a youth is to be found in the ability of the court to revoke the order and

proceed under s 83 of the Act which, of course, requires consideration of the provisions of ss 4, 69 and 81 of the Act.[4]

[25] It follows that the magistrate erred in restoring a part of the suspended sentence pursuant to the provisions of s 121(6)(a)(i) of the Act. If, as seems apparent, his Honour considered a sentence of actual detention or imprisonment as an appropriate response to the actions of the appellant the applicable provision was s 121(6)(a)(ii) of the Act. Prior to imposing such a sentence the magistrate was obliged to give consideration to the requirements of ss 4 and 81 of the Act and also to obtaining a report under s 69 of the Act.

[26] In the circumstances I allow the appeal on this ground and I set aside the order of the magistrate varying the sentence imposed on 10 August 2011 by restoring three weeks of the suspended sentence. I refer this aspect of the matter back to the Court of Summary Jurisdiction for reconsideration in light of these reasons.

[27] It is unnecessary to consider the remaining grounds of appeal in relation to this aspect of the orders of his Honour.

The offence of breach of bail

[28] There remains for consideration the sentence of imprisonment for the period of seven days imposed in relation to the offence of breach of bail. This offending occurred when the appellant was an adult and the sentence was

[4] *Ingram v Littman; Ingram v Verity* (2009) NTSC 70 at [7] and [8].

imposed under the terms of the *Sentencing Act*. The only continuing complaint made regarding the sentence was that it was manifestly excessive. The principles applicable to such a ground of appeal are well known and need not be repeated on this occasion.

[29] In sentencing for this offence the magistrate determined that it was not a trivial matter. His Honour noted that the consumption of alcohol was a contributing factor to the criminal history of the appellant. The breach of the term of the grant of bail requiring the appellant to abstain from consumption of alcohol was significant in that the appellant was found in a public street with a blood alcohol reading of 0.124%. His Honour concluded that the consumption of alcohol went "to the heart of the whole bail process" in relation to the appellant. It reflected an intention on the part of the appellant to disregard his conditions of bail. It was also noted that the appellant had prior convictions for breach of bail. In my opinion it cannot be said that the sentence of imprisonment for seven days was manifestly excessive in all the circumstances of the offending and of the offender. I dismiss this ground of appeal.

[30] The appeal is allowed in part and that part of the matter remitted to the Court of Summary Jurisdiction for reconsideration.
