Walker v Mattiuzzo & Anor [1999] NTSC 88

PARTIES:	JEREMIAH WALKER AND DANIELLA MATTIUZZO AND LEONARD DAVID PRYCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	No. JA 24 of 1999 & JA 25 of 1999
DELIVERED:	27 AUGUST 1999
HEARING DATES:	5 AUGUST 1999
JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	J Birch

Solicitors:

Appellant:	Centralian Australian Aboriginal Legal Aid Service, Alice Springs
Respondent:	Office of Public Prosecutions, Alice Springs

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. JA 24 of 1999 & JA 25 of 1999

Walker v Mattiuzzo and Anor [1999] NTSC 88

BETWEEN:

JEREMIAH WALKER
Appellant

AND:

DANIELLA MATTIUZZO

AND:

LEONARD DAVID PRYCE
Respondents

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 27 August 1999)

[1] This is an appeal against sentences imposed on 29 March 1999 by the Court of Summary Jurisdiction sitting at Alice Springs.

[2] The appellant was convicted upon his own plea of the following offences:

"The January Offences"

(a) That on 30 January 1999 at Katherine, being required under the Traffic Act to submit to a breath analysis, he failed to provide, in accordance with the directions of the person carrying out the breath analysis, a sample of breath sufficient for the completion of the breath analysis, contrary to s 20(1) of the *Traffic Act*.

(b) That on 30 January 1999 at Katherine, he drove a motor vehicle, namely a Toyota Troopcarrier NT426 233, on a public street, namely Katherine Terrace and Railway Terrace, whilst not being the holder of a licence to do so, contrary to s 32(1)(a)(i) of the *Traffic Act*.

"The March Offences"

(c) That on 27 March 1999 at Alice Springs, he did drive a motor vehicle on a public street whilst having a concentration of alcohol equal to 80 milligrams or more of alcohol per 100 millilitres of blood, namely 201 milligrams of alcohol, contrary to s 19(2) of the *Traffic Act*.

(d) That on 27 March 1999 at Alice Springs, he did drive a motor vehicle on a public street without due care, contrary to Regulation 95 of the Traffic Regulations.

(e) That on 27 March 1999 at Alice Springs, he did drive a motor vehicle on a public street which vehicle was involved in an accident whereby injury or damage was caused, and did leave this scene of such accident before allowing sufficient time for any enquiries to be made, contrary to Regulation 138(1) of the Traffic Regulations.

(f) That on 27 March 1999 at Alice Springs, he did drive a motor vehicle on a public street whilst not being the holder of a licence to do so, contrary to s 32(1)(a)(i) of the *Traffic Act*.

[3] For the January offences, the appellant was sentenced to an aggregate term of three months imprisonment. For the March offences, he was sentenced to an aggregate term of eight months imprisonment. The learned Magistrate ordered that the two terms of imprisonment be served on a cumulative basis. Accordingly, the effective sentence was one of eleven months imprisonment to be served immediately.

[4] The admitted facts in relation to the January offences were in the following terms:

> "Around 4.45 am on Saturday, 30 January 1999, the defendant was driving a Toyota troop-carrier, north along Katherine Terrace. He was apprehended there; was given a breath test, which was positive and arrested. He was unsteady on his feet and speech slurred. Taken to the Katherine Police Station for breath analysis. He was explained the procedures for supplying a sufficient sample of breath. He commenced the first blow but pulled the mouth piece out of his mouth prior to completion of it. He was given a second opportunity to provide a sufficient sample. Procedures were explained and he commenced the blow, but again, pulled the mouth piece out of his mouth prior to completion.
>
> When asked a reason why he couldn't supply a sample of breath, he replied that he must have been singing too much at the night club. A check revealed that he's not the holder of a current licence. When asked why he was driving whilst not the holder of a licence, he replied that his sister made him drive because she was to drunk.".

[5] The admitted facts in relation to the March offences were in the following terms:

> "At around 1540 hours on 27 March, the defendant was driving a Falcon station-wagon along Larapinta Drive, Alice Springs. The victim was travelling west along Larapinta Drive in a Nissan Patrol

and had stopped at the intersection of Lyndavale Drive to turn into the Larapinta Welcome Mart.

As the victim began to turn into Lyndavale Drive, the defendant attempted to overtake by crossing onto the inbound lane of Larapinta Drive from behind the victim's vehicle. He was overtaking it on the right hand side.

There was an accident where they collided. The defendant's vehicle sustained damage to the left front of the vehicle. After the accident, he failed to stop and continued along Larapinta Drive. The offending vehicle was noticed by the police later on; was apprehended and the owner of the vehicle, Barney Kilgarrif, told them who the driver of the vehicle was, and he was currently at Walpiri Camp. The police attended there; located the defendant.

When spoken to about the accident and if he drove, he said; 'Yep'. When asked where the accident was, he said; 'Larapinta'. He was given a breath test and a subsequent breath analysis and had a reading of 0.201. The defendant stated he was unlicensed at the time of the offence."

[6] The appellant has an appalling record of convictions involving motor vehicles, including six offences of driving while disqualified, four offences of driving without a licence and three offences of "exceed .08". The appellant has spent more than four of the past eight years in prison, mostly as a result of offences committed in connection with motor vehicles.

[7] In his plea in mitigation, counsel informed the learned magistrate that the appellant is a 24 year old married man with children, resident at Lajamanu where he worked as a mechanic's assistant.

[8] In relation to the January offences, it was submitted that the appellant had been drinking alcohol but was capable of appropriately controlling the vehicle. He was aware that he had no driving licence and knew from past

experience that if he was found to have any alcohol in his blood he would be in "some trouble". In consequence of this knowledge, he failed to provide the required sample of breath for analysis.

[9] In relation to the March offences, it was submitted that the appellant stopped after the accident that he caused for long enough to satisfy himself that the other driver was uninjured and then the appellant panicked and drove off. Counsel for the appellant conceded that the appellant had a high concentration of alcohol in his blood. This was said to be a result of an extended period of drinking during the evening or night before the accident.

[10] The learned magistrate gave brief reasons for sentence in which she emphasised the appellant's very bad record of offences involving motor vehicles and stressed the dangers of driving under the influence of alcohol.

[11] The principal ground of appeal relied upon by Mr Goldflam for the appellant is that the learned magistrate "failed to have regard to section 53, 54 and/or 58 of the *Sentencing Act*". At the hearing of the appeal, Mr Goldflam successfully applied (without objection from Mr Birch on behalf of the respondents) to add a second ground of appeal in relation to the March offences to the effect that the eight month sentence of imprisonment was "manifestly excessive".

[12] Section 53 of the *Sentencing Act* imposes an obligation on a sentencing court to consider fixing a non-parole period where the court sentences an offender to be imprisoned for twelve months or longer (that is not suspended

in whole or in part). The provision is subject to section 54, requiring a sentencing court to fix a non-parole period of not less than 50% of the period of imprisonment that the offender is to serve (subject to a minimum period of eight months).

[13] Section 58 of the Sentencing Act is in the following terms:

> "58. 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."

[14] The effect of s 58 was considered by Angel J in *Ryder v Dredge and Winzar*, JA47 and 48, unreported, 8 December 1998. His Honour concluded that the effect of s 58 is that "a court cannot impose a sentence of between eight and twelve months imprisonment". *Ryder* has been cited with approval in two more recent decisions: *Phillips v Pryce*, NTSC 49, unreported, 6 May 1999 per Martin CJ and *Lernbom v Fry* NTSC 70, unreported, 16 July 1999 per Riley J. In the latter judgment, Riley J observed at par [10]:

"The effect of s 58 of the S*entencing Act* is this. In has no application to sentences of imprisonment of twelve months or greater. In relation to sentences of less than twelve months, s58(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)."

[15] *Ryder*, *Phillips* and *Lernbom* highlight the anomaly produced by the application of s 58. A court in sentencing an offender to a term of imprisonment of less than 12 months is required (in practical terms) to reduce that term by one third. Section 58 has no application to an offender imprisoned for 12 months or longer. Logic dictates that a court could not pass not a sentence of imprisonment between eight and twelve months which would be consistent with the *Sentencing Act*. In this regard, I agree, with respect with the observation of Martin CJ in *Phillips*, supra at par [16], that the position may be different if a sentence in the range of eight months to twelve months was imposed, but partly suspended so that not more than two thirds of that sentence is to be spent in custody.

[16] I have noted previously that the appellant was sentenced to three months imprisonment for the January offences and to eight months imprisonment for the March offences, to be served on a cumulative basis. It necessarily follows from the application of s 58 that the sentence of eight months imprisonment is wrong in principle and the appellant's appeal must be allowed in relation to the March offences.

[17] There is nothing in the learned magistrate's reasons for sentence which indicates that she had in mind the provisions of s 58 when sentencing the appellant. The fact that she arrived at a sentence of eight months

imprisonment is strongly suggestive that her Worship overlooked the provision and its anomalous prohibition of imposing a sentence of eight months imprisonment. If that were so in relation to the sentence for the March offences, it can be inferred that the learned magistrate similarly overlooked the application of s 58 to the sentence imposed for the January offences. Applying this approach, the appeal should be allowed and the sentences for both the January offences and the March offences reduced by one third and the appellant be ordered to serve them on a cumulative basis in accordance with the learned magistrate's expressed intention. This would result in the appellant being required to serve two months imprisonment with respect to the January offences and (in round figures) something in the order of five months and three weeks with respect to the March offences. The total sentence served on a cumulative basis would be less than eight months imprisonment and would appear to present no difficulties in terms of the Sentencing Act. Having regard to the circumstances of the offences and the offender, I did not consider that such sentences, whether considered separately or in combination, could be characterised as manifestly excessive.

[18] I am inclined to adopt the approach outlined above. I take some comfort in drawing the inference that the learned magistrate overlooked s 58 of the *Sentencing Act* from the fact that if the learned magistrate had applied s 58 to the sentence imposed for the January offences she must have adopted as her starting point an aggregate sentence of four and a half months imprisonment. While not beyond the bounds of possibility, adoption of such

a figure in preference to a round number of months or weeks might be considered unusual.

[19] The above analysis and suggested outcome would be sufficient to dispose of the appeal. However, both Mr Goldflam for the appellant and Mr Birch for the respondent have urged me to consider another of the anomalous situations presented by s 58 of the *Sentencing Act*.

[20] Mr Goldflam submitted that it would be inconsistent with the *Sentencing Act* for a court to impose an immediate term of imprisonment of between eight and twelve months if this was the consequence of ordering multiple sentences to be served on a cumulative basis (and notwithstanding that any individual sentence considered in isolation had been imposed in accordance with s 58).

[21] The issue is perhaps best illustrated by a hypothetical example. If a court considered sentences of six months imprisonment and nine months imprisonment, to be served on a cumulative basis, were appropriate for an offender, then applying s 58, the sentences would be reduced to four months and six months respectively. The consequence of ordering the sentences to be served on a cumulative basis would be a sentence of ten months imprisonment to be served immediately and with no possibility of parole. In Mr Goldflam's submission, such a sentence would be contrary to the legislative intent embodied in s 53 of the *Sentencing Act* which relevantly provides:

> "53. FIXING OF NON-PAROLE PERIOD BY SENTENCING COURT
>
> (1) Subject to this section and sections 54 and 55, where a court sentences an offender to be imprisoned -
>
> (a) for life, or
>
> (b) for 12 months or longer, that is not suspended in whole or in part,
>
> it shall, as part of the sentence, fix a 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 such a period inappropriate."

[22] It is apparent that s 53(1) imposes an obligation on a court to fix a non-parole period for a sentence of twelve months imprisonment or longer (unless suspended in whole or in part or the circumstances make the setting of such a period inappropriate).

[23] Section 53(1) refers to a situation "where a court sentences an offender to be imprisoned … for twelve months or longer" without expressly indicating whether the provision is directed to individual sentences of at least twelve months or a total effective sentence of such a duration (after taking into account any order for sentences to be served on a concurrent or cumulative basis).

[24] Subsection (2) of s 53 provides:

> "(2) Where a court sentences an offender to be imprisoned in respect of more than one offence, a period fixed under subsection (1) shall be in respect of the aggregate period of imprisonment that the offender is liable to serve under all the sentences then imposed."

[25] This effect of this provision is to require a court to fix a single non-parole period for "the aggregate period of imprisonment that the offender is liable to serve under all the sentences then imposed". There can be no doubt that if the sum of an offender's sentences is equal to or greater than twelve months, s53(1) requires a court to fix a non-parole period (subject to the express exceptions of the provision).

[26] In the example referred to at par [21] above, but for the application of s 58 the offender would have received a total effective sentence of 15 months imprisonment and in accordance with s 53(1) and s 54(2) been eligible to have a non-parole period fixed (of not less than eight months). The application of s 58, in Mr Goldflam's submission, has deprived the offender of the chance to have a non-parole period fixed which, subject to judicial discretion, may be for a period shorter than the ten months that he would otherwise be required to serve. In Mr Goldflam's submission such an outcome is unfairly prejudicial to the interests of an offender.

[27] In my view, a flaw in Mr Goldflam's submissions is the inherent assumption that s 58 prohibits imposition of a term of imprisonment between eight and twelve months **for all purposes**. The provision has the effect that any term of imprisonment of less than twelve months must be reduced in accordance with its terms. In accordance with *Ryder, Phillips* and *Lernbom*, supra, s 58 effectively prohibits a court from imposing a sentence of between eight and twelve months imprisonment for a **single** offence; but it does not follow that

any term of imprisonment falling between eight and twelve months is precluded regardless of how such a total term is arrived at.

[28] The purpose of s 58 is to ensure that sentences of up to twelve months are adjusted to take account of the abolition of remissions. The purpose of s 53(1) is to ensure that (subject to express exceptions) a non-parole period is fixed for (single or aggregate) sentences of twelve months or longer. I consider that having received the benefit of the reduction in sentence provided for by s 58, it cannot be said to be unfair or prejudicial to an offender that he has lost the opportunity to have a non-parole period fixed for a term of imprisonment that he would have received if s 58 had not been enacted.

[29] While it is true that an offender, through the application of s 58 and a court's discretion to order sentences to be served on a cumulative basis, may be imprisoned for a term of imprisonment in excess of the minimum non-parole period of eight months prescribed by s 54, neither that provision nor s 53 has application to an offender who receives a total head sentence of less than twelve months imprisonment. Adoption of Mr Goldflam's submissions would seen to imply that a prisoner has a right to be released from imprisonment when he has completed a minimum non-parole period fixed by a court.

[30] In *Phillips*, supra, Martin CJ held at par [15]:

> "Applying the words of s 58, which are restricted to situations where the court sentences an offender to a term of imprisonment of less than twelve months, it is necessary for a sentencing court to apply s 58 each time it sentences a person to serve a term of imprisonment of less than twelve months, without regard to the subsequent effect which may be arrived at by the operation of s 50 of the Act in regard to concurrency, or by order under s 51 in regard to cumulation."

[31] With respect, I agree with the analysis of the learned Chief Justice, subject to the qualification that if the total sentence of an offender is equal to or greater than twelve months imprisonment then the sentencing court would be obliged to apply s 53 and s 54 in relation to the fixing of a non-parole period of not less than eight months.

[32] I do not consider that any unfairness or prejudice to the interests of an offender can be said to arise where he or she receives a total sentence of less than twelve months because of the application of s 58. While such a person has, in one sense, "lost" the opportunity of having a non-parole period fixed, any disadvantage is balanced by the substantial discount in sentence effected by s 58 coupled with the certainty of a fixed date for release from imprisonment.

[33] In relation to the present appeal, as I indicated earlier in these reasons, the learned magistrate erred in not applying s 58 to both the aggregate sentence imposed for the January offences and that imposed for the March offences.

[34] The appeal is allowed and the sentences imposed by her Worship set aside. Counsel for the appellant and for the respondent submitted that I should re-sentence the appellant. In all the circumstances, I am satisfied that the appropriate course is to re-sentence the appellant in accordance with the learned magistrate's intentions subject only to the application of s 58.

[35] In accordance with these reasons, the appellant is sentenced to an aggregate term of imprisonment of two months with respect to the January offences and to an aggregate term of imprisonment of five months with respect to the March offences. The two sentences are to be served on a cumulative basis and are deemed to have taken effect from 29 March 1999.