Samide v Munn & Letsoya v Mackay [2004] NTSC 4

PARTIES:	BASRI SAMIDE v MICHAEL REX MUNN and HASAN LETSOYA v ROY STUART MACKAY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	JA 113 of 2003 (20308347) JA 114 of 2003 (20308353)
DELIVERED:	10 February 2004
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JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	J.K. Franz
Respondent:	P. Usher

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Commonwealth Director of Public Prosecutions

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

Samide v Munn & Letsoya v Mackay [2004] NTSC 4
Nos JA 113 and 114 of 2003

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

BASRI SAMIDE
Appellant

AND:

MICHAEL REX MUNN
Respondent

and

HASAN LETSOYA
Appellant

AND:

ROY STUART MACKAY
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 10 February 2004)

[1] These appeals against sentence were heard together at the request of the parties. The circumstances of the offending are similar and the complaints of the appellants are the same.

[2] On 5 June 2003 the appellant Basri Samide pleaded guilty to, and was convicted of, two offences against the Fisheries Management Act (Cth). The first of those offences was that on 20 May 2003 he used a foreign boat for commercial fishing in the Australian Fishing Zone (AFZ) contrary to s 100(2) of the Act. He was fined $10,000 and, pursuant to s 26(2) of the Sentencing Act (NT), it was ordered that if the fine was not paid within 28 days he was to be imprisoned for 100 days.

[3] Mr Samide was also convicted of having been in charge of a foreign boat equipped with fishing equipment contrary to s 101(2) of the Fisheries Management Act. In relation to this offence the learned sentencing magistrate, without passing sentence, ordered that he be released upon entering into a good behaviour bond pursuant to s 20(1)(a) of the Crimes Act 1914 (Cth) in the sum of $10,000 to be of good behaviour for 5 years. Pursuant to s 33B of the Justices Act (NT) it was further ordered that, in the event the bond was breached, the amount would be forfeited and in default of immediate payment Mr Samide was to be committed to gaol for up to 3 months.

[4] Mr Letsoya was dealt with on the same day and before the same magistrate. He pleaded guilty to having, on 21 May 2003, used a foreign boat for

commercial fishing in the AFZ contrary to s 100(2) of the Fisheries Management Act. In relation to that offence he was convicted and fined $11,000. Pursuant to s 26(2) of the Sentencing Act it was ordered that if the fine was not paid within 28 days he was to be imprisoned for a period of 110 days.

[5] In addition, Mr Letsoya pleaded guilty to having been in charge of a foreign boat equipped with fishing equipment contrary to s 101(2) of the Act. In that regard the learned sentencing magistrate convicted Mr Letsoya but without passing sentence ordered that he be released upon entering into a good behaviour bond in the sum of $10,000 to be of good behaviour for 5 years. In the event the bond was breached, the amount would be forfeited and in default of immediate payment Mr Letsoya was to be committed to gaol for up to 3 months.

[6] Each of the appellants appealed on the basis that a fine should not have been imposed in relation to the first count and that the amount of the fine was manifestly excessive. In relation to the second count it was submitted that the amount of the recognizance for the good behaviour bond was manifestly excessive.

[7] Mr Letsoya was the master of the vessel “Karaya Baru” which sailed from Merauke in Indonesia and had been in Australian waters for 2 days. There were 5 crew on board. The vessel was an Indonesian Type lll motorised boat and was located 112.3 nautical miles inside the AFZ. The vessel was

searched and found on board was fresh dolphin fish and a bag containing 10 kilograms of fresh shark fin. The vessel had a magnetic compass which was in working order.

[8] Mr Samide was the master of the vessel "Indonesia Mas" which was located 109 nautical miles inside the AFZ. It was a Type lll motorised Indonesian shark boat with a crew of 5. That vessel had also sailed from Merauke in Indonesia and had been in the area for one day. Shark fin was found in a concealed compartment on the vessel. The vessel was equipped with a magnetic compass which was in working order.

[9] Each of the appellants was a first offender. They were subsistence fishermen and were impecunious. They each had debts and had people dependent upon them for support. The vessels for which they were responsible were destroyed. It was submitted that they would each have to compensate the owners of the vessels for which they were individually responsible, for the loss.

[10] Both appellants co-operated with the authorities and pleaded guilty at an early time. They each spent time in Immigration detention and their catch and fishing equipment was automatically forfeited to the Commonwealth.

[11] In sentencing the appellants, the learned sentencing magistrate placed emphasis upon the extent to which the individual vessels had ventured into Australian waters. He regarded this as an aggravating factor noting that, in his experience, offences of this kind commonly occurred where people were

"on the cusp of the fishing zone". That was not the case in relation to these offences where the vessel of which Mr Samide was the master was 109 nautical miles within the zone and that commanded by Mr Letsoya was 112.3 nautical miles within the zone.

[12] In imposing sentence his Worship gave weight to the need for general deterrence. It is clear from the sentencing remarks that his Worship understood that each of the appellants would be returned to Indonesia before the payment of the fine became due and would not suffer any further penalty unless they returned to Australia. In sentencing Mr Samide he said:

> "Again the penalties that will be imposed by me today are not designed to send you to gaol today but are designed to ensure that you don't make the same mistake again. If you don't come back into the Australia Fishing Zone, you will not have to spend any time in an Australian gaol. If you do come back in, you will have to. That is what I mean by deterrence. So that you must make a choice yourself about whether you want to run the risk of going to gaol or not. If you do come back in you will go to gaol."

[13] In her submissions on behalf of the appellants Ms Franz concentrated on the imposition of the fines and submitted that "from a perusal of the sentencing statistics … it can be seen that the usual sentencing disposition for such offences against the Act for similarly placed defendants" is a bond for a first offence and a fine with a default period of imprisonment for a second or subsequent offence.

[14] The sentencing statistics to which reference was made were tables of penalties imposed in the Court of Summary Jurisdiction in the Northern

Territory for similar offences. A perusal of the schedule provides some support for the submission made by Ms Franz.

[15] When the matter came on for argument Mr Usher, for the respondents, provided a more comprehensive schedule of sentencing statistics covering not only similar offences dealt with in the Northern Territory but including such offences dealt with in Western Australia and Queensland. A consideration of those schedules reveals a marked difference between sentences in this jurisdiction and those in other jurisdictions administering the same legislation.

[16] The information provided in relation to the Queensland courts revealed that all of the matters were heard in Cairns Magistrates Court and involved offenders and offences similar to those before me. Commonly the vessels involved were described as being "Indonesian Type lll foreign fishing vessels" coming from Indonesian ports. In many cases the journeys originated in Merauke. In most cases the vessels carried a crew of between 5 and 8 men. The crew were described as subsistence fishermen who were impoverished and were generally responsible for the welfare of others. At the time of sentence each of the offenders had spent time in one form of custody or another. In relation to the offences under s 100(2) of the Fisheries Management Act the court imposed fines ranging from $3000 to $6800. Varying default periods were set ranging from 68 days imprisonment to 4 months imprisonment (for a repeat offender). Of significance is that in each case the court allowed no time to pay which, I

was advised, meant the offender served the default period of imprisonment before being returned to Indonesia.

[17] In Western Australia the cases to which I was referred were dealt with in the Broome Magistrates Court. The information available to me was less detailed than that provided in relation to Queensland. I do not have a detailed description of the offences but, rather, a summary of the penalties imposed.

[18] In Western Australia most offences against s 100(2) of the Fisheries Management Act were dealt with by way of conditional release pursuant to the terms of s 20(1)(a) of the Crimes Act (Cth). However, in a significant number of cases the court imposed fines on the offenders ranging in amount from $5000 to $25,000 (for a repeat offender). In such cases the court set a default period of imprisonment ranging upwards from 45 days. Most default periods were in the range of 2 months to 6 months. I was informed that the effect of dealing with matters in this way is that the offender is required to serve the default period in lieu of payment of the fine prior to being released to return to Indonesia.

[19] It seems that an impoverished Indonesian fisherman who boards a fishing vessel in an Indonesian port, travels to the AFZ and engages in conduct contrary to s 100 or s 102 of the Fisheries Management Act, is likely to incur different penalties depending upon whether the arresting officers take

him to Queensland, Western Australia or the Northern Territory of Australia.

[20] It is clearly desirable that, wherever possible, like offenders should be punished alike. Mason J said in *Lowe v The Queen* (1984) 154 CLR 606 at 611:

> "Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community."

[21] Sentencing practises will differ from jurisdiction to jurisdiction depending upon the differing conditions that may apply in different parts of Australia. This was acknowledged in *Leeth v The Commonwealth* (1991-1992) 174 CLR 455 where Mason CJ and Dawson and McHugh JJ said (470):

> "It is obviously desirable that, in the sentencing of offenders, like offenders should be treated in a like manner. But such a principle cannot be expressed in absolute terms. Its application requires the determination of the categories within which equal treatment is to be measured. Its application in Australia is necessarily upon a State by State basis, for it has long been recognized that sentencing practices may not be uniform from State to State but may be affected by local circumstances. Of course, with many offences, particularly federal offences, local circumstances may, under State sentencing practises, have no bearing upon the appropriate sentence and it may be proper to have regard to sentences imposed elsewhere in Australia."

[22] Their Honours went on to say (at 471):

> "There is no requirement that the actual sentence of a federal offender be fixed having regard to local circumstances. The sentencing Judge may, as in this case, have regard to the sentences imposed in other States in order to achieve as far as possible a measure of consistency."

[23] Courts in one jurisdiction should accord weight to the decisions of courts in other jurisdictions when dealing with similar offending against the same Federal statutory provision. In my view it is appropriate for those responsible for sentencing in matters such as are now before this Court to have regard to sentences imposed in other jurisdictions in order to achieve a measure of consistency Australia-wide. It is also appropriate and desirable that, where prosecuting authorities inform the court of the range of sentences available, they refer to sentences imposed in relation to offences under the same legislative provision dealt with in other jurisdictions.

[24] The principles applicable to an appeal based upon a ground that a sentence is manifestly excessive are well known. In the absence of identified error, an appellant seeking to establish that a sentence was manifestly excessive must show that the sentence was not just arguably excessive but that it was so "very obviously" excessive that it was "unreasonable or plainly unjust": *Raggett, Douglas & Miller* (1990) 50 A Crim R 41 at 47; *Salmon v Chute* (1994) 94 NTR 1. The presumption is that there is no error in the sentence. It is not enough that this court would have imposed a less or different sentence. There must be some reason for regarding the sentencing discretion as having been improperly exercised: *Cranssen v The King* (1936) 55 CLR 509 at 519-520. The appellate court interferes only if it be

shown that the sentencing magistrate was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing magistrate said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error.

[25] The offences to which the appellants pleaded guilty are serious. The maximum penalties imposed by the legislation reflect that fact. The courts have repeatedly referred to the need to protect the resources in the AFZ. Comment has been made as to the expanse of waters concerned and the difficulty and expense of detecting and combating illegal fishing in that area. The need for deterrent sentences has frequently been stated. In this case his Worship regarded the offending as more serious because of the depth of the incursions into Australian waters in circumstances where those incursions were for the purpose of commercial fishing. The offences are prevalent. In my view his Worship correctly concluded that deterrent sentences were appropriate.

[26] In relation to the offending against s 100(2) of the Fisheries Management Act the appellants were sentenced by way of a substantial fine with a period of imprisonment in default. In considering the amount of the fine imposed where an offender is impecunious it is relevant to bear in mind the observation of Bailey J in *Bahloni & Kalungan v Munn* (2001) 125 A Crim R 144 where his Honour said (at 150):

> "From an offender's viewpoint, whether he is fined $10,000 with 200 days imprisonment in default or fined $14,000 with 200 days imprisonment in default has no practical significance. In the former he would "cut out" his fine at $50 per day and in the latter at $70 per day. On either approach he would be imprisoned for 200 days. In the case of an offender with no means to pay a fine the precise calculation to arrive at the actual term of imprisonment which he will serve is of little more than academic interest. In terms of the administration of the criminal justice system, it is the combined fine and default period which needs to be assessed as just in all the circumstances rather than the component parts of the sentence."

[27] His Worship considered the option of proceeding by way of conditional release pursuant to s 20(1)(a) of the Crimes Act (Cth), but declined to do so in light of the distances the appellants ventured into Australian waters and the need for general deterrence. Having regard to the way in which the sentence was crafted, neither appellant was required to spend any further time in custody beyond that necessary for them to be processed and returned to Indonesia. In the event that either one should return to Australia and re-offend he can expect to serve a period of imprisonment of either 100 days in the case of Mr Samide or 110 days in the case of Mr Letsoya. Although that penalty is greater than penalties generally imposed in the Northern Territory, it is within the range of penalties imposed in other jurisdictions. I am unable to agree that it is manifestly excessive.

[28] In relation to the offences against s 101(2) of the Act, no challenge was mounted as to the sentencing option chosen by his Worship. The complaint was that "the amount of the recognizance for the good behaviour bond … was manifestly excessive". According to the information provided to me, such bonds in the Northern Territory have commonly been in the sum of

$3000 to $5000 own recognizance. In his sentencing remarks the learned sentencing magistrate indicated that he increased the amount because of the depth of the incursions into the AFZ. Reference to the schedules provided in relation to matters dealt with in Western Australia reveals that bonds in the amount of $10,000 own recognizance are not unusual. It seems such bonds are rarely used in Queensland, fines are preferred. I am unable to agree that the amount of the recognizance imposed in the case of each appellant is manifestly excessive in all the circumstances.

[29] The appeals are dismissed.

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