*Latu v McPherson; Latu v Marshall* [2009] NTSC 67

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| PARTIES: | LATU, Loni<br><br>v<br><br>McPHERSON, Craig John<br><br>LATU, Loni<br><br>v<br><br>MARSHALL, Adrian Arthur |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 32 of 2009 (20916100)<br>JA 33 of 2009 (20829974) |
| DELIVERED: | 10 December 2009 |
| HEARING DATES: | 20 November 2009 |
| JUDGMENT OF: | MARTIN (BR) CJ |
| APPEAL FROM: | Mr R Wallace, SM |

**CATCHWORDS:**

CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE

Breach of suspended sentence – further offending of similar nature within short period – role in subsequent offending 'minimal' – full restoration of suspended sentence – whether Magistrate erred – whether sentence was manifestly excessive – appeal dismissed.

*Kava Management Act 1998* (NT); *Sentencing Act 1995* (NT), s 43(7).

*Bukulaptji v The Queen* [2009] NTCCA 7, discussed.

*Lawrie v The Queen* (1992) 59 SASR 400; *Marston v The Queen* (1993) 60 SASR 320; *R v Anthony* (2007) 22 NTLR 36; *R v Buckman* (1988) 47 SASR 303, referred.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | P Elliott |
| Respondent: | S Ozolins |

*Solicitors:*

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| Appellant: | - |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | C |
| Judgment ID Number: | Mar0915 |
| Number of pages: | 13 |

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

*Latu v McPherson; Latu v Marshall* [2009] NTSC 67
No. JA 32 of 2009 (20916100); JA 33 of 2009 (20829974)

BETWEEN:

**LONI LATU**
Appellant

AND:

**CRAIG JOHN McPHERSON**
Respondent

**LONI LATU**
Appellant

AND:

**ADRIAN ARTHUR MARSHALL**
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 10 December 2009)

**Introduction**

[1] On 3 November 2008 the appellant pleaded guilty to a charge of possessing a commercial quantity of kava (270kg) between 29 October 2008 and 1 November 2008. A sentence of nine months imprisonment was imposed by Mr Carey SM, suspended after the appellant had served seven days. The operative period of the suspension was 18 months from 1 November 2008.

[2] In breach of the suspended sentence, on 12 May 2009 the appellant committed the offence of possessing a commercial quantity of kava (119kg). On 10 July 2009 the appellant pleaded guilty to that offence and a sentence of five months imprisonment was imposed by Mr Wallace SM.

[3] At the time of sentence on 10 July 2009, the learned stipendiary Magistrate found that the breach of the suspended sentence of 3 November 2008 was proven and restored the balance of the sentence which was seven days less than nine months. His Honour ordered that the restored sentence and the sentence of five months imprisonment for the later offence be served concurrently.

[4] The appellant appeals against the sentence of five months imprisonment on the basis that it is manifestly excessive. The appellant also appeals against the restoration of the previous suspended sentence on the basis that restoration of the entire sentence held in suspense was unjust.

[5] For the reasons that follow, the appeals are dismissed.

**Facts**

[6] The facts in relation to the May offending were presented to the Magistrate by the prosecution in the following terms:

> "During the afternoon and evening of 12 May 2009, the [appellant] travelled to a destination south of Katherine with the co-offenders, Filiatu Fe'Nua, Seminu Ha'Villa and Levi Asile, where they retrieved a quantity of kava that had been hidden in bushland previously by persons other than the [appellant].

About 1:55 am on Wednesday, 30 May 2009, the [appellant] and co-offenders returned and were travelling northbound on the Stuart Highway past the Katherine Council Chambers where they were stopped by police. Co-offender, Asile, who was driving, was subjected to a roadside breath test. Asile provided a negative result. After a brief conversation with the co-offenders it was revealed that there was a quantity of kava in the vehicle.

A search of the vehicle revealed two large white feed bags in between the front and rear seats amongst the [appellant] and co-offenders containing kava. Several further large bags of kava were also located in the boot of the vehicle. The [appellant] and co-offenders were arrested and conveyed to the Katherine Police Station where they were lodged in cells until the rest of the investigations [could] take place. The kava was seized and weighed with a total approximate weight of 119 kilograms, 81 of which was divided into about 4000 individual 20 gram deal size bags.

Later the same afternoon, the [appellant] participated in a record of interview during which he made admissions to travelling from Darwin knowing the intention was to pick up kava south of Katherine. The [appellant] further admitted to assisting the co-offender[s]. The [appellant] was later charged and refused bail to appear in court. The entire amount of kava seized was a commercial quantity as defined in the *Kava Management Act*. The [appellant] is not the holder of a kava licence to import, supply or possess kava."

[7] The facts were agreed by counsel for the appellant with the explanation that the admission to providing assistance was an admission to assisting the co-offenders in loading the kava into the vehicle. Counsel informed the Magistrate that the appellant was asked if he would help load the kava into the vehicle and he picked up one bag and put it in the car.

[8] The appellant is 47 years of age and is of Tongan origin. The Magistrate was told that the appellant came to the Northern Territory for the Arafura Games to meet up with fellow Tongans who were competing in weight lifting. As counsel put it, after meeting "some of the Tongan boys up here",

the appellant was invited to join them on a trip to Katherine. He asked why and was told “We’re going to get some kava”. Although he was aware of the purpose of the trip, counsel put to the Magistrate that the appellant had no idea of the amount of kava that would be involved or the purpose of obtaining it.

[9] Counsel put to the Magistrate that he, counsel, “quizzed” the appellant about the fact that he was on a suspended sentence. The submissions continued:

> “[The appellant] said, ‘Well, I had nothing to do with it and it’s rude for me to not got with them. They would’ve thought I didn’t like them.’ So apparently within the Tongan culture and community, it would’ve been a slight not to go.”

[10] As to matters personal to the appellant, counsel informed the Magistrate that the appellant had worked as a truck driver running his own business for many years and was a hard worker. He is married with ten children, some of whom still require support. A number of references were tendered which spoke very highly of the appellant and of his valuable contribution to the Tongan community.

**Magistrate’s reasons**

[11] The submissions of counsel were not contested by the prosecutor. The Magistrate accepted the version advanced in submissions and correctly described the appellant’s “part in the possession” as at a “very low and minimally responsible level.” However, while not rejecting the reason

advanced for not refusing to accompany the other persons to Katherine, the Magistrate found that the reason was an "abjectly inadequate excuse".

[12] As to the imposition of the sentence of five months, I am unable to discern any error in the approach of the Magistrate. His Honour had regard to all the relevant facts and specifically mentioned the minimal role played by the appellant. Ground 3 complains that his Honour placed insufficient weight on the plea of guilty and the personal circumstances of the appellant, but in my view that ground is without substance. While the Magistrate did not specifically refer to the plea of guilty, there is no reason to suppose that his Honour overlooked that factor. Although appellate courts have encouraged the identification of a specific allowance in respect of a plea of guilty, a failure to do so is not an error of principle.

[13] In the absence of discernable error, the appeal against the sentence of five months imprisonment can only succeed if error can be inferred. The appellant submitted that error can be inferred because the sentence of five months is manifestly excessive.

**Manifestly excessive**

[14] On the basis of the facts accepted by the Magistrate, the appellant played a minimal role in connection with the possession of the kava. However, he did so six months into a suspended sentence for a serious offence involving kava. The offence was planned by others in advance and the appellant agreed to become involved by accompanying the co-offenders on a trip from

Darwin to Katherine knowing that the others were making the trip for the purpose of obtaining kava.

[15] Counsel submitted that the appellant had no idea of the amount to be obtained and whether it would be of a sufficient quantity to amount to an offence. Given his experience with kava, and given the 600 kilometre round trip involved, at the least the appellant must have appreciated that it was highly unlikely that the others would not be embarking on the trip unless a significant quantity of kava was involved. He must also have realised that it was highly likely to involve committing an offence.

[16] In reality, the appellant had no reason whatsoever to become involved. He had every reason to decline the invitation to travel to Katherine. He was not only on a suspended sentence for an offence involving kava, but it was a suspended sentence imposed in the court of the very town to which he had been invited to travel. The Magistrate accepted the reason advanced, but correctly described it as "abjectly inadequate". If I had been in the position of the Magistrate, I would have gone further and rejected the reason advanced.

[17] On the basis of the facts found by the Magistrate, I am not persuaded that the sentence was manifestly excessive. In my view it was open to the Magistrate to impose a sentence of imprisonment and the period of five months is within the range of the sentencing discretion. It was also open to his Honour to decline to suspend the sentence or part of it.

**Restoration**

[18] Section 43(7) of the *Sentencing Act* directs that the Court shall make an order restoring the sentence held in suspense and order the offender to serve the sentence "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 …". This provision in the legislative scheme was discussed by the Court of Criminal Appeal in *Bukulaptji v The Queen*[1] where emphasis was placed upon the importance of a sentencing court not undermining the integrity of the sentencing regime. Riley J said:[2]

> "[33] Section 43(7) discloses a clear legislative policy that the starting point for a court dealing with a breach of a condition of a suspended sentence is that the offender should serve the sentence which was suspended. The fact that the sentence is suspended and hangs over the head of the offender provides an inducement to the offender to comply with the terms of the order and maintain a law-abiding life. The sanction for failure is the restoration of the obligation to serve the suspended term of imprisonment. That being so a court 'will not lightly interfere with the ordinary consequence of a breach'.[3] For a court to fail to respond appropriately to breaches would be to undermine the integrity of the sentencing regime and reduce the deterrent impact of such sentences upon others.[4]"

[19] The decision as to whether it would be unjust to restore the sentence is to be determined by having regard to the "circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent

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[1] [2009] NTCCA 7.

[2] *Bukulaptji* [2009] NTCCA 7 at [33]. See also *R v Anthony* (2007) 22 NTLR 36 at [18] – [20].

[3] *R v Buckman* (1988) 47 SASR 303 per King CJ at 304.

[4] *Marston v The Queen* (1993) 60 SASR 320 per King CJ at 322; *Lawrie v The Queen* (1992) 59 SASR 400 per Perry J at 403.

offence …". However, those circumstances do not mean that the nature of the original offending is to be ignored. That offending provides the context in which the breach and the potential consequences are considered.[5]

[20] In *Bukulaptji* Riley J identified a number of the factors to be taken into account:[6]

> "(a) the nature and terms of the order suspending the sentence;
>
> (b) the nature and gravity of the breach and, particularly, whether the breach may be regarded as trivial;
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> (c) whether the breach evinces an intention to disregard the obligation to be of good behaviour or to abandon any intention to be of good behaviour;
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> (d) whether the breach demonstrates a continuing attitude of disobedience of the law;
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> (e) whether the breach amounted to the commission of another offence of the same nature as that which gave rise to the suspended sentence;
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> (f) the length of time during which the offender observed the conditions;
>
> (g) the circumstances surrounding or leading to the breach;
>
> (h) whether there is a gross disparity between the conduct constituting the breach and the sentence to be restored;
>
> (i) whether the offender had been warned of the consequences of a breach; and

[5] *Anthony* (2007) 22 NTLR 36 at [21] and [22].
[6] *Bukulaptji* [2009] NTCCA 7 at [35].

> (j) the level of understanding of the offender of his obligations under the terms of the order suspending the sentence and of the consequences of a breach."

[21] In the matter under consideration, while the appellant's role in the offence was minimal, nevertheless he knowingly became involved in a serious offence and the breach cannot be regarded as trivial. This was not a breach of a condition such as failing to comply with directions of a probation officer. The breach involved commission of a further offence of the same type for which the suspended sentence had been imposed.

[22] Counsel submitted that the breach did not evince an intention to disregard the obligation to be of good behaviour nor demonstrate a continuing attitude of disobedience of the law. I do not agree. At the least, the appellant must have realised it was highly likely that an offence involving kava was about to be committed and, without good reason, he was prepared to become involved by accompanying the other persons in a lengthy journey to obtain the Kava.

[23] Counsel submitted that there is a "gross disparity" between the conduct involved in breaching the suspended sentence and the sentence to be restored. At times, this submission verged on a proposition that the appellant was being required to serve almost nine months imprisonment for the minimal role he played in lifting one bag of kava into a car. This submission is to misunderstand the sentencing scheme. The appellant was not being sentenced to nine months imprisonment for his role in May 2009.

The sentence of nine months imprisonment was the appropriate sentence for the original offending in November 2008 and suspension of service of that sentence was intended to provide an inducement to reform.[7] Having been given that opportunity, the appellant failed to reform with the consequence that he became liable to serve the sentence which the sentencing court regarded as the appropriate sentence for the offending. The fixing of that original sentence had nothing to do with the subsequent offending in May 2009.

[24] In my opinion, there is no gross disparity between the conduct that amounted to the breach and the sentence of nine months to be restored. The circumstances under consideration are well removed from the circumstances in *Bukulaptji* where a breach of a condition of suspension would have resulted in service of two years and nine months imprisonment.

[25] The Magistrate exercised leniency in directing that the sentence of five months and the restored period be served concurrently. In effect, the appellant is not being required to serve any period of custody for the second offence, but by virtue of his subsequent offending, he is being required to serve the original sentence that was regarded as the appropriate sentence for his previous offending.

[26] As to the approach of the Magistrate to the question of restoration, his Honour observed that the appellant had not even managed to reach the half

[7] *Bukulaptji* [2009] NTCCA 7 per Riley J at [31].

way mark of the operative period of suspension before getting himself "mixed up again with kava". His Honour's reasons continued:

> "Mr Latu, suspended sentences are supposed to stop those subject to them being tempted into criminal behaviour again. The community would expect and hope that anybody who is under a suspended sentence for possession of a commercial quantity of kava, would be alarmed, afraid and seriously on guard when the purpose of this trip to Katherine was mentioned, namely, to pick up some kava.
>
> We would expect you, I think, to say, 'what', and to ask your companions whether they knew that kava was illegal – of course, in the circumstances of this offence, it's perfectly clear they knew that well and that's why the kava was hidden in the bush – to point out to your friends that it's a serious offence in the Territory, to tell them that you're under a suspended sentence for kava and that, however rude it may seem, you would have to decline to their invitation because no way in the world were you going to put your neck in the noose and get yourself at risk of breaching that suspended sentence.
>
> I don't think that's a whole lot to expect and the only reason put forward for you not being sensible and looking after yourself is that you would have found it rude, impolite, contrary to Tongan expectations to back out of that trip under the circumstances. Mr Latu, that seems to me to be an abjectly inadequate excuse for getting yourself involved in this offending …"

[27] The Magistrate concluded that there was "just [no] reason of justice whatsoever" why he should not restore the suspended sentence. In my view, it was open to his Honour to reach that conclusion. The appellant had not identified any circumstances which had arisen since the imposition of the suspended sentence which would make it "unjust" to restore that sentence.

[28] In relation to the question of restoration, ground 5 asserts that the Magistrate "erred in either not considering or placing insufficient weight on the sentence imposed on the co-offender Fe'Nua". In effect, counsel sought

to create a case of disparity. Fe'Nua had been sentenced by a different Magistrate in respect of two offences involving kava. For the offence arising out of the circumstances involving the appellant, Fe'Nua received a sentence of eight months imprisonment to be suspended after service of seven weeks. Counsel argued that the appellant was entitled to experience a "legitimate sense of grievance" because, for his role in the offending which was less serious than Fe'Nua's involvement, the appellant was being required to serve eight months and three weeks imprisonment while Fe'Nua would be released after serving seven weeks.

[29] This submission contains the same underlying fallacy identified earlier in these reasons. The appellant did not receive a sentence of eight months and three weeks imprisonment for the offending in May 2009. He received a sentence of five months. The period to be served by the appellant was the appropriate sentence for the offending in 2008. No question of parity or disparity arose.

**Conclusion**

[30] For these reasons, in my opinion no error has been demonstrated and the orders made by the Magistrate were within the range of his Honour's sentencing discretion. His Honour took a generous view of the appellant's involvement, a view which I would not take if I was called upon to re-sentence the appellant. As I have said, I would reject his reason for accompanying the co-offenders as totally lacking in credibility. The burden

being on the appellant to establish a matter of mitigation in connection with sentence, I would not be persuaded on balance that the appellant became involved in the way he described. I would be left in the position of not being able to make a specific finding in that regard. In these circumstances, matters of mitigation accepted by the Magistrate would not form part of the factual basis upon which I would impose sentence and I would not impose a sentence less than the sentence imposed by the Magistrate. Nor would I decline to restore the suspended sentence in full.

[31] For these reasons, both appeals are dismissed.

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