Schnitzer v Burgoyne [2003] NTSC 48

PARTIES:	SCHNITZER, Douglas Max
	v
	BURGOYNE, Robert Roland
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA6 of 2003
DELIVERED:	9 May 2003
HEARING DATES:	2 May 2003
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL - Justices Appeal – appeal against sentence – manifestly excessive – criminal deception – question of restitution – employed in a position of trust – person of good character – no prior convictions.

Criminal Code 1983 (NT), s 227; *Sentencing Act* 1995 (NT), s 88

Queen v Cameron & Rae, unreported (NT) 10 May 2001, applied.
Cavallin, unreported 24 July 1996, referred to.
Novak (1993) 69 A Crim R 145 at 149, referred to.
R v Kerr (1973) 7 SASR 13, applied.
Ingrassia (1997) 91 A Crim R 383, applied.

REPRESENTATION:

Counsel:

Applicant:	R Goldflam
Respondent:	R Brebner

Solicitors:

Applicant:	NTLAC
Respondent:	DPP

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

Schnitzer v Burgoyne [2002] NTSC 48
No. JA6 of 2003

BETWEEN:

DOUGLAS MAX SCHNITZER
Applicant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 9 May 2003)

[1] Appeal against sentence. The appellant was convicted and sentenced in the Court of Summary Jurisdiction at Alice Springs on 28 January 2003 for that on 13 November 2002 he obtained by deception cash from Wests Sporting Club to the value of $3,926 contrary to s 227 of the Criminal Code 1983 (NT).

[2] The appellant was sentenced to 15 months imprisonment wholly suspended as the learned Magistrate put it, "forthwith upon conditions to repay Wests Sporting Club" the amount of $3,926 within six months. An operational period of two years was fixed.

[3] The admitted facts are of short compass. The appellant was employed to perform general bar duties and controlled the gaming facilities at the Club. On 13 November 2002 he was working in that capacity and decided to gamble on credit with the NT TAB facility at the Club. On 21 occasions he entered bets into the TAB computer amounting to $4,261 in all, but put only $240 of his own money plus winnings of $95 into the till. The bets ranged from $60 up to $900 and were all placed during the period from 11.54am to 2.38pm. The following day he was confronted by the Club manager and openly admitted his action. He offered no reason for what he had done, and as a result he was dismissed from his employment. When interviewed by police he again freely admitted what he had done, including that he was not authorised to place bets without providing the cash required. The deficiency constituted a debt due by Wests Sporting Club to NT TAB.

[4] Counsel for the appellant before that court acknowledged that his client's actions amounted to a serious breach of trust which ordinarily would attract a custodial sentence, but urged upon his Worship that any such sentence be suspended.

[5] The appellant was 22 years of age, born in Alice Springs, raised by his grandmother and auntie and then returned to be with his mother. His father played little part in his upbringing. He attended school in Alice Springs to year 10 and since leaving school had obtained a variety of paid and unpaid employment. At the age of 18 he went to visit relatives in New South Wales and obtained a job at the local RSL Club and it was there that his troubles

with gambling began. His counsel conveyed to the court information as to his habit, which was termed a gambling addiction, which led to the intervention of some friends and his consulting a psychiatrist or psychologist. He had tried hypnotherapy. When he left New South Wales the appellant thought he was free of the addiction, but upon returning to Alice Springs started gambling again, but did not think it was out of control.

[6] As to the circumstances of this offending, the court was informed that he was alone at work, there were no staff or customers at the time and he was bored. He used $240 of his own money by betting with the TAB, lost the lot and rashly decided to try and win his money back by placing bets without putting any money into the till. It was put on his behalf that he became desperate in chasing his losses and only stopped when other people arrived at the Club. When he first spoke to the manager and admitted his guilt he also offered to "make restitution". However, as he was dismissed from his employment and had been unable to obtain a further job he had no funds from which to make payment.

[7] One consequence of his offending has been that upon disclosing that he was due to be dealt with by the court for the offences prospective employers would not take him on, at least until the matter was cleared up by the court. Nevertheless, he invited the court to make an order.

[8] There were three grounds of appeal, one going to the term of imprisonment imposed and the other two surrounding the order of restitution, as it was called.

[9] His Worship did not give any reasons for imposing the sentence of 15 months imprisonment beyond an earlier indication that he regarded people who obtained jobs at sporting clubs and then breached the trust reposed in them as having committed serious offences. That attitude became more pronounced during discussion about the order for payment. It was suggested by counsel for the appellant that he be given 12 months within which to accomplish that, but his Worship rejected that submission and ordered that the monies be paid within six months notwithstanding the financial circumstances of the appellant as disclosed during the plea.

[10] His Worship thought that the offence was prevalent because to his knowledge there had been at least two or three others in the previous two years. I do not consider that to be a satisfactory manner to establish the prevalence of an offence. His Worship's admittedly doubtful recollection of the number of prior offences over that period was not a good basis for treating the offences here as calling for sterner punishment.

[11] The tone of his Worship's remarks indicate that the sentence would not have been wholly suspended had it not been for the sentence imposed by Thomas J on 10 May 2001 upon Maxwell Tamaki Cameron and Andrew Jonathon Rae who had obtained credit by deception to the value of $81,803

from NT Keno. They were also employed as staff at Wests Sporting Club. Those offenders had taken out 211 tickets over a period of 87 minutes without paying for them. The Darwin based supervisor of the Keno Office noticed the amount of the transactions and telephoned and spoke to one of the offenders who assured him that everything was in order. Shortly thereafter they realised that they could not pay the amount which they had gambled away and told the manager of the Club what they had done. They volunteered their confessions to police. Both were mature men with no priors, good character and good employment records. The guilty pleas were accompanied by remorse which her Honour accepted as genuine. The offenders winnings of $16,800 were taken into account in calculating the loss to the club of $65,003. Both men were sentenced to imprisonment for two years which was wholly suspended. An order for restitution was sought, but her Honour declined to make one taking into account the financial position of each of the offenders.

[12] There is a strong similarity between those two cases and this. The quantum of the loss is a differentiating factor, but I consider that the nature of the offending itself is a primary consideration not simply the amount of the loss.

[13] It was submitted that his Worship failed to give any mitigatory effect to the what was termed the appellant's gambling addiction. The authors of "Sentencing State and Federal Law in Victoria" Fox and Freiberg, 2nd Ed at par 3.731 claimed addiction to gambling is not an uncommon factor put forward in mitigation of sentence:

> "although the courts have generally been unsympathetic to such claims, being unwilling to distinguish between forms of addiction, the dramatic growth in opportunities in gambling in Victoria over recent years has raised concern over the relationship between gambling and crime."

The authors go on to refer to what fell from Tadgell JA in *Cavallin*, unreported 24 July 1996:

> "It is notorious that the availability of poker machines, as instruments of easy gambling, has dramatically increased in this State in the last few years. The nature and full extent of the consequences to the community of that no doubt remain to be seen. It would be optimistic, however, in the short term at least, to say that the courts will not see more and more cases of criminal activity which, to some extent, is associated with, or even a direct product of, poker machine gambling. Some of it, no doubt, will be the result of a pathological and, therefore, an obsessively addictive urge. I would acknowledge that some crimes resulting from what might be called a gambling disease will need to be dealt with accordingly … . It is, however, … important that the public does not assume that a crime which is to some extent generated by a gambling addiction, even if it is pathological, will, on that account, necessarily be immune from punishment."

[14] The appellant also relies upon that passage in the judgment of Vincent J with whom Phillips CJ and Crockett J agreed in *Novak* (1993) 69 A Crim R 145 at p 149:

> "… I should add that there is no shortage of evidence, which has been accumulating over the years, that persons do become addicted to gambling to the extent that their whole lives are affected by it. The commission of crimes of dishonesty in order to secure the necessary funds to satisfy temporarily their compulsion or obsession is a well-recognised phenomenon. It can, in my view and in some circumstances, constitute an important factor to be taken into account by a sentencing judge when assessing the degree of an offender's moral culpability and the extent to which the sentence should incorporate an element of general deterrence."

[15] There is no evidence here, as in that case, that the gambling problem affecting the appellant, was of a pathological character nor that what the appellant did here was done out of a desire to satisfy temporarily his compulsion or obsession. I therefore do not consider that his so called gambling addiction affords him any mitigation of penalty.

[16] I now turn to look at the order for restitution. I call it that because that was the word used throughout the proceedings by counsel for the appellant, who first raised the issue by making the offer, the prosecutor, who sought that the order be made, and by his Worship. It will be noted that his Worship made the obligation to pay a condition attaching to the suspension of the sentence. The power of a court in s 40(1) to suspend a sentence may be made subject to conditions as the court thinks fit, s40(2). A breach of a condition attaching to a suspended sentence may lead to the sentence being restored in whole or in part and the court is to make such an order 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 (Sentencing Act, s 43(2)(5)(c) and (7)).

[17] Although not expressly on the point I derive some assistance as to whether it is open to a court to suspend a sentence on such a condition from *R v Keur* (1973) 7 SASR 13 and *Ingrassia* (1997) 91 A Crim R 383. Awards of compensation are additional to the sentencing process and not a substitute for punishment. To combine these two separate aspects of sentencing seems to me to be erroneous. On the face of it, this order was made in the exercise

of the general discretionary powers of the court in relation to a suspended sentence. The subject of compensation and restitution finds its place in a special part of the Sentencing Act, Part 5, and prevails over the general power. The specific power to make such an order is to be found in s 88 and in a case such as this I think the most appropriate order is that compensation be paid for the loss that occurred in the course of, or in connection with, the commission of the offence (par (c)). Specific reference to the exercise of such a power directs attention to the provisions enabling an extension of time in which the payment is to be made and the ability to make an order that the payment be by instalments, s 94 and s 95. Imprisonment for breach of the order may follow, but the term of imprisonment is limited to a maximum of 12 months, s 93. The appeal on that ground must be allowed.

[18] The appellant, through his counsel on appeal, has again indicated his willingness to compensate the Club for its loss. At the time of the hearing of the appeal his counsel had no information other than that which was conveyed to the learned Magistrate when the appellant was sentenced as to his financial circumstances. The difficulties which courts have sometimes faced when having little or no knowledge as to an offender's financial circumstances when coming to consider making such an order would now appear to be largely overcome by the enactment of the Fines and Penalties (Recovery) Act 2001 (NT). Section 105(1)(c) brings an order for compensation within the scope of the enforcement provisions of the Act, Part 3 of which applies by operation of s 106(1). The Act prescribes a

period of 28 days within which such an order is to be met (s 23(1)) and the amount ordered to be paid is to be paid to the Fines Recovery Unit unless the court otherwise directs. Application may be made for further time to pay (s 25) and the Unit may allow it to be paid by instalments (s 26(2)(b)). Such an order may be enforceable as if a judgment for payment of the amount under the Local Court Act 1989 (NT), s 107.

[19] During the hearing of the appeal attention was also drawn to s 90(5) of the Sentencing Act which prohibits a court making an order for compensation or restitution where the person whose property was taken, lost, destroyed or damaged does not consent to the order being made. No indication was given to his Worship as to whether the club did or did not consent to the order being made in that court. The preferable view of the operation of s 90(5), I think, is that the court should not proceed unless it has been informed that the person concerned has consented to the order which is sought to be made. In any event counsel for the respondent before this court was able to inform it that the Club did consent.

[20] I have reviewed again the circumstances of the offence and of the offender as detailed above. I note the serious breach of trust involved in offending of this sort and that the offender should have realised that he may not have wholly overcome his gambling problem and yet embarked upon this course of action and continued it well beyond the stage where he had any capacity to make up the deficiency. On the other hand, he is a man of good character without prior convictions who readily acknowledged his guilty and indicated

he intended to plead guilty. He has indicated his willingness to pay compensation to the Club and that is an outward indication of his remorse. I consider that the guilty plea, carrying with it assistance to the administration of the criminal justice system when coupled with his demonstrated remorse would enable a reduction in a sentence which might otherwise be imposed of the order of 25 percent. If his Worship had approached the matter in that way, then he must be taken to have had in mind a head sentence of 20 months before making the allowance, and I consider that in all of the circumstances of this case such an approach invites a close appraisal on appeal.

[21] However, I remind myself of the general principles applicable to appeal against sentence, the presumption is that there is no error, the appellant must demonstrate the sentencer erred where the ground is that the sentence was "manifestly excessive" and it is for the appellant to show that the nature of a sentence itself affords convincing evidence that in some way the exercise of the discretionary sentencing power was unsound. He must show that the sentence was clearly and obviously, and not just arguably, excessive. See generally the reasons of the Court of Appeal in *Damaso* (2002) 130 A Crim R 206.

[22] The sentence of 15 months imprisonment strikes me as being manifestly excessive. The sentence will be quashed and the appellant is sentenced to nine months imprisonment suspended forthwith. An operational period of two years is fixed as from 28 January 2003.

[23] The appellant is ordered to pay compensation pursuant to s 88(c) of the Sentencing Act in the sum of $3,926. That amount is to be paid to the Fines Recovery Unit on account of the loss caused to Wests Sporting Club that occurred in the course or in connection with the commission of the offence.
