Szymanski v Andrew [2005] NTSC 32

PARTIES:	SZYMANSKI, Dorian Edward
	v
	ANDREW, Elizabeth
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 23 of 2005 (20508272, 2032449)
DELIVERED:	17 June 2005
HEARING DATES:	15 June 2005
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	E. Sinoch
Respondent:	M. Fay

Solicitors:

Appellant:	Salmon & Sinoch
Respondent:	Office of the 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

Szymanski v Andrew [2005] NTSC 32
No JA 23 of 2005 (20508272, 2032449)

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:

SZYMANSKI, Dorian Edward
Appellant

AND:

ANDREW, Elizabeth
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 17 June 2005)

[1] On 20 May 2005 the appellant pleaded guilty to a charge of possessing liquor in a restricted area, namely the Kintore Restricted Area, contrary to s 75(1)(b) of the Liquor Act. The maximum penalty for the offence was a fine of $1000 or imprisonment for six months. The appellant was sentenced to imprisonment for a period of three months. It was ordered that the sentence be fully suspended. By virtue of that conviction and sentence the

appellant breached the terms of an earlier suspended sentence for driving a motor vehicle whilst disqualified. On the earlier occasion he had been sentenced to imprisonment for two months with that sentence fully suspended pursuant to the terms of s 40 of the Sentencing Act. A period of 14 months commencing 22 March 2004 was specified as the period during which he was not to commit another offence punishable by imprisonment if he was to avoid being dealt with under s 43 of the Act. His Worship determined to restore 14 days of the suspended sentence. The total effective sentence was therefore imprisonment for three months and 14 days, which was ordered to be suspended after he had served 14 days. An operational period of two years commencing 20 May 2005 was ordered.

[2] The appellant has appealed against that sentence on two grounds. The first ground is that, in restoring the sentence to the extent of 14 days, the learned magistrate imposed a penalty that was manifestly excessive in the circumstances and tainted by error in that the learned magistrate failed in the exercise of his discretion to accord sufficient weight to the rehabilitative aspect of sentencing generally and in particular with regard to the appellant.

[3] The submissions made on behalf of the appellant were of a kind made during the course of an appeal based upon a ground that a sentence is manifestly excessive. There was no mention made of the legislative regime in which the initial sentence was imposed and the breach occurred. In particular there was no reference in the written submissions to the provisions of s 43(7) of the Sentencing Act which provides that a court shall make an order restoring

the sentence or part-sentence held in suspense and order the offender to serve it "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 and, if it is of that opinion, the court shall state its reasons". The appropriate ground of appeal would seem to have been that his Worship erred in the exercise of his discretion pursuant to s 43(7) of the Sentencing Act.

[4] The application of s 43(7) of the Sentencing Act was discussed in *Wilson v Taylor* (1997) 113 NTR 1. In that case Kearney J made various observations regarding the application of the section. He noted that it is not necessary to show any relationship between the offence which led to the initial sentence and the matter then before the court. His Honour observed that the nature of the further offending is relevant because, as the section notes, "the facts of any subsequent offence" is one of the circumstances which must be taken into account when deciding whether it would be "unjust" to restore the initial sentence. Kearney J then said (7):

> "The fact that the further offence is different in its nature to the initial offence is not sufficient in itself to justify not restoring the sentence; such justification may exist, if the further offending is both of a different character from the initial offence, and relatively trivial, particularly where there is an appearance of gross disparity between the suspended sentence and the further offence … . In general, a magistrate considering the application of s 43(7) should address inter alia the following questions: whether the further offence warrants a custodial sentence in its own right …; whether it is sufficiently trivial to justify non-restoration of the suspended sentence …; and whether, if restored, the aggregate term which results would be excessive."

[5] Some of the factors relevant to a consideration of whether to restore the initial sentence include: the nature of the terms of the recognizance or order; the nature and gravity of the breach; whether the breach evinces an intention to disregard the obligation to be of good behaviour; the commission of another offence of the same or a similar nature; the length of time elapsing between the making of the order and the subsequent offending; and the moral pressures upon the offender to commit the breach: *Baird v R* (1991) 104 FLR 113; *Wilson v Taylor* at 8.

[6] In *Wilson v Taylor* (supra) Kearney J agreed with the observations of Perry J in *Lawrie v R* (1992) 59 SASR 400 where his Honour said:

> "To excuse or vary the consequences of the breach of bond, the grant of which resulted in the suspension of a term of imprisonment, has a tendency to undermine the integrity of the sentencing process generally. It follows that the power to do so should be exercised sparingly, and only in cases where proper grounds have clearly been made out or where genuinely special circumstances exist."

[7] In determining the approach to be adopted in the present matter the learned sentencing magistrate noted that the courts have a responsibility to ensure that orders of suspended sentences are complied with and breaches of them "are viewed as very serious". He went on to say:

> "After taking into account all the material that has been placed before me, I am of the view that part of that sentence should be restored. In taking into account the length of time which you have complied with that suspended sentence, I am going to restore a very short part of it but I am of the view that the further offending was of a serious nature during the period of good behaviour and in all of the circumstances, part of the suspended sentence should be restored."

[8] In the course of his submissions, counsel for the appellant acknowledged that the learned magistrate addressed all material factors in his sentencing remarks. A review of those remarks confirms that to be so. In my view his Worship addressed the appropriate matters relevant to the exercise of his discretion and error on his part has not been shown.

[9] The second ground of appeal was that the sentence imposed in relation to the offence under the Liquor Act was manifestly excessive.

[10] The principles that apply to an appeal against sentence are well understood and have been addressed in many decisions of the Supreme Court of the Northern Territory. It is not necessary to refer to those principles in detail. The court will only interfere if it be shown that the sentencing magistrate was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing magistrate said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error: *R v Tait & Bartley* (1979) 24 ALR 473. In order to establish the existence of an unidentified error the appellant must show that the sentence was not just arguably excessive or inadequate but so very obviously excessive or inadequate that it was unreasonable or plainly unjust: *Raggett, Douglas & Miller* (1990) 50 A Crim R 41. The sentence must be so disproportionate to the sentence which the circumstances required as to indicate an error in principle: *R v Anzac* (1987) 50 NTR 6 at 12.

[11] In this matter the circumstances of the offending were that the appellant was the storekeeper at Kintore, which is a restricted area for the purposes of the Liquor Act. Submissions were made to the effect that the position of storekeeper in a community such as this is a very responsible and important undertaking. In March 2005 the appellant travelled into Alice Springs where he purchased a 750 millilitre bottle of Scotch whisky and a can of Coopers Lager Home Brew. He carried that alcohol into Kintore aboard his flight with Ngurratjuta Air Charter. He secreted it in his luggage. Upon arrival he stored the alcohol in his residence. On 4 April 2005 he took the tin of home brew and mixed it with 15 litres of water to produce liquor known as Coopers Lager Home Brew, the alcoholic content of which was said to be greater than 1.5 per cent at the time. With further time it would have reached an alcoholic content of about 3.25 per cent. On 8 April 2005 the appellant consumed a quantity of whisky and then attended at the Kintore Store. His conduct in the store was such that it attracted the attention of the police who subsequently searched his premises and found the alcohol. When interviewed by police he admitted that he had consumed alcohol prior to going to work on that occasion and that he had carried the alcohol into the restricted area in the manner described. It was submitted on his behalf that he had an alcohol problem and that he was under a substantial amount of pressure in the course of his employment and resorted to alcohol "to calm down".

[12] In his sentencing remarks the learned magistrate referred to the experience the appellant had obtained in working and living in Aboriginal communities. He noted the appellant was well aware of the reasons why restricted areas are created under the Liquor Act. His Worship acknowledged the responsible and stressful employment of the appellant and referred to the creditable work he did in managing the store on behalf of the community. His Worship made particular reference to the problem the appellant experienced with alcohol and his dependency upon it. His Worship was aware that the appellant was now seeking help for his dependency upon alcohol. He noted the references from people in the community and was aware that the appellant's employment had been retained notwithstanding this offending. His Worship then said:

> "So, as a matter of general proposition you are a person highly regarded in your employment. You're obviously trustworthy, reliable and one who is very dependable. And I suppose in the light of your condition, it can be understood that when placed under pressure you need to rely on the use of alcohol to cope with that. On the evidence that has been placed before me there is nothing to indicate that you had the alcohol in your possession other than for your own use and that you keep it secreted in your premises in Kintore without knowledge of any other members of that community. And you only came under notice, obviously after becoming intoxicated and no doubt mixed up too with the pressure that you were under, you came under the notice of the police officers for your behaviour and clearly one thing has led to another."

[13] His Worship recorded that counsel appearing on behalf of the appellant "properly conceded that offences of the nature for which you have pleaded guilty require a very strong element of both general and specific deterrence. And he has conceded that it is within the range of sentencing options for the

court to impose upon you a sentence of imprisonment". His Worship then stated that he was of the view that a sentence of imprisonment was appropriate. On this appeal the appellant does not contend otherwise than that a sentence of imprisonment was within the range of sentencing options available for the court. The complaint of the appellant is that the sentence should not be for the period of three months.

[14] In appeals of this kind the courts in the Northern Territory have, over many years, observed that where it is contended that a punishment manifestly exceeds the tariff it is desirable that sufficient factual information be submitted to the appellate court to enable it to determine what the tariff is. What is required is information which discloses adequate details of offences and penalties imposed so that the Court can see what the normal range of sentences for a particular offence is. Obviously where there is a normal range of sentences for a particular offence, sentences imposed by different magistrates should fall within that range unless the circumstances of the offence or of the offender are exceptional or require otherwise: *Clair v Brough* (1985) 37 NTR 11. See also *Mason v Pryce* (1988) 53 NTR 1. It was not suggested in the course of this case that the offences with which we were dealing were not capable of providing a tariff as occurs in some circumstances, eg manslaughter. No such body of cases was provided or referred to and the Court was denied the assistance that would have been provided thereby.

[15] Notwithstanding the submission of the appellant to the contrary, this was a serious offence. It involved a deliberate taking of a significant quantity of alcohol into the restricted area by the appellant. At the time the appellant was the subject of a suspended sentence for an alcohol related matter and was well aware that he was committing a further offence by importing the alcohol. He acted in deliberate defiance of the law in circumstances where, because of his history and his position in the community, he should have known better. He was under no pressure from anyone other than himself to offend in this way. Whilst his offending was not of the most serious kind and was not accompanied by aggravating circumstances such as providing the alcohol to others or undertaking a commercial exercise, this was still serious offending. The learned sentencing magistrate was particularly swayed by the amount of alcohol involved.

[16] The sentence of imprisonment was, in my view, justified. Whilst it may have been a longer sentence than I would have imposed, that is not the issue. It has not been demonstrated that the sentence is outside the range of sentences available to his Worship. The appeal must be dismissed.

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