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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 112 of 1992

IN THE MATTER of the Justices Act
AND IN THE MATTER OF an appeal against a sentence imposed by the Court of Summary Jurisdiction at Darwin

BETWEEN:

JEFFREY ALAN LEE
Appellant

AND:

DAVID JOHN LLEWELLYN
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 27 July 1992)

By Notice of Appeal dated 1 May 1992 the appellant appealed against the severity of a sentence imposed upon him by the Court of Summary Jurisdiction at Darwin on 29 November 1991. The background to that sentence is as follows.

On 16 December 1989 Police attended the scene of an accident at the intersection of Hook Road and Tiger Brennan Drive in Darwin. They found a Toyota utility upside down in Hook Road. The driver was not present. Police went to the premises of the owner of the utility. There they found the appellant. According to the Police the appellant admitted that he had been driving the utility at the time of the accident. Pursuant to s23(1)(b) of the Traffic Act the Police gave the appellant a breath test. After that they arrested him under s23(7)(a)(ii) of the Act for the purpose of carrying out a breath analysis.

In due course (following a conviction, an appeal and an order for a re-hearing) the appellant faced a re-hearing of a charge in the Court of Summary Jurisdiction on 7 October 1991 that on 16 December 1989 he had failed to provide a sample of breath sufficient for the completion of the breath analysis, contrary to s20(1)(b) of the Traffic Act. On 26 November 1991 the appellant was convicted of that offence, which carries a penalty of a $1000 fine or imprisonment for 12 months. On 29 November he was sentenced for that offence to 3 months imprisonment; it was ordered that service of that sentence be suspended upon the appellant entering into a home detention order for the period of 3 months. He was also disqualified from driving for a period of 4 years; I should say that the appellant

made it quite clear before me that he did not wish to appeal against the order for disqualification.

On 29 November 1991 the appellant appealed to this Court against his conviction of 26 November; a copy of that appeal is annexed, as the appellant had informed me that he had lodged the appeal prior to being sentenced on 29 November. In fact, it appears that during the sentencing process on 29 November 1991, and before the learned Magistrate imposed sentence, the appellant handed up in court an unsigned Notice of Appeal against his conviction. This accounts for what the appellant told me. On 16 April 1992 this Court dismissed the appeal of 29 November against conviction. Fifteen days later, on 1 May, the appellant lodged a Notice of Appeal against the sentence imposed on him on 29 November 1991, on the grounds that -

> "- - the sentence was exceptionally cruel and harsh under the circumstances. - - "

The appeal of 1 May was listed for hearing in this Court at 2.00pm on 3 June. The appellant did not appear when his appeal was called on at that time. The learned Judge before whom the appeal was listed to be heard ordered that it be "struck out". The appellant appeared in Court a few minutes later. His Honour informed him that "your

appeal has been struck out for your failure to appear."

Then ensued the following exchange:-

> "MR LEE: - - - does that mean that my appeal is dismissed?
>
> HIS HONOUR: Well, it's been struck out, Mr Lee. You might want to consider your position. I can't give you advice about that. For the present time your appeal is struck out and I will not hear you in prosecution of your appeal today. It may be there are other things you can do about it but I won't hear you about it now. Do you understand that?
>
> MR LEE: I understand from your words, Your Honour, that I have to see the Registrar to apply for another date.
>
> HIS HONOUR: Well, I don't know that the understanding is correct or not, Mr Lee. I can't advise you as to what you ought to do. It might be a good place to go and start by asking the Registrar what you ought to do but you should tell the Registrar that you were not here on time and your appeal has been struck out. All right?
>
> Now I have another matter and I'm proceeding to hear that now. I will not be proceeding [to] hear from you in relation to your appeal any further today. All right? Thank you.
>
> MR LEE: I understand Your Honour and I beg your pardon for any intrusion I may have caused.
>
> HIS HONOUR: That's all right, thank you. As long as you know what's happened and you can set about finding out what to do as a result."

Mr Adams of counsel for the respondent submitted that by "struck out" his Honour must have meant that the appeal was "dismissed". He referred to the power under r83.19, read with r84.13, for the Court to order that an

appeal be dismissed for want of prosecution; he submitted that it was this power which his Honour exercised. However, it appears to me that a fair reading of the exchange between his Honour and the appellant is that his Honour by his order intended to strike the appeal of 1 May from the list of appeals to be heard that day, but not then and there to dismiss it for want of prosecution. The appellant subsequently saw the Registrar and sought to have his appeal re-listed for hearing. For that purpose he lodged a fresh Notice of Appeal on 5 June 1992, in the same terms as his Notice of Appeal of 1 May. The appeal of 5 June 1992 came on for hearing before me on 8 July.

Mr Adams submitted that the appellant had lost his right to appeal against sentence because he had instituted it too late, unless he first successfully applied for an order under s165 of the Justices Act dispensing with the requirement under s171(2) that the appeal be "instituted within one month" from the date of imposition of sentence (29 November 1991). He conceded that the Court could dispense with that time limit provided it was satisfied, as required by s165, that "the appellant has done whatever is reasonably practicable to comply with [the Justices] Act."

The appellant initially considered that he did not have to apply for dispensation under s165. I eventually

ascertained that he held a firm and assured view of the law in this regard, untrammelled by any consideration of the actual provisions of the Justices Act. I am satisfied that he wrongly but genuinely believed that the sentence imposed on 29 November was of no effect at all unless and until the conviction of 26 November had been "approved", as he put it, by this Court. As I say, that belief is quite wrong; see r83.09. The appellant adhered firmly to that belief despite my attempt to explain matters to him. On his view of the law he had one month from the time this Court "approved" the conviction on 16 April, within which to lodge his appeal against sentence. He believed therefore that he was within time when he lodged his appeal on 1 May and therefore he did not have to apply for dispensation under s165 of the Justices Act.

However, the appellant eventually applied under s165 to dispense with the requirements of s171(2). Mr Adams opposed this application. He took me through the somewhat tortuous history of the proceedings arising out of the offence of 16 December 1989. He stated that at no time prior to or during the hearing of his appeal against conviction on 16 April 1992 had the appellant sought to appeal against the sentence of 29 November. Mr Adams submitted that the Notice of Appeal of 5 June 1992 had been lodged some 159 days late, and the appellant had not shown

that he had "done whatever is reasonably practicable to comply" with the time limit of one month fixed by s171(2), and accordingly that condition precedent to appeal which had not been met should not be dispensed with. I ruled that on 3 June 1992 his Honour had not dismissed the appeal instituted by the Notice of Appeal of 1 May 1992, and it was the appeal instituted by that document which should now be dealt with. Mr Adams submitted that the appeal instituted by the Notice of Appeal of 1 May had been instituted some 124 days too late, and, for the same reasons he had advanced in relation to the Notice of Appeal of 5 June, the time limit of one month imposed by s171(2) should not be dispensed with. Mr Adams acknowledged that authorities such as *FCT v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8 showed that in an appropriate case a failure to comply with s171(2) could be remedied by an order under s165; see per Asche J (as he then was) at pp13-19. However, Mr Adams contended that in this case, since the appellant had failed to show that he had done what was "reasonably practicable", the use of the dispensing power under s165 was not open.

The appellant should have appealed against both conviction and sentence, when his appeal against conviction was heard on 16 April. He had, after all, formally lodged his Notice of Appeal against conviction on 29 November 1991 after he had been convicted and sentenced; see the copy of

the Notice of Appeal annexed. There is clearly a great deal of weight in what Mr Adams put to me, that it is not open to use the dispensing power under s165 in the present case. On any view of the matter the appellant can hardly be said to have done what was "reasonably practicable" to comply with the time limit fixed by s171(2) of the Act; indeed, it seems obvious that in his mistaken understanding of the law, he believed that time did not commence to run from 29 November, and so he took no steps until after 16 April. However, as I understood it on 8 July, the appellant had never had the benefit of legal advice at any time in these proceedings. I bore in mind his genuine if misguided belief that he was proceeding in the correct manner, in bifurcating his appeal as between conviction and sentence. Considerations of solicitude and mercy towards an unassisted wanderer in the thickets of the law coupled with a desire to prevent what would otherwise certainly become a festering of a wholly groundless sense of grievance on the appellant's part, prompted me to hold on 8 July, though with great hesitation, that the time limit set by s171(2) of the Act should be dispensed with in this case, so as to enable the hearing of the appeal on the merits to proceed.

On the substance of his appeal the appellant made the following submissions. The sentence was "irrelevant", and "did not correspond with the accident", the learned

Magistrate "not being in an appropriate position" to extend clemency. The appellant would have to pay for the damage to the utility he had "wrecked", "with my own blood, sweat and tears - - because I have no money". No-one else had been involved in the "incident" of 16 December 1989, which was not an "accident". Losing his licence for 4 years had effectively stopped him "from helping the general public, in working in my main trade". He submitted that the appropriate sentence, in lieu of what the Magistrate had imposed, was that he be put on a good behaviour bond "or something similar", during or after which he should be allowed to work again.

The appellant asked "as an innocent man who has been convicted wrongly", that his sentence should be suspended for the 4 year period for which his licence had been suspended. Alternatively the sentence should be quashed so that he "could go back to work tomorrow". He informed me that he was of good character and had lived in the Territory for 25 years. He submitted that the learned Magistrate had not taken all the facts into consideration. He summed up his plea succinctly: "let me off the hook". He said he could "not understand why I should be here - - an innocent man".

He informed me that he had references from "one of the biggest truck owners there is in Darwin", and a personal reference from him "that I could work for him any tick of the clock".

Mr Adams then informed me that the appellant had been represented by counsel before the learned Magistrate on 29 November 1991, in relation to sentence. He said that the appellant's record of prior convictions had been placed before the learned Magistrate at the time. Mr Adams then sought to tender what he described as a list of those prior convictions, and also details of convictions for offences committed by the appellant after 16 December 1989, the latter solely to dispel any suggestion that the appellant had been of good character since 16 December 1989. The appellant however informed me that the convictions set out in the paper were "definitely not correct". Accordingly, I did not accept the tender of the document and adjourned the hearing in order that the respondent could seek to prove any convictions on which he relied, in the proper way, and the appellant could produce the references on which he relied.

The hearing continued on 21 July. Mr Adams called two witnesses and tendered certificates of conviction, relying on s32 of the Evidence Act as proof of the convictions therein recorded. This process took

considerable time. I am satisfied that the appellant had indeed been convicted of the six prior offences between 1978 and 1986 to which the learned Magistrate had referred when sentencing him on 29 November 1991. Those convictions are as follows:-

1. Convicted on 31 August 1978 for driving a motor vehicle on 8 March 1978 while having a blood alcohol reading in excess of .08; fined $150 and disqualified from holding a licence for 8 months.

2.(a) Convicted on 3 January 1979 for driving a motor vehicle on 23 December 1978 while disqualified. Sentenced to 4 months imprisonment but released after serving 28 days upon entering into a bond in sum of $500 to be of good behaviour for 12 months; disqualified from holding a licence for 18 months.

(b) Arising out of the same incident, convicted for driving with a blood alcohol reading in excess of .08, namely .260; fined $400.

3. Convicted on 5 November 1982 for driving a vehicle on 24 August 1982 with a blood alcohol reading in excess of .08, namely .290; fined $350

and disqualified from holding a licence for 12 months.

4. Convicted on 8 November 1982 for driving a vehicle on 24 August 1982 with a blood alcohol reading in excess of .08 percent, namely .300; fined $500 and disqualified from holding a licence for 2 years.

5. Convicted on 10 November 1982 for driving a vehicle on 25 August 1982 with a blood alcohol reading in excess of .08, namely .240; fined $700 and disqualified from holding a licence for 2½ years.

I also received from the appellant and read a reference from the company which has employed the appellant from time to time "over the last fifteen years."

When sentencing the appellant on 29 November 1991 the learned Magistrate said:-

> "I have no doubt in my mind that this present matter before the court warrants a term of imprisonment. - - What I have to turn my mind to is whether or not I suspend that term of imprisonment and, if I do suspend it, upon what terms and conditions.

> I have called for a home detention assessment report which indicates that you are suitable for this disposition and indeed I have also before me your consent, your signed consent, to enter into a home detention order. Furthermore, the form of consent indicates that you fully understand the consequences of not complying with the terms of the home detention order.
>
> In short, the effect of a home detention order is that a breach thereof renders you liable to serve the term of imprisonment which has been suspended. In particular you will be subject to surveillance during the currency of the home detention order and you will be directed in a reasonable fashion as to things that you may be required to do by the surveillance officer in charge of the case.
>
> Significantly, you are not to consume alcohol during the currency of the order. That is a primary directive. Accordingly, I confirm the conviction that I recorded on the last occasion and you are sentenced to 3 months imprisonment with hard labour which I suspend upon your entering into a home detention order for a period of 3 months. You are to reside and remain during the currency of the order at unit 3, 6107 Tabletop Place, Malak.
>
> It is a condition of the order that you report immediately to the Correctional Services officer on the third floor of this building. That does not end the matter because I have to turn my mind to what is the appropriate period of disqualification. Having regard to the record that is before me which comprises a number of certificates of conviction, and in addition a further matter in '86 which you acknowledge and agree with, I am of the view that a proper period of disqualification would be a period of 4 years."

The nature of the appeal against the severity of the sentence imposed by the learned Magistrate is as set out in *Sultan v Svikart* (1989) 96 FLR 457. To succeed, the

appellant must show that his Worship's sentencing discretion miscarried; the appeal is not a hearing de novo.

Against this background I consider that the appeal against the severity of the sentence imposed on 29 November 1991 lacks any merit whatsoever. That sentence was well within the proper exercise of the learned Magistrate's sentencing discretion and, with respect, was merited in every respect. There was no overt error in the sentencing process, nor was the sentence manifestly excessive. As the learned Magistrate rightly said on 29 November, the appellant's prior record shows that he is a menace as a motorist on the road.

The appeal is dismissed and the sentence of 29 November 1991 is affirmed; the case is remitted to the Court of Summary Jurisdiction for execution of that sentence.

I direct that the original fingerprint exhibits received into evidence on 21 July be handed back to Mr Adams.

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