Millar v Brown [2012] NTSC 23

PARTIES:	MILLAR, Alistair v BROWN, Peter
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 5 of 2012 (21144408), JA 6 of 2012 (21144409), JA 7 of 2012 (21143870) and JA 17 of 2012 (21012728)
DELIVERED:	4 APRIL 2012
HEARING DATES:	3 APRIL 2012
JUDGMENT OF:	KELLY J
APPEAL FROM:	G SMITH SM

CATCHWORDS:

Appeal against failure to fix non-parole period - *Sentencing Act*, s 53(1) – where sentence of imprisonment for 12 months or longer – duty to consider whether to fix a non-parole period – court required to fix a non-parole period unless it considers that the nature of the offence, the past history of the offender or the particular circumstances of the case make doing so inappropriate – appeal allowed.

Sentencing Act, s 53(1)

Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] 1 KB 223; *Bartusevics v Fisher* (1973) 8 SASR 601; *House v The King* (1936) 55 CLR 499 at 509; *R v Haji-Noor* (2007) 21 NTLR 127; *Jambajimba v Dredge* (1985) 33 NTR 19 at 22 per Muirhead ACJ; *R v Krasnov and Shlakht* (1995) 125 FLR 120 at 127; *Miles v R* [2001] NTCA 9 (per Mildren, Bailey and Riley JJ at [29]); *R v Shrestha* [1991] HCA 26; (1991) 173 CLR 48 at 68; *R v VZ* (1998) 7 VR 693 at 697; *Van Toorenburg v Westphal* [2011] NTSC 31 at [23], followed.

REPRESENTATION:

Counsel:

Appellant:	F Kepert
Respondent:	I Taylor

Solicitors:

Appellant:	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

Millar v Brown [2012] NTSC 23
No. JA 5 of 2012 (21144408), JA 6 of 2012 (21144409), JA 7 of 2012 (21143870) and JA 17 of 2012 (21012728)

BETWEEN:

ALISTAIR MILLAR
Appellant

AND:

PETER BROWN
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 4 April 2012)

Background

[1] On 5 October 2010, Alistair Millar pleaded guilty in the Court of Summary Jurisdiction to two counts of aggravated assault against a woman. One of those counts was aggravated by the use of a weapon and the fact that the victim suffered harm. He was sentenced to a total of 16 months imprisonment commencing on 16 June 2010 suspended forthwith (ie after having served 3 months and 20 days), subject to a number of conditions including supervision and abstinence from alcohol. An operational period of 18 months was fixed which would expire on 4 April 2012. (This matter is identified as CSJ File No 21012728.)

[2] Mr Millar reported in accordance with the conditions of his suspended sentence from 5 October 2010 to 7 December 2010.

[3] On 10 December 2010 he was caught at Kirby's front bar in Katherine by corrections staff. He admitted to drinking alcohol and a breath test revealed a breath alcohol concentration of 0.199%.

[4] Thereafter, Mr Millar ceased reporting and has since been in continuous breach of his suspended sentence, which had 375 days remaining. He further breached the conditions of his suspended sentence by failing to complete the Indigenous Family Violence Offender Programme within 6 months of his release.

[5] He was summonsed to appear in the Katherine Court of Summary Jurisdiction to be dealt with for breaching his suspended sentence, but he failed to appear and a warrant was issued for his arrest.

[6] On 23 November 2011 he appeared in the Katherine Court of Summary Jurisdiction, the breach was found proved, and no action was taken.

[7] Mr Millar then committed further offences.

(a) On 22 December 2011, he committed damage to property.

(b) On 28 December 2011 he committed aggravated assault causing harm in contravention of a DVO. He also breached his bail. He was arrested with a breath alcohol content of 0.198%.

[8] On 30 December 2011 Mr Millar pleaded guilty to:

(a) aggravated assault and contravention of a DVO (CSJ file no 21144408) for which he was sentenced to imprisonment for a total of 6 months beginning on 28 December 2011 – 5 months on one count and 1 month on another to be served cumulatively;

(b) damage to property (CSJ file no 21143870) for which he was sentenced to imprisonment for 1 month beginning on 28 December 2011, to be served concurrently with the sentence for file no 21144408;

(c) breach of bail (CSJ file no 2114409) for which he was sentenced to imprisonment for 2 days to be served concurrently with all the other sentences.

That brought the total sentence for the fresh offending to imprisonment for 6 months.

[9] In addition, the balance of the suspended sentence was restored and it too was to be made concurrent with the sentences for the fresh offending. The total sentence Mr Millar received on 30 December 2011 was therefore only the 375 days outstanding on his original suspended sentence, that is to say, 1 year and 10 days. The learned sentencing Magistrate did not fix a non-parole period.

The appeal

[10] The appellant was granted leave to appeal on 29 March 2012 and, by an amended notice of appeal dated 29 March 2012, he appeals against the sentence imposed by the learned Magistrate on one ground only, namely that the learned Magistrate erred in failing to fix a non-parole period.

Principles

[11] Section 53(1) of the *Sentencing Act* provides that where a court sentences an offender to a term of imprisonment for 12 months or longer (that is not suspended in whole or part), the court must fix a non-parole period during which the offender is not eligible to be released on parole unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of a non-parole period inappropriate. If no non-parole period is fixed the offender is not eligible to apply for parole and will not be released until he has served the whole of his sentence.

[12] That is to say, if the sentence is to be imprisonment for 12 months or longer, and the court determines that it is not to be wholly or partly suspended:

(a) the court must consider whether to impose a non-parole period; and

(b) there is a presumption in favour of fixing a non-parole period. It is only where the court considers that the nature of the offence, the past history of the offender or the circumstances of the particular case

make the fixing of a non-parole period inappropriate that the court is justified in not fixing a non-parole period.

[13] These principles apply equally to a restored suspended sentence as to any other sentence imposed.[1]

[14] All of the considerations relevant to the sentencing process are relevant in considering whether to fix a non-parole period (and if so in determining its duration, subject to the statutory minimum periods). These include antecedents, criminality, punishment and deterrence,[2] as well as prospects for rehabilitation and matters relevant to the wider interests of the community such as the need for community protection.[3]

[15] If the Court determines not to fix a non-parole period, it would normally be expected to give reasons for such a decision, given that it can only determine not to fix a non-parole period if it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of a non-parole period inappropriate.[4] Further, although failure to give reasons for not fixing a non-parole period

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1 *R v Haji-Noor* (2007) 21 NTLR 127 at [156].

2 *R v Shrestha* [1991] HCA 26; (1991) 173 CLR 48 at 68.

3 *Miles v R* [2001] NTCA 9 (per Mildren, Bailey and Riley JJ at [29]).

4 *R v Krasnov and Shlakht* (1995) 125 FLR 120 at 127; *R v VZ* (1998) 7 VR 693 at 697.

does not of itself amount to an error of law, such a failure invites scrutiny of the decision.[5]

[16] The appellant contends that the learned Magistrate failed to consider at all whether or not to fix a non-parole period. If that were the case, then that would amount to an error of principle and I would be obliged to remit the matter to the learned Magistrate to re-sentence according to law; to re-sentence the appellant myself; or, if I were of the opinion that, notwithstanding demonstrated error, there had been no substantial miscarriage of justice, to dismiss the appeal.

[17] If the Magistrate did consider whether to fix a non-parole period, and determined that he would not do so, then it would not be open to me to interfere with that exercise of the learned Magistrate's discretion unless it were shown to be so unreasonable that no reasonable magistrate could have arrived at it.[6]

[18] The first question, therefore, is whether the learned Magistrate did fail to consider whether to fix a non-parole period. Counsel for the appellant contended that this could be assumed from the fact that the learned Magistrate did not refer to the fixing of a non-parole period in his sentencing remarks. Notwithstanding that reasons for not fixing a non-

5 *R v VZ* (1998) 7 VR 693 at 697.

6 *House v The King* (1936) 55 CLR 499 at 509 and *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

parole period would normally be expected, that contention cannot be accepted.

[19] It is not to be assumed that the failure to mention a sentencing principle means that it has been overlooked.[7] In particular, magistrates are working under pressures which mean that they are simply unable to give the kind of detailed reasons which might be expected of a court delivering a reserved judgment, and sentencing remarks delivered in such circumstances should not be subjected to the same degree of critical analysis as the words in a considered reserved judgment.[8] An appellate court is entitled to assume that a magistrate has considered all matters which are necessarily implicit in any conclusions which he has reached.[9]

[20] However, looking at the learned Magistrate's remarks, it seems to me that he did not in fact give consideration to fixing a non-parole period. Talking to the appellant before he entered his plea, the Magistrate said, "Well Mr Millar, you are at risk of getting another 12 months to serve today." After the plea was entered, the facts were read and admitted and the information for courts and victim impact statements were tendered. Counsel for Mr Millar made submissions about Mr Millar's circumstances and the circumstances of the offending. No submissions were made on Mr Millar's behalf that the suspended sentence should not be fully restored. It seems to

7 *Van Toorenburg v Westphal* [2011] NTSC 31 at [23].

8 *Jambajimba v Dredge* (1985) 33 NTR 19, at 22 per Muirhead ACJ.

9 *Bartusevics v Fisher* (1973) 8 SASR 601.

have been accepted (rightly in my view) that in the circumstances of the breach by further serious offending, this course was inevitable. Thereafter there was a discussion about the existence of the suspended sentence, the circumstances that led to the sentence being suspended and the existence of prior breaches and his Honour made the following finding:

> "These are serious assaults that you have been committing. In those circumstances there is no basis upon which I can take the view on this occasion that it would be unjust to order you to serve the remainder of the sentence."

[21] No submissions were made that a non-parole period should be fixed. The requirements of s 53(1) appear to have been overlooked, and it seems to have been assumed by all concerned that restoring the sentence in full meant that the full sentence would inevitably have to be served. That assumption is reflected in the following remarks by the learned Magistrate:

> "So you will spend, effectively, all of this year in custody as a result of the breach of that suspended sentence. Once that time is up there will be nothing hanging over your head; you will be able to get on with your life, but hopefully you will be given some programmes while you are in gaol so that when you come out we won't see you back in court for committing violent offences."

[22] Counsel for the respondent contended that failure to fix a non-parole period did not amount to error on the part of the sentencing Magistrate. She submitted that although the learned Magistrate did not expressly refer to the consideration of whether or not to fix a non-parole period, during the course of the sentencing process he addressed all of the considerations

relevant to declining to fix a non-parole period. She submitted, further, that, having considered those factors, and having considered the totality principle, the Magistrate evinced a clear intention that the accused actually serve 12 months and 10 days in prison. He did this by ordering total concurrency of the sentences for the fresh offending with the restored sentence so that the total time to be actually served would be 12 months and 10 days. If he had decided to fix a non-parole period, he may well have fixed a different head sentence, for example by ordering total or partial accumulation of the sentences.

[23] I cannot accept that submission. It seems to me from the transcript that the learned Magistrate did not in fact turn his mind at all to the question of whether to fix a non-parole period, and the fact that he may have considered matters which would have been relevant in considering that question for a different purpose is irrelevant. It may well be that the Magistrate determined that 12 months and 10 days was the appropriate time for the accused to actually serve, and it may also be the case that that explains the total concurrency of the sentences for the fresh offending with the restored sentence. Indeed it is difficult to see why the sentences would have been made totally concurrent otherwise as the fresh offending was quite separate from the original offending for which the suspended sentence was imposed. The effect of making these sentences totally concurrent was that there was no consequence at all to Mr Millar of committing the fresh offences. However, there is no appeal against the

decision not to order some accumulation of the sentences. In any case, if that is what occurred then, contrary to the submission of the respondent, the process adopted to arrive at the amount of time to be actually served was erroneous. The appropriate sentences for the individual charges should have been determined – as the learned Magistrate did. Then a head sentence should have been fixed which took account of the overall seriousness of the offending, having regard to the totality principle but also to factors which warranted accumulation or partial accumulation of the sentences for the fresh offending with the restored sentence. Then a non-parole period should have been fixed to establish the minimum period of imprisonment to be actually served (unless the Magistrate was of the opinion that that was inappropriate given the nature of the offence, the past history of the offender or the circumstances of the case, in which case reasons for not fixing a non-parole period should have been given).

[24] The alternative submission made by the respondent was that a period of 12 months and 10 days in prison was an appropriate period of time for the accused to actually serve in all of the circumstances and so even if error were demonstrated, there has been no miscarriage of justice, and therefore I should dismiss the appeal. There is something to be said for that contention, particularly as there has been total concurrency of the sentences for the fresh offending and the restored sentence and the term of imprisonment in question is only just over the 12 month term to which s 53(1) applies. However, I do not think that the contention can be

accepted as it focuses solely on the amount of time which ought to be served by the appellant and does not take into account the other benefits of fixing a non-parole period. As the High Court said in *R v Shrestha*: [10]

> "The basic theory of the parole system is that, notwithstanding that a sentence of imprisonment is the appropriate punishment for the particular offence in all the circumstances of a case, considerations of mitigation or rehabilitation may make it unnecessary, or even undesirable, that the whole of that sentence should actually be served in custody."[11]
>
> "…. in a society where imprisonment for the punishment of crime is accepted as being sometimes unavoidable, the parole system represents an important influence for the reform and rehabilitation of those in gaol. In a case where subsequent eligibility for parole is not precluded by order of the sentencing judge, the indeterminate nature of the period (within the confines of the head sentence) which will actually be served in custody provides the offender with "a basis for hope of earlier release and in turn an incentive for rehabilitation" *(reference omitted)*. From this flow two significant and valuable consequences. The first is that the prisoner is likely to be better behaved while in confinement. The second is that a prisoner who retains at least some degree of control over his future fortunes and who has a real incentive to reform is more likely to retain basic self-respect and to enjoy some real prospects of eventual rehabilitation. In the harsh context of a prison environment, the potential advantages - in terms of hope, self-esteem, incentive for reform and rehabilitation - which eligibility for release on parole offers a prisoner in an Australian gaol should not be underestimated."[12]

[25] Moreover there can be benefits to both the prisoner and the community in having a transitional period between actual imprisonment and

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10 (1991) 173 CLR 48.

11 Per Deane, Dawson and Toohey JJ at p67 – 68.

12 Ibid at p 69.

unconditional release where the prisoner can perhaps undergo a period of supervision and/or be released into a rehabilitation facility if appropriate.

[26] I therefore consider that the appeal should be allowed.

[27] Timing considerations make it inappropriate for me to refer the matter back to the learned sentencing Magistrate. I therefore turn to the question of whether a non-parole period should be fixed and, if so, what it should be.

[28] The presumption is that a non-parole period should be fixed. In this case the appellant has a poor record of complying with court orders and a history of breaching a suspended sentence by reoffending. However, I do not think that there is anything in Mr Millar's history or in the nature of the offence itself or any other reason why it would be inappropriate to fix a non-parole period. These matters (along with other relevant considerations) will no doubt be taken into account by the Parole Board at the appropriate time in deciding whether or not to grant parole.

[29] The minimum non-parole period prescribed by legislation is 8 months and I see no reason to fix a longer period.

[30] The total period of imprisonment imposed by the learned sentencing Magistrate is 1 year and 10 days commencing on 28 December 2011. There has been no appeal against that sentence and, accordingly there is no alteration to the length of the head sentence.

ORDERS:

1. The appeal is allowed.

2. I fix a non-parole period of 8 months beginning on 28 December 2011.