Lernbom v Fry [1999] NTSC 70

PARTIES:	YVONNE ANNICKA LERNBOM
	v
	PATRICK DAVID FRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA8 of 1999 (9817856)
DELIVERED:	16 July 1999
HEARING DATES:	13 and 15 JULY 1999
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	J. Lewis
Respondent:	L. Ward

Solicitors:

Appellant:	Withnall Maley & Co.
Respondent:	Commonwealth Department of Public Prosecutions

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

Lernbom v Fry [1999] NTSC 70
No. JA8 of 1999 (9817856)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence imposed in the Court of Summary Jurisdiction

BETWEEN:

YVONNE ANNICKA LERNBOM
Appellant

AND:

PATRICK DAVID FRY
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 16 July 1999)

[1] On 12 February 1999 the appellant pleaded guilty to having, between 16 November 1993 and 30 October 1997, imposed upon the Commonwealth by an untrue representation with a view to obtaining money in that she represented to the Department of Social Security and then Centrelink that she was single when she was in fact living in a de facto relationship. The offence is contrary to s 29B of the *Crimes Act*.

[2] On 12 February 1999 in the Court of Summary Jurisdiction she was sentenced to a period of ten months imprisonment with that sentence to be suspended upon her entering into a home detention order for a period of twelve months. She appeals against the severity of that sentence.

[3] In imposing the sentence of ten months imprisonment the learned Magistrate adverted to the provisions of s 58 of the *Sentencing Act* and said:

> "The maximum penalty in this court is 12 months imprisonment. I am obliged to consider the effect of the abolition of remissions but it seems to me that the effect of abolition of remissions should be considered in relation to the overall maximum, that is the 2 years rather than the 12 months. And I cannot see that the abolition of remissions prevents me from imposing upon you a maximum up to and including the 12 months provided by the law."

[4] The impact of s 58 was addressed by Angel J in *Ryder v Dredge & Winzar* (SCNT, 8 December 1998) where his Honour concluded that, for the present, the effect of s 58 was that a "court cannot impose a sentence of between eight months and twelve months".

[5] Section 58 is in the following terms:

> "Court to take abolition of remissions into account
>
> (1) Subject to section 78A, when sentencing an offender to a term of imprisonment of less than 12 months a court shall consider whether the sentence it proposes would result in the offender spending more time in custody, only because of the abolition of remission entitlements by section 6 of the *Prisons (Correctional Services) Amendment Act* (No. 2) 1994, than he or she would have spent had he or she been sentenced before the commencement of that section for a similar offence in similar circumstances.

(2) If the court considers that the sentence it proposes would have the result referred to in subsection (1) it shall reduce the proposed sentence in accordance with subsection (3).

(3) In applying this section a court -

(a) shall assume that an offender sentenced before the commencement of section 6 of the *Prisons (Correctional Services) Amendment Act (No. 2)* 1994 would have been entitled to the maximum remission entitlements; and

(b) shall not reduce a sentence by more than is necessary to ensure that the actual time spent in custody by an offender sentenced after that commencement is not greater, only because of the abolition of remissions, than it would have been if the offender had been sentenced before that commencement for a similar offence in similar circumstances.

(4) For the purposes of this section -

"remission entitlements" means a remission under section 92 of the *Prisons (Correctional Services) Amendment Act*, as in force before the commencement of section 6 of the *Prisons (Correctional Services) Amendment Act (No. 2)* 1994, that may have been granted to a prisoner under the determination made under that section that was in force immediately before that commencement;

"term of imprisonment" includes -

(a) a term that is suspended wholly or partly; and

(b) any non-parole period fixed in respect of the term.

(5) This section shall expire 5 years after its commencement.

(6) It is intended that the expiry of this section will not of itself have any effect on sentencing practices and that after the expiry a court will have regard to sentencing practices current immediately before then as if this section had not expired.”

[6] As is noted above his Worship imposed a term of imprisonment of ten months which he then suspended upon the appellant entering into a home detention order for a period of twelve months. In order to impose that period of imprisonment there would seem to have been only two possibilities upon which his Worship may have proceeded. Both lead to the conclusion that an error occurred.

[7] The first possibility is that his Worship intended to impose a period of imprisonment of ten months and considered that to be the appropriate sentence in all of the circumstances. If he did so then, by virtue of s 58(1), he was then required to consider whether that sentence would result in the appellant spending more time in custody because of the abolition of remission entitlements. Prior to the abolition of those entitlements any sentence imposed for a period of more than 28 days resulted in the person actually serving two thirds of that sentence. Put another way there was an entitlement to a maximum period of remission of one third of the sentence. In the case of a sentence of ten months, a period of six and two-thirds months actual imprisonment would result.

[8] It follows that, if his Worship considered that the appropriate penalty was a period of imprisonment for ten months, he was obliged by operation of s 58 to reduce the proposed sentence in accordance with s 58(3) to a period of six and two-thirds months.

[9] On the other hand the approach of his Worship may have been that he determined the appropriate sentence for the offence in all of the circumstances and then reduced it in accordance with s 58(3) to result in a reduced sentence of ten months. If this occurred, he must have erred. This is because the sentence which his Worship thought appropriate to this particular offence must have been fifteen months imprisonment in order to achieve the end result of ten months imprisonment after the application of s 58(3). However, if the starting point was fifteen months then s 58 would have no application to the sentence because s 58 clearly applies only to sentences of less than twelve months. The original sentence of fifteen months would therefore have been outside the scope of s 58 and would not have been subject to any reduction by virtue of s 58(3).

[10] The effect of s 58 of the *Sentencing Act* is this. It has no application to sentences of imprisonment of twelve months or greater. In relation to sentences of less than twelve months, s 58(3) requires that the proposed sentence be adjusted by reducing the sentence which would historically have applied by the maximum remission entitlements to which the offender would have been entitled prior to the abolition of remission entitlements effected by s 6 of the *Prisons (Correctional Services) Amendment Act (No.2)* (1994). In this case that entitlement amounted to one third of the sentence. Whilst a court may impose a sentence of imprisonment for a period of twelve months or more it cannot impose a sentence of imprisonment between eight months and that period of twelve months because of the impact of s 58(3).

[11] It was submitted on behalf of the respondent that s 58 of the *Sentencing Act* has no application to orders for home detention. That is to miss the point of this appeal. Here the attack of the appellant is not upon the order of his Worship in relation to home detention but rather upon the underlying sentence of ten months imprisonment which was suspended upon the appellant entering into a period of home detention. I was referred to *Arnold v Trenerry* (1997) 118 NTR 1 but that was a case where the grounds of appeal related to the failure of a Magistrate to adjust a period of home detention to reflect the operation of s 58 of the *Sentencing Act*. With respect Mildren J correctly held that the learned Magistrate had been correct in concluding that s 58 of the *Sentencing Act* is not applicable to home detention orders.

[12] I was also directed to *Mbitjana v Appel* (1997) 140 FLR 278. That was a case in which Martin CJ was required to consider a sentence of imprisonment imposed prior to the commencement of the *Sentencing Act* which sentence was suspended upon the appellant entering into a home detention order. The appellant breached the home detention order and the appellant was dealt with for the breach after the commencement of the *Sentencing Act*. The matter involved the interpretation of the transitional provisions of the *Sentencing Act* and does not apply to the circumstances presently before the court.

[13] In the circumstances of this matter it follows that his Worship was not able to impose a penalty of ten months imprisonment (even though it be suspended) and his Worship therefore erred.

[14] I allow the appeal and set aside the sentences imposed by his Worship. There would appear to be no reason why I should not re-sentence the appellant and I will proceed to receive any further submissions in that regard.

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