Bland v The Queen [2001] NTSC 31

PARTIES:	BLAND, Dexter Middleton
	v
	THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	9915488
DELIVERED:	4 May 2001
HEARING DATES:	26 April 2001
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

CRIMINAL LAW

Jurisdiction, practice and procedure – indictment – whether sentence not in accordance with the law – whether circumstance of aggravation to be charged and pleaded to separately.

*Sentencing Act*1995 (NT), s 112
Criminal Code Act 1983 (NT), s 305

REPRESENTATION:

Counsel:

Appellant:	S Cox
Respondent:	M Carey

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	mar0114
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Mar0114

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

Bland v The Queen [2001] NTSC 31
No. 9915488

BETWEEN:

DEXTER MIDDLETON BLAND
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 4 May 2001)

[1] The applicant seeks to have the court reopen proceedings in which he was sentenced to imprisonment by me on 22 August 2000. The application is made pursuant to s 112 of the Sentencing Act 1995 (NT).

[2] The sentence imposed is said to be not in accordance with the law because I proceeded to sentence the applicant where the circumstance of aggravation upon which I relied was not charged in the indictment (contrary to s 305(4) of the Criminal Code Act 1983 (NT)) leading to error in determining the maximum penalty.

[3] The indictment charged the applicant in the following terms:

> "Between 3 July 1999 and 5 July 1999 at Yulara in the Northern Territory of Australia, did steal cash to the value of about $116,966.55, the property of Ayres Rock Corporation".

It was for that that the applicant was committed to this Court.

[4] The offence of stealing is to be found in s 210(1) of the Criminal Code and carries a maximum penalty of seven years imprisonment. If the value of the thing stolen exceeds $100,000, there is a circumstance of aggravation, and the maximum penalty is imprisonment for 14 years (s 210(2)).

[5] The applicant was represented by counsel and pleaded guilty. It is not suggested that he lacked any understanding of the English language.

[6] The facts put by the prosecutor at trial proved the offence and the circumstance of aggravation. They were admitted by the applicant. During the course of submissions, with reference to co-called comparative sentences, I said that they were "under $100,000" and that the maximum penalty was less then that prescribed for this case (transcript p 7). When sentencing the applicant, I said that "The maximum penalty for the offence is imprisonment for 14 years since the value of the money stolen exceeded $100,000". At no stage of the proceedings or immediately thereafter did the prosecutor or counsel, who then appeared for the applicant, seek to persuade me that my view would lead to a sentence being imposed that was not in accordance with the law.

[7] The point is now taken that the form of the indictment was defective in that there should have been included a statement of the offence and a separate charge of the circumstance of aggravation intended to be relied upon (Criminal Code, s 305(1) and (4)). It is common to see an indictment framed in that manner. Indeed, counsel for the Crown said upon this application that the practice in the Office of the Director of Public Prosecutions is to draw indictments so that the offence and the circumstance or circumstances of aggravation are charged separately.

[8] The practice of the court on such an indictment is to put each charge separately and to invite the accused's plea to each. The advantage in proceeding in that way is said to lie in the assurance that the accused is not left in any doubt as to the matters with which he or she is charged and to indirectly draw attention to the punishment to which he or she may be liable. It would also make it easier for the plea to the circumstance of aggravation to be isolated from the plea to offence. But that result can be achieved upon an indictment in the present form (see s 315 and the remarks of Asche CJ hereunder).

[9] I agree that an indictment in the form generally adopted by the Director, and the method of arraigning an accused upon it, are preferable. But, the question is whether in the circumstances of this case the sentence was not in accordance with the law.

[10] The indictment contains a statement of the offence of stealing and charges the circumstance of aggravation that the value of the thing stolen exceeded $100,000. This is not a case like *Pryce v Trenerry* (1995) 78 A Crim R 561 where Kearney J was dealing with a charge in which the circumstance of aggravation had not been included at all. The charge was for the supply of a dangerous drug and the facts disclose that the offence took place in licensed premises (an "aggravating circumstance"). The offender was sentenced by reference to the penalty provisions applying in those circumstances. His Honour upheld the appeal against sentence on that ground. In the course of doing so, his Honour referred to a number of cases suggesting the practice at common law which now finds its expression in s 305. His Honour went no further than to hold that a person charged with an offence should, by the charge, be made aware before he pleads of what may be the consequences of his plea in terms of punishment (p 570).

[11] I was also referred to *O'Brien v Fraser* (1990) 66 NTR 9, a decision of former Chief Justice Asche. That case had to do with whether the information was duplicitous. His Honour held it was not. It is interesting, however, to look at the form of the charge under consideration. The defendant was charged "for that the said defendant did on 19 June 1989 at Darwin … unlawful assault Deborah Lee Fraser, who is a female, and the said (defendant) is a male and the said Deborah Lee Fraser was threatened with a firearm and an offensive weapon … and an axe" contrary to s 188 of the Criminal Code. Subsection (1) of that section provides for the offence,

of assault, and s 188(2) refers to a number of separately enumerated circumstances of aggravation including that the person assaulted was a female and the offender a male and the person assaulted was threatened with a firearm or other dangerous or offensive weapon.

[12] His Honour's remarks on the form of the information appear at p 17:

> "The information in its present form does not draw this clear distinction between the substantive offence and the various circumstances of aggravation; for example the information charges the defendant with "being a male did unlawfully assault Deborah Lee Fraser a female" thereby mixing up the substantive offence with a circumstance of aggravation. I would not hold that the information is thereby void for uncertainty, since the basic elements of the charge and the circumstances of aggravation plainly appear;".

His Honour then gave an example of the form in which one normally sees the offence and circumstances of aggravation under s 188 now expressed.

[13] There was no suggestion in that case that the form in which the information was drafted amounted to or led to an error of law.

[14] At p 19 his Honour urged that care be taken when a defendant pleads guilty to a charge containing aggravating circumstances:

> "That he understands that his plea subsumes all the circumstances alleged. He may wish to admit some and deny others. If he denies any, there is then a triable issue between him and the prosecution on each such denial which should be resolved by the court before sentence is passed".

[15] In neither of those cases is authority for the proposition here advanced by the applicant and conceded by the prosecutor. However, both parties submit

that the sentence was not in accordance with the law and that the court should reopen the proceedings and impose a sentence, taking into account that the maximum penalty is imprisonment for a term of seven years.

[16] There is no evidence to suggest that the applicant was mistaken as to the maximum penalty when he entered the plea. My remarks in the course of submission brought no objection and the express reference to the maximum penalty of 14 years imprisonment during sentencing remarks did not cause the applicant to then and there seek to correct the perceived error, or to indicate that the plea was initiated by mistake. If the value of the thing stolen was in dispute, then the indictment could have been amended to charge the offence and the circumstance of aggravation separately and a trial had on that issue (s 312). (Go to s 315).

[17] The provisions of s 305 are a parliamentary instruction as to the content of an indictment. They are not instructions as to form. In my opinion it is enough that a statement of the offence and any circumstance of aggravation intended to be relied upon be "charged". It is not necessary that the words "circumstance of aggravation" be used; it is sufficient that any such circumstance be specified with sufficient particularity to alert the accused that he will be called upon to meet the allegation.

[18] The penalty prescribed for the offence with or without circumstances of aggravation form no part of the indictment. The inclusion of reference to the section and enactment defining the offence (s 305(3)) is all that is

required. The statute does not require reference to the section and enactment defining the penalty.

[19] It should be noted that a circumstance of aggravation is not an element of the offence. It is a circumstance which, if proved, by admission or otherwise, renders the offender liable to a greater penalty than would otherwise by the case, *Kingswell v The Queen* (1995) 159 CLR 264, *The Queen v Meaton* (1986) 160 CLR 359.

[20] Notwithstanding the agreement between the parties, I am not satisfied that the sentence imposed was not in accordance with the law. The indictment conformed with the requirements of the law in that it charged both the offence and circumstance of aggravation relied upon.
