Meneri v Smith [2001] NTSC 106

PARTIES:	STRATH MENERI
	v
	GARRY JOHN SMITH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 70 of 2001 (9910016)
DELIVERED:	27 November 2001
HEARING DATES:	21 November 2001
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	Ms T.M. O'Sullivan
Respondent:	Dr. N. Rogers

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of Director of Public Prosecutions

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Meneri v Smith [2001] NTSC 106

No. JA70 of 2001 (9910016)

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 Alice Springs

BETWEEN:

STRATH MENERI
Appellant

AND:

GARRY JOHN SMITH
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 27 November 2001)

[1] On 27 August 2001 the appellant pleaded guilty to having controlled liquor, namely a 5 litre case of Moselle wine, within the Hermannsburg restricted area contrary to s 75(1)(b) of the *Liquor Act.* He had a prior conviction for the same offence. The maximum penalty for a second offence is a fine of $2,000 or imprisonment for 12 months. The appellant was convicted and was sentenced to 14 days imprisonment. He now appeals against the severity of that sentence.

[2] The remarks on sentence made by his Worship were short and I set them out in full:

> HIS WORSHIP: On 18 June, when last I was here at Hermannsburg, I said that anyone who was found to have liquor in their possession in a restricted area of Hermannsburg would be sentenced to a term of imprisonment, and so it will be in this case. The defendant has one prior conviction for controlling liquor in a restricted area. Hermannsburg, during the last 12 months that I have been coming here, has been getting worse and worse with liquor offences or liquor induced offences.
> The violence is extraordinary for a town of this size. On the last occasion there were fifty actual persons summonsed to appear or appearing in custody out of a population of 600, which was extraordinary. The violence is enormous. There have been quite a few homicides. Many domestic violence assaults involving broken legs and broken arms and quite frankly drinking is or certainly was getting out of control.
> The defendant has pleaded guilty at the very earliest opportunity in this matter; the offence only being committed on 2 August. And he has a record for offences, but considering his age it is not what you would call a bad record. He does, as I say, have that one prior conviction; 6 years (ago) for controlling liquor in a restricted area. Taking those matters into account and doing the best I can, I will give him a very short sentence of imprisonment of 14 days.
> MS O'SULLIVAN: Your Worship, I'd ask you to consider suspending that sentence given his age, given his lack of priors and his plea of guilty.
> HIS WORSHIP: No, I made it perfectly clear on the last occasion that anyone would go to actual – a sentence of actual imprisonment and he will be sentenced to 14 days actual imprisonment and I will not suspend it. I should add this, if he wants to appeal, I will grant him bail pending the disposition of the appeal.

[3] The grounds of appeal contained in the notice of appeal were as follows:

> 1. The sentence was manifestly excessive.

2. The learned Stipendiary Magistrate failed to give sufficient weight to the appellant's lack of prior convictions when sentencing him.

3. The learned Stipendiary Magistrate imposed a sentence of imprisonment which was not proportional to the objective circumstances of the offence.

4. The learned Stipendiary Magistrate erred in increasing the tariff for offences under s 75 of the *Liquor Act*.

5. The learned Stipendiary Magistrate failed to apply s 5 of the *Sentencing Act*.

[4] The record of prior convictions referred to by his Worship included offences dating back to 1975. The most serious of those offences was an illegal use of a motor vehicle and an offence of break, enter and steal in relation to which he was sentenced to a total of 2 months and 14 days imprisonment in 1975. The appellant stayed out of trouble between 1987 and 1995. In 1995 he was convicted of indecent exposure and being in control of liquor in a restricted area. In relation to the latter offence he was fined $200. He remained out of further trouble between 1995 and the date of the present offence.

[5] In concluding that the offence was prevalent and that offences of that kind contributed to serious adverse consequences within the restricted area of

Hermannsburg his Worship relied upon his own experience in that community. Whilst there has been some criticism of judicial officers relying upon personal court experience in determining the prevalence of particular crimes (eg see Fox and Freiberg; Sentencing: State and Federal Law in Victoria at paragraphs 2.346 and 2.347) that criticism would not apply in this case. The community concerned is a relatively isolated community in Central Australia. It is a community with which the learned Magistrate, who is a very experienced magistrate, has developed a personal familiarity over a period of time by virtue of being a visiting magistrate to that community. As was observed by Muirhead ACJ in *Jambajimba v Dredge* (1985) 81 FLR 180 at 182, it is a "healthy thing in a restricted community for a magistrate to take sufficient interest in the people amongst whom he works to gain understanding of the background of individuals". The same observation will apply to the whole community in circumstances such as exist here.

[6] In this case there is no suggestion that the remarks made by his Worship were other than a fair portrayal of the situation that prevailed in Hermannsburg at the time of sentence and in the period leading up to the imposition of the sentence. His Worship was clearly of the view that a period of actual imprisonment was necessary to meet the circumstances of this offence and others like it.

[7] It is necessary to bear in mind that appellate courts have accorded respect and weight to the views expressed by those who are regularly called upon

to deal with certain offences. Barwick CJ said in *Griffiths v The Queen* (1976-1977) 137 CLR 293 at 310:

> "I ought at this point to say that I agree with the reasons for judgment of Isaccs J in *Whittaker v The King* and accept the citations which he makes in support of his views. I would call attention to what his Honour says and add that, in my opinion, the views of those whose daily, or almost daily, task is the sentencing of prisoners must command respect. They are in reality in a better position to assess the proper sentence than, in my opinion, is a court of appeal, error or breach of principle being absent."

[8] In *Jambajimba v Seears* [1984] 2 NTJ 439 Forster CJ said, in dismissing an appeal against sentence:

> "There must be added to these circumstances the fact that an experienced magistrate is apparently firmly of the view that prison sentences, albeit short, are necessary as a general deterrent to the commission of a most prevalent offence."

[9] The principal ground of appeal relied upon by the appellant was that the sentence imposed by the learned Magistrate was, in all the circumstances, manifestly excessive. The complaints that his Worship failed to give sufficient weight to the appellant's lack of prior convictions, that he imposed a sentence which was not proportional to the objective circumstances of the offence and that he erred by raising the tariff for offences under s 75 of the *Liquor Act* were all presented as part of the general submission that the sentence was manifestly excessive.

[10] I was provided with a schedule of penalties for sentences in respect of such offences imposed in the Court sitting at Hermannsburg. The details contained in that schedule were not said to include all relevant matters but

rather were the product of a "random search of files from Hermannsburg Bush Court circuits where defendants had been dealt with for *Liquor Act* offences". That schedule revealed that penalties varied between a conviction without penalty, community service orders, fines from $80 up to $600 and suspended sentences of imprisonment of up to 3 months. In the schedule there were no sentences of actual imprisonment. The detail in the schedule was insufficient to enable me to determine what factors were determinative of the sentence in a particular matter. The information available suggested that the sentences increased for repeat offenders and also where the amount of alcohol involved was greater.

[11] The appellant complains that the sentence imposed by his Worship, being an actual period of imprisonment of 14 days, effected an "abrupt" increase in the applicable penalties and it was submitted that the appellant was justifiably aggrieved by his special treatment in that regard.

[12] I was referred to *Breed v Pryce* (1985) 36 NTR 23 where Nader J said (at 32 and 33):

> "Whether the general run of sentences has been over-lenient or not (and, as I said, they seem to me to have been too lenient) the appellant has every reason to feel aggrieved by his special treatment. An impartial fair-minded bystander would surely agree with him.
>
> ...
>
> I would only add this note of caution. If the magistrates and justices of the peace, in the future exercise of their sentencing discretion, take the view that past penalties under s 107B(1) have been too light, the position should be corrected by an upward trend in penalties

> rather than by an abrupt increase. The former has the dual virtue of signalling to the community that penalties are moving to a level that reflects the Parliament's view of the seriousness of the offence but, at the same time, no single sentence will be so disparate as to fairly warrant a sense of having been unjustly treated."

[13] Those remarks and remarks to similar effect by Bray CJ in *R v Barber* (1976) 14 SASR 388 were considered by the High Court in *Poyner v The Queen* (1986) 60 ALJR 616. The Court in a joint judgment observed that "these statements provide useful guidance which should always be kept in mind, but they do not state a binding principle."

[14] In this case it cannot be said that the intention to increase penalties was without warning. In his sentencing remarks his Worship identified the warning that had been given on an earlier occasion and prior to the offence with which he was then dealing. It was submitted that the warning was inadequate because it was given in the Court sitting at Hermannsburg and therefore would have received little publicity. I reject that submission. The warning was given in the community to which it was directed and in the only appropriate forum. No alternative was suggested in submissions. I have been referred to a transcript of the proceedings in which the warning was given. It was a clear warning that offences of this nature would in future be punished by a short period of imprisonment.

[15] In my view the increase in penalty reflected in the sentence imposed by his Worship could not be described as "abrupt" or as a "leap" in penalty. Further, the nature of the increase likely to apply had been identified by his

Worship on the earlier occasion. Penalties of imprisonment, albeit suspended, had been imposed in other cases involving repeat offenders. Those penalties ranged up to 2 months imprisonment. Suspended sentences of imprisonment had also been imposed in cases where the amount of alcohol was more than one bottle or one cask of wine. In those cases penalties ranged up to 3 months imprisonment fully suspended. It should be remembered that a suspended sentence of imprisonment will not be imposed unless a sentence of imprisonment of that length would be appropriate in the circumstances: *McKaye* (1982) 7 A Crim R 96; *Marsh* (1983) 35 SASR 333. In my view this was not an increase in penalty which calls for interference by this Court. Further, in my view, the penalty is not manifestly excessive.

[16] The final ground of appeal argued by the appellant was that his Worship failed to apply the provisions of s 5(2) of the *Sentencing Act* when sentencing the appellant. That section provides guidelines for the sentencing process and, inter alia, details matters to which a court shall have regard in sentencing an offender. Such matters include the character, age and intellectual capacity of the offender, the extent to which he is to blame for the offence and other identified matters.

[17] It is the submission of the appellant that his Worship imposed "an effective minimum mandatory sentence for a particular offence" and that he failed to take into account the matters raised in s 5(2) of the Act. Reference to the sentencing remarks of his Worship does not fully support that submission.

His Worship referred to the prevalence of the offence and the damage that resulted to the community arising from the offence and other offences involving alcohol. In his sentencing remarks he specifically referred to a consideration of the age and character of the appellant and the fact that he had pleaded guilty.

[18] However when he was asked to consider suspending the sentence his Worship observed that he had "made it perfectly clear on the last occasion that anyone would go to actual – a sentence of actual imprisonment". He did not indicate that he had already considered the issue of any possible suspension in formulating the sentence he imposed. He declined to consider the question whether or not to suspend the whole or any part of the sentence, not by reference to the circumstances of the offender or of the offence, but by reference to the warning that had been given on the earlier occasion. This is to ignore the requirements of s 5(2) of the *Sentencing Act* and in my view demonstrates error.

[19] An immediate sentence of imprisonment is a more severe penalty than a suspended sentence of the same duration. A determination whether to suspend a sentence in whole or in part will include a consideration of all of the circumstances of the case including the circumstances of the offending and circumstances personal to the offender: *R v Wacyk* (1996) 66 SASR 530 at 536; *Canet v Hales* (2001) NTSC 100 per Bailey J.

[20] In this case his Worship failed to consider the suspension of the sentence at all. He was asked to do so and responded by referring to his warning. In my view his Worship declined to consider a suspended sentence because of his previous warning. He did not consider the circumstances of the particular offence nor did he consider the circumstances personal to the appellant.

[21] It follows that error occurred in the sentencing process. The appeal must be allowed and the sentence set aside. It is necessary to re-sentence the appellant. In my opinion the head sentence imposed by the learned Magistrate was appropriate and I do not propose to depart from it. However bearing in mind the circumstances of the offence, I consider that the age of the appellant, his relatively clean record, the lengthy periods that he has remained out of trouble and the fact that he is in continuing employment call for that sentence to be suspended.

[22] The appeal is allowed. The sentence is set aside. The appellant is sentenced to 14 days imprisonment and that sentence is suspended forthwith. The appellant is not to commit another offence punishable by imprisonment for a period of 12 months if he is to avoid being dealt with under s 43 of the *Sentencing Act*.