

Roper v Dore [2000] NTCA 2

PARTIES: ESTELLE ROPER

v

CHRISTINE DORE

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: APPEAL FROM THE SUPREME
COURT EXERCISING TERRITORY
JURISDICTION

FILE NO: 9523001 (AP26 of 1999)

DELIVERED: 1 June 2000

HEARING DATES: 11 April 2000

JUDGMENT OF: ANGEL, MILDREN AND RILEY JJ

REPRESENTATION:

Counsel:

Appellant:	P. Elliott
Respondent:	J. Blokland

Solicitors:

Appellant:	North Australia Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

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

Roper v Dore [2000] NTCA 2
No. 9523001 (AP26 of 1999)

BETWEEN:

ESTELLE ROPER
Appellant

AND:

CHRISTINE DORE
Respondent

CORAM: ANGEL, MILDREN AND RILEY JJ

REASONS FOR JUDGMENT

(Delivered 1 June 2000)

- [1] At the conclusion of the hearing of this matter the Court allowed the appeal. The order of Bailey J of 12 October 1999 was set aside as was the order of Mr Wallace SM of 11 August 1999. The Court ordered that the sentence imposed by Mr McGregor SM be suspended forthwith upon condition that, during the period of that suspension, the appellant place herself under the supervision of a delegate of the Director of Correctional Service and obey all reasonable directions of the Director as to vocational training, employment, residence, associates, reporting and education, counselling and treatment for alcohol abuse and anger management, including attendance at a residential rehabilitation centre. For the purposes of section 40(6) of the *Sentencing Act* the court directed that the operational period of the order is

10 months from 11 April 2000. The Court indicated that reasons for decision would be published at a later date. These are those reasons.

The History

[2] The appellant came before the Court of Summary Jurisdiction on 11 August 1999 to be dealt with for failing to comply with conditions imposed upon her in relation to her conditional release from prison. Between December 1996 and June 1998 she had been convicted and sentenced in relation to a series of offences. The cumulative effect of that process was that, on 26 June 1998, Mr McGregor SM ordered that she serve a period of imprisonment of 29 months calculated with effect from 2 April 1998. On that occasion the Court ordered that she be released on 1 February 1999 and the balance of her imprisonment be held in suspense. Pursuant to s 40(6) of the *Sentencing Act* the Court specified a period of 18 months from 26 June 1998 as the period during which the appellant was not to commit another offence punishable by imprisonment if she was to avoid being dealt with under s 43 of the *Sentencing Act*.

[3] The appellant was released from prison on 1 February 1999 subject to conditions that she :

“(1) Place herself under the supervision of a delegate of the Director of Correctional Services and obey all reasonable directions as to vocational training, employment, residence, associates and reporting and educational counselling and treatment for alcohol abuse and anger management.

- (2) At once on release, admit herself to a rehabilitation centre chosen by the delegate and remain there for 13 weeks, participating fully in the program of the centre, obeying all rules and directions and doing nothing to cause her discharge from the program.”

- [4] Upon her release and in accordance with those conditions the appellant attended at the Council of Aboriginal Alcohol Program Services (CAAPS). Nineteen days later the appellant left CAAPS without notice or permission. At the time of her arrest she was also obliged to report at specified times to the police. She ceased doing that on 29 March 1999.
- [5] A warrant was issued for her arrest and she was eventually brought before the Court of Summary Jurisdiction on 16 July 1999 when she was remanded in custody. On 11 August 1999 the matter came before Mr Wallace SM and pursuant to s 43(5)(d) of the *Sentencing Act* he ordered that a sentence of 18 months imprisonment be restored. This was an order restoring the total of the outstanding balance of the suspended sentence after allowing for time served.
- [6] The appellant appealed to the Supreme Court on the grounds that the restoration of the whole of the suspended sentence was unjust in view of all the circumstances arising since the suspended sentence was imposed and in view of the absence of any re-offending. The Supreme Court was not persuaded that error had occurred and the appeal was dismissed. The matter then came to this Court on appeal. The grounds of appeal were as follows:

- “(1) The Learned Appeal Judge erred in failing to sufficiently address those factors which ought to be taken into account in finding what is, or not, “unjust” within the meaning of the *Sentencing Act*.
- (2) The Learned Appeal Judge erred in considering circumstances other than those which have arisen since the suspended sentence was imposed, when addressing the issue of “unjustness” within the meaning of the *Sentencing Act*.
- (3) The learned Appeal Judge erred in finding that it would undermine the intent of s 43(7) of the *Sentencing Act* to find it would be unjust to sentence the appellant to serve the unexpired portion of her sentence”

[7] At the time of the hearing before this Court the appellant had spent a further 9 months in custody following the order of his Worship.

Section 43(7) of the *Sentencing Act*

[8] Section 43 of the *Sentencing Act* makes provision for the consequences for an offender if the offender breaches a condition of an order for release under s 40 of the Act. Section 43(5)(a) allows the Court, where it is satisfied that the offender has breached a condition of such an order, to:

- “(c) subject to subsection (7), restore the sentence or part sentence held in suspense and order the offender to serve it;
- (d) restore part of the sentence or part sentence held in suspense and order the offender to serve it;
- (e) in the case of a wholly suspended sentence, extend the operational period to a date after the date of the order suspending the sentence;

- (ea) in the case of a partially suspended sentence - extend the operational period to a date after the date specified in the order suspending the sentence; or
- (f) make no order with respect to the suspended sentence.”

[9] Section 43(7) of the *Sentencing Act* is in the following terms:

“A court shall make an order under subsection (5)(c) unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence and, if it is of that opinion, the court shall state its reasons.”

[10] It was the submission of the appellant that his Honour erred in considering matters beyond those prescribed in that subsection and, in particular, by considering matters which arose prior to the suspended sentence being imposed. It was submitted that the subsection specifically precluded that from occurring. In our view such a narrow interpretation of the subsection would lead to artificial and often unjust results. The effect of s 43(7) is that a court shall make an order restoring the sentence or part sentence held in suspense where it is satisfied that there has been a breach of a condition of an order suspending a sentence or where there has been an offence committed against the law in force in the Territory or elsewhere that is punishable by imprisonment. The Court will proceed in that way “unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence”. To limit the consideration of the Court to the circumstances subsequent to the imposing of the sentence

in isolation would be to consider those matters in a contextual vacuum. It would be an artificial exercise. It is only by a consideration of the whole of the surrounding circumstances that the events arising since the sentence was imposed can be given full colour and meaning and their true impact understood.

[11] This approach is consistent with the principles developed by the Courts in relation to the interpretation of s 43(7) of the Act.

[12] In *Pryce v Walker* (1999) NTSC 50 Martin CJ dealt with a matter in which the respondent had been convicted in September 1997 of an aggravated dangerous act and sentenced to three years imprisonment suspended after nine months. On 30 January 1999 the respondent failed to supply a sufficient breath sample after driving and on 27 March 1999 he drove with a blood alcohol content in excess of .08 percent alcohol per 100 millilitres of blood. Those actions were in breach of the terms of his suspended sentence. Martin CJ did not activate the suspended part of the sentence finding it unjust to do so because of the respondent's progress towards rehabilitation. That progress can only have been measured against the circumstances that prevailed prior to the sentence being imposed.

[13] In considering whether to restore the whole or part of a sentence upon breach a matter the Court will take into account is whether a subsequent offence is different in its nature from the initial offence for which the suspended sentence was imposed: *Wilson v Taylor* (1987) 113 NTR 1. It

was observed by Kearney J in that case that the Court may be justified in not restoring a sentence:

“If the further offending is both of a different character from the initial offence, and relatively trivial, particularly where there is an appearance of gross disparity between the suspended sentence and the further offence.”

- [14] In any case in which the offender wishes to point to progress towards rehabilitation or to the different nature of subsequent offending it will be necessary to identify the circumstances of the offender prior to the sentence and compare and contrast those with what has happened since.
- [15] In all the circumstances it is clear that the section requires that the “circumstances which have arisen since the suspended sentence was imposed” are to be considered in light of the context set by the pre-existing circumstances.

The Restoration of the Sentence

- [16] The effect of the conduct of the appellant in leaving the CAAPS program without permission was that, within three weeks of her conditional release from prison, she had breached a fundamental condition applicable to her release. Shortly thereafter she breached another condition by failing to report to police as required.
- [17] The explanation provided for her conduct was that she was placed under cultural and moral pressure to leave. It was submitted that she was being

pressured by members of her extended family to provide money to them and she was unable to do so whilst at CAAPS. It was submitted that she left CAAPS in order to avoid the shame of not being able to comply with the demands of the members of her extended family.

[18] It is clear that her leaving the program was intended by her. She did not accidentally breach her conditions. It is also clear that she did not leave in direct defiance of the conditions of her release. She left because she felt under moral pressure to do so. That pressure is a matter that may be taken into account in considering an appropriate disposition: *Wilson v Taylor* (supra) at 9.

[19] Subsequent to her departure she remained out of trouble until she was arrested in relation to the breach. This was a period of some five and a half months. In that time she reduced her consumption of alcohol.

[20] The Court was informed that upon her re-arrest she expressed a desire to resume the rehabilitation course at CAAPS and further that CAAPS was willing to take her back.

[21] In the circumstances there is evidence that rehabilitation has progressed notwithstanding the breaks. The extent of that progress is to be assessed taking into account all of the circumstances of the offender. In this case the appellant is a 28 year old married Aboriginal woman who lived in an Aboriginal community and at the Bagot Community. She suffered from a serious alcohol problem. The fact that she remained out of trouble for the

period from her departure, that she had reduced her alcohol consumption and that she had come to the conclusion that she wished to complete the CAAPS rehabilitation course are all signs of some (if small) progress towards rehabilitation.

[22] The effect of the order of his Worship was that the appellant was required to serve a period of imprisonment of 18 months (19 months if the period of one month already spent in prison is taken into account) because of the breach of these conditions. In our view, and in all of the circumstances, that was so disproportionate to the breach as to make the imposition of that period of imprisonment unjust in all of the circumstances. In our view there was a gross discrepancy between the imposition of the balance of the suspended sentence and the nature of the breach.

[23] Factors that lead to this conclusion include the fact that the appellant had not re-offended in any way during the period of five and a half months she was at liberty. Although the condition which she breached was significant, indeed a fundamental part of the basis upon which she was released, the breach was not carried out in defiance of the condition. There was an explanation for her conduct consistent with her succumbing to a pressure which she felt. There was a willingness and an ability to resume the rehabilitation program at CAAPS and it was and is in the interests of the appellant and of the community that she do so. Whilst it may not have been unjust to impose a period of imprisonment upon the appellant in order to maintain the integrity of suspended sentences the reimposition of a period of

18 months imprisonment was disproportionate to what was required in the circumstances of this matter.

[24] For these reasons the appeal was allowed.
