BAIRD v R

Court of Criminal Appeal of the Northern Territory of Australia

Gallop, Nader and Angel JJ

21 November 1990 and 9 May 1991 at Darwin

CRIMINAL LAW - Breach of recognizance - error in endorsement - backdating - Criminal Law (Conditional Release of Offenders) Act - s.6(3), Criminal Code (NT) s.405

SENTENCE - Breach of recognizance - whether court has power to sentence for breach of recognizance - Criminal Law (Conditional Release of Offenders) Act s.6(3)

SENTENCE - Appellant claimed manifestly excessive - discretionary factors to be considered - Criminal Law (Conditional Release of Offenders Act) s.6(3)

Cases considered:

Bowditch v Telfer (1980) 3 N.T.R. 9
Devine v R (1967) 119 C.L.R. 506
Higgins v Goldfinch (1981) 26 S.A.S.R. 364
Marshall v McFarland [1989] 1 N.T.J. 658
R v Roper (Unreported, Martin J 10/8/90)
Rijnbeek v Daire (1982) 31 S.A.S.R. 146
Rix v Murray (1984) S.A.S.R. 517
Ross v Seears (1988) 54 N.T.R. 26

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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 12 of 1990

BETWEEN:

KYLE GLEN BAIRD
Appellant

AND

THE QUEEN
Respondent

CORAM: GALLOP, NADER AND ANGEL JJ

REASONS FOR JUDGMENT
(Delivered 9th day of May 1991)

GALLOP, NADER AND ANGEL JJ: On 1 May 1990 the applicant, Kyle Glen Baird, was convicted, on his pleas of guilty entered on 23 April 1990, of possessing cannabis for the purpose of supply to another person (section 66(2)(c) of the Poisons and Dangerous Drugs Act) and of supplying cannabis to another person (section 66(2)(b) of the same Act). On the same date the applicant was sentenced to 12 months imprisonment on each count concurrently. The learned sentencing judge effectively made an order under section 5(1)(b) of the Criminal Law (Conditional Release

of Offenders) Act (the Act), directing that the applicant be released forthwith upon his giving security by recognizance to be of good behaviour for two years. The recognizance was subject to other specified conditions.

On 24 June 1990, the applicant was apprehended by police driving his motor vehicle with a blood alcohol concentration of 0.210 in respect of which, on 31 July 1990, he was convicted and fined $800 and disqualified from holding a driving licence for 22 months. He was also convicted of a lesser traffic offence. As a consequence of these convictions, on 16 August 1990, the applicant again came before his Honour having been committed to the Supreme Court by a magistrate under section 6(2A) of the Act to be dealt with by that court. Mr Rowntree for the Crown reminded his Honour of the history of the matter but added that the sentences were "deemed to have commenced on 23 April." That was not so. His Honour had made no order giving retroactive effect to the sentences. That is quite clear from the transcript and from his Honour's own recollection. (See, below, section 405 of the Criminal Code for the power to give a sentence of imprisonment retroactive effect.)

The misapprehension arose from an error in the indorsement of the indictment. The indorsement wrongly included the phrase: "Sentences deemed to have commenced

from 23.4.90". This error was carried into a recital of the recognizance. When the applicant came before his Honour on 16 August 1990 he had not served any part of either sentence. His Honour was alerted to the error and pointed it out to Mr Rowntree. His Honour asked: "Having been officially recorded, having been passed and entered, am I in a position to make any change to it?" After some discussion of the question with counsel, his Honour initially said that he would be in breach of section 6(3)(e) of the Act if he were to commit the applicant to prison for one year. Section 6(3)(e) provides:

> "Where a person appears before a court in answer to a summons under subsection (1A)(d) or on committal under subsection (2A), the court if it is satisfied that -
>
> ...
>
> (e) in a case where the person having been sentenced, was released forthwith or after he had served a specified part of the sentence imposed on him - commit the person to prison to undergo imprisonment for such a term, being a term not exceeding the sentence or the balance of that sentence, as the case may be, or make any order (including an order under section 5(1) which the court would, if he had then and there been sentenced for the offence of which he was originally charged, be empowered to make."

With this provision in mind, and in the light of the indorsement on the indictment, his Honour concluded: "So if I now sentenced him to one year from today, that would be exceeding the original sentence." Mr Rowntree

encouraged his Honour in this approach, saying that it seemed that he was bound by the terms recorded "especially on the recognizance" and that therefore if he were to commit to prison the sentence would have to be deemed to be from 23 April, otherwise he would be going outside subsection (3)(e). His Honour later modified his initial firm opinion, but he thought that because the applicant would have been misled into thinking his sentence had commenced on 23 April by the terms of the recognizance instrument, it would be unfair to treat him as if he had not served any of the sentence. So, as a matter of fairness, if not of strict law, the learned judge decided to treat the sentence as having been passed with retroactive effect. He added: "I do not wish however this to be taken as any precedent that there is no way in which a sentence of this nature can be corrected to recite what was actually sentenced but I think in the circumstances here by keeping within what is stated to be the original sentence (even though they are in error)." Neither Mr Rowntree, nor Mr Carter for the applicant, took issue with this practical approach. The applicant has no cause for complaint on this score because, as will be seen, he was favoured with the full effect of the erroneous indorsement and recital.

After stating his reasons for requiring the applicant to serve the whole of the sentence originally imposed

his Honour said: "I sentence the accused to imprisonment for one year, such sentence deemed to commence on 23 April 1990, and I fix a non-parole period of 6 months."

The relevant dates and events are summarised for easier understanding:

Between 30 April 1989 and 28 September 1989	Offences committed.
23 April 1990	Pleaded guilty.
1 May 1990	Convicted and sentenced to 12 months on each count, concurrent. Sentences conditionally suspended. Indictment erroneously indorsed. Error carried into recog.
24 June 1990	Drove with excess alcohol in blood and other traffic offence.
31 July 1990	Convicted of last-mentioned offences; fined, disqualified from holding licence; committed by magistrate to Supreme Court for breach of recog. of 1 May 1990.
16 August 1990	Sentenced to imprisonment for one year, 6 months non-parole period specified. Sentence to be deemed to have commenced on 23 April 1990.

By backdating the commencement of his sentence of 16 August 1990 to 23 April 1990, his Honour effectively

credited the accused with having served a term commencing on 23 April 1990 and expiring on 16 August 1990 - on our reckoning, about 3 months and 25 days - a term which had not in fact been served. His Honour's order had the same practical effect as if he had committed the applicant to prison for a term of 8 months and 6 days, without making any order under section 405(2) of the Criminal Code for backdating. It seems that the fact of the error in the recognizance induced his Honour to exercise prudence and to do justice at the same time as honouring the erroneous recital. His Honour said:

> "Well, I have discussed with counsel for the Crown the error which seems to have crept into the original sentence which backdated a suspended sentence to 23 April which seems to me a contradiction in terms, but I feel that since it was so recorded, it would be unfair to the accused to impose a sentence which commences from today when he would have had the expectation upon reading his recognizance that the sentence dated from 23 April 1990."

This passage explains why his Honour made the order under section 405(2) of the Criminal Code.

In these circumstances, we would ask first, whether an effective sentence of 8 months and 6 days (with an effective non-parole period of 2 months and 6 days) is one that ought to be quashed under section 411(4) of the Criminal Code.

Section 411(4) of the Criminal Code is in the following terms:

> "(4) On an appeal against a sentence the Court, if it is of the opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor and in any other case shall dismiss the appeal."

The form of his Honour's order made on 16 August 1990 may have been incorrect having regard to the terms of section 6(3)(e) of the Act. If one looks at the logic of the general situation, one sees that it is possible to sentence a person to a term of imprisonment but to direct that he be released either forthwith or after serving a specified part of the sentence: Section 5(1)(b) of the Act. Even before going further into the Act one would expect to find identified in it circumstances in which a person, having been so released, may be required to serve all or a part of the unserved portion of the sentence. Otherwise, one may ask, why sentence the person in the first place? And, pursuing that logic a step further, in the circumstances referred to, one would not expect to find it necessary to sentence the person to a term of imprisonment again, he having already been sentenced. Therefore, it would be surprising if one were to find a

provision of the Act requiring a person so dealt with to be sentenced again for the same offence. In fact, as we would construe the Act, there is no such provision. Section 6 provides, inter alia, that the Supreme Court, if satisfied that the person has been convicted of an offence committed during the period of good behaviour, may "commit the person to undergo imprisonment ...". We suggest that section 6 accords with the expected logic: the person is not "sentenced to a term of imprisonment" but "committed to undergo imprisonment". It is significant also that a person is not "convicted" of failing to be of good behaviour, but rather the court must be "satisfied" that the person has been convicted of an offence committed during the specified period. Under s.6(3)(c) of the Act the sanction for breach of recognizance arises upon conviction. Where there is a conviction, questions as to whether the conduct giving rise to the conviction also constitutes a breach of the good behaviour condition in the recognizance for the purposes of s.6(3)(a), do not arise, cf Devine v The Queen (1967) 119 C.L.R. 506; Higgins v Goldfinch (1981) 26 S.A.S.R. 364; Rijnbeek v Daire (1982) 31 S.A.S.R. 146; Rix v Murray (1984) 34 S.A.S.R. 517; although the circumstances giving rise to the conviction will be relevant to what order or orders should be made in respect of the breach of recognizance. We do not think the phrase in section 6(3)(e), "or make any order (including an order under

section 5(1)) which the court would, if he had then and there been sentenced for the offence of which he was originally charged, be empowered to make.", extends to empowering the court to sentencing the person to a term of imprisonment. We do not think the orders there envisaged include orders imposing penalties. In our opinion, the phrase is restricted in its scope by the earlier part of paragraph (e) providing for committal to prison for a restricted term. It is likely, therefore, that the expression "any order" is intended to comprehend other kinds of orders. If the expression "any order" includes "any sentence of imprisonment" that the court was originally empowered to impose, the restriction on the term for which the person may be committed to prison under the earlier part of the paragraph can be readily circumvented. What is more, we have difficulty in imagining a case where there would be any reason to impose a fresh sentence in preference to committing the person to prison by virtue of the original sentence and as expressly empowered by section 6 of the Act. This construction of paragraph (e) is supported by the terms of the preceding paragraph, paragraph (d), which applies in cases where the person had been released without sentence having been passed. Paragraph (d) enables the court to impose on the person any penalty which the court would, if the person had then and there been convicted of the offence with which he was originally charged, be empowered to impose or

make any order (including an order under section 5(1)) which the court would, if he had then and there been convicted of the offence of which he was originally charged, be empowered to make. Paragraph (d) distinguishes between the imposition of a penalty and the making of an order. We think that the distinction is intended to be observed when considering the meaning of the phrase "make any order" in paragraph (e) also. If we are correct as to the effect of paragraph (e), the court is not empowered to sentence a person to a term of imprisonment under section 6, and if imprisonment is the appropriate consequence of the breach, the court must bring it about by committing the person to prison in execution of the sentence previously passed. By an order for committal to prison, the hitherto executory part of the original sentence is wholly or partly executed.

It will be noted that here the learned sentencing judge, in terms, purported to sentence the accused to imprisonment for one year. For the reasons given, we do not think he had power to do so, but he had the power to commit to prison.

Pursuing this line even further, the question arises whether the order for committal to prison under section 6(3)(e), can by order of the judge be regarded as having commenced at a date earlier than the date of the

order for committal to prison. That is what the learned sentencing judge purported to do in this case in sentencing the appellant. A power to order that imprisonment be regarded as having commenced at a time before the day on which the court passes sentence is contained in section 405 of the Criminal Code. There is no other power to a similar effect of which we are aware. Section 405(2) provides:

> "(2) Where the offender has been in custody on account of his arrest for an offence and he is then convicted of that offence and sentenced to imprisonment it may be ordered that such imprisonment shall be regarded as having commenced on the day on which he was arrested or on any other day between that day and the day on which the court passes sentence."

It is reasonable to assume that on 1 May 1990, at the time of originally sentencing the applicant (and therefore on 16 August 1990 also), the applicant had been in custody on account of his arrest for the offences to which he pleaded guilty: so that the first condition was doubtless fulfilled. The section does not give any significance to the duration of the custody, and even prompt release on bail would not matter. There is no express requirement that the offender has been continuously in custody until the date of conviction. On 1 May 1990, the applicant was convicted of the offences for which he had been arrested. Those convictions satisfied the next

condition of the sub-section. The next condition was satisfied by his Honour "sentencing" the applicant to imprisonment. The fulfillment of those conditions empowered his Honour to order that such imprisonment be regarded as having commenced on the day of his arrest or on any other day between that day and the day on which sentence was passed, namely, 1 May 1990. The 23 April 1990 was a day that fell between those limits. His Honour could validly have ordered on 16 August 1990 that the applicant be committed to prison and that such imprisonment be regarded as having commenced on 23 April 1990. Strictly speaking, there was no power to order that the sentence, as distinct from the imprisonment, be so regarded.

Because the construction of section 6(3)(e) was not argued, and because there are cases which, it appears, have proceeded on an assumption contrary to our views, [see Ross v Seears (1988) 54 N.T.R. 26; Marshall v McFarland [1989] 1 N.T.J. 658; R v Roper (unreported, Martin J 10 August 1990) and cf Bowditch v Telfer (1980) 3 N.T.R. 9 at 19 per Toohey J], we refrain from expressing a final opinion. More importantly, even if we are correct in our tentative opinion, there is no proper foundation on which to allow the appeal on that ground alone. The irregularity of form of his Honour's orders, if it be such, is not significant in our opinion. We would simply regard them as a somewhat informal formulation of orders that his Honour

did have power to make, namely, to commit the applicant to prison for 12 months, to specify a non-parole period of 6 months and to order that such imprisonment be regarded as having commenced on 23 April 1990.

We turn now to the substantive issues raised by the application. First, the applicant relies on the ground that the sentence was manifestly excessive. As we pointed out above, the effective sentence to be served was not one year but a little over 8 months. The options open to a judge in the circumstances are specified by section 6(3)(e) of the Act: see above. They range from the committal of the person to prison for the full term of the sentence (or the unserved balance of the sentence) at the severe end of the range, to taking no action at the other.
Section 6(3)(e) itself does not supply the criteria for deciding the matter, nor does any other provision of the Act, but one would expect that some of the kinds of things to be taken into account are fairly obvious. The Parliament having conferred a wide discretion, we do not think the courts ought effectively to restrict it. Like the art of sentencing itself, making orders under section 6(3) involves the exercise of a wide discretion in a potentially infinite variety of circumstances.
Consistent with the unfettered nature of the discretion under section 6(3)(e), some general, and therefore not very helpful propositions are possible. It is axiomatic that

the order should be a just one. A warning given by the judge imposing the original sentence as to the consequences of a breach may be relevant. The nature of the terms of the recognizance are relevant. The nature and gravity of the breach is a relevant factor. Whether the breach evinces an intention to disregard the obligation to be of good behaviour or to abandon any such intention would normally be relevant. For instance it would be an aggravating factor if the breach amounted to the commission of another offence of the same nature as that which gave rise to the recognizance. The length of time during which the offender observed the conditions of the recognizance may be relevant. The moral pressures upon the offender to commit the breach may count. The possibilities are as potentially numerous as the factors that effect the ordinary sentencing process itself. But the materiality of any factor is determined by fairness and common sense. In this case it is discernible that the sentencing judge was only just persuaded that the applicant should have been released without serving his sentence in the first place. He warned the applicant in no uncertain terms of what would be the consequence of breaking the law: "if he breaks the law in the period of the bond he will almost certainly have to serve the amount of imprisonment for which he was sentenced, so it is by no means a lenient sentence. It is giving him an appropriate chance, but <u>if he does not take that chance he will serve the sentence which I will now</u>

impose." (Our emphasis.) In fact, although formally requiring the applicant to serve one year in prison, as has been shown, the effective sentence was considerably less. There is nothing to our minds manifestly excessive about the actual term of imprisonment that his Honour ordered the applicant to serve.

Another ground of appeal is that the learned sentencing judge did not consider alternative sentencing options. It cannot be said that, because his Honour did not expressly allude to options other than imprisonment, he did not turn his mind to them. On the contrary, he was aware of the terms of section 6(3)(e) of the Act, having referred to it in discussion with counsel on 16 August. It is manifest from many of his Honour's remarks that in his judgment nothing less than imprisonment was appropriate. Indeed, he expressed the view that nothing less than the whole of the sentence would be adequate. In our opinion, there is no substance in the submission that other options were not considered: the occasion for dwelling upon them did not arise. His Honour clearly considered that, looked at against the background of the applicant having so recently been given the benefit of a suspended sentence and having been warned that a breach would lead to the imposition of the whole of the suspended sentence, the breach offence was a serious enough repudiation of the applicant's undertaking to be of good behaviour to warrant his commitment to prison

for the original drug offences. We would not be prepared to say that commitment to prison was not an appropriate order for the learned sentencing judge to have made.

In all the circumstances of this matter, and particularly having regard to the limited matters argued before us and the practical working of his Honour's orders, we consider there has been no miscarriage of justice.

We grant leave to appeal and dismiss the appeal.