Campbell v Allen, Dixon and Anderson [2006] NTSC 56

PARTIES:	CAMPBELL, Jerry v ALLEN, Robert James and DIXON, Garnet Alan and ANDERSON, Kylie
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 18 of 2006 (20324711) JA 19 of 2006 (20423225) JA 20 of 2006 (20517410)
DELIVERED:	19 July 2006
HEARING DATES:	18 July 2006
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

APPEAL – JUSTICES

Appeal against sentence – whether learned sentencing magistrate erred – prior offending at time of sentence treated as breach – whether proper basis in law established to warrant restoration of periods held in suspense-

Appeal against sentence – whether sentence manifestly excessive – whether sentence offends totality principle -

Appeal allowed
Appellant re sentenced

*Justices Act (NT)*s 177(2)(f)
Sentencing Act (NT) s 43(5),(6),(7)
Liquor Act (NT) s 75(1)(a)

House v The King (1936) 55 CLR 499, followed
Liddy v R [2005] NTCCA 8, followed

R v Faulkner (1972) 56 Crim App R 594, referred to

REPRESENTATION:

Counsel:

Appellant:	T Aickin
Respondent:	C Roberts

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
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

Campbell v Allen, Dixon and Anderson[2006] NTSC 56
Nos JA 18-20 of 2006 (20324711, 20423225 and 20517410)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF appeals against sentences handed down in the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

CAMPBELL, Jerry
Appellant

AND:

ALLEN, Robert James
and
DIXON, Garnet Alan
and
ANDERSON, Kylie
Respondents

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 19 July 2006)

Introduction

[1] This is an appeal against sentences imposed by a stipendiary magistrate upon the appellant on 26 May 2006, on the ground that the practical effect

of them was to constitute a penalty that was manifestly excessive in the relevant circumstances.

[2] There are three separate files before me, namely Nos. 20517410, 20324711 and 20423225. It is necessary, briefly, to recapitulate the history relating to each to found a proper understanding of the inter-relationship between them.

File No 20324711

[3] On 16 July 2004, the appellant appeared before the Kintore Court of Summary Jurisdiction. He pleaded guilty to an offence of bringing liquor into the Papunya Restricted Area, contrary to s75(1)a of the Liquor Act. Specifically, he conceded that, on 12 November 2003, he had brought no less than 16 two litre casks of port wine into that area. It was therefore a very serious offence of its type.

[4] A conviction was recorded on the plea and the appellant was sentenced to three months imprisonment. That sentence was fully suspended, with an operative period of 18 months.

File No 20423225

[5] On 28 November 2005 the appellant further appeared before the Alice Springs Court of Summary Jurisdiction. At that time he pleaded guilty to two related offences, both committed on 12 October 2004. He was convicted of the offences of driving whilst disqualified and driving with a blood alcohol concentration of 0.173%.

[6] On that occasion he was sentenced to two months imprisonment and the previously suspended sentence was restored as to one month and 14 days from 25 November 2005, thereby leaving one month and 16/17 days in suspension. The new sentence was made cumulative upon the restored period but it was suspended after service of a total period of two months to run from 25 November 2005, with an operative period of 18 months.

[7] The practical effect of that sentencing strategy was that on release from prison the appellant was subject to a period of one month and 16/17 days suspended sentence in respect of the 2003 offence, plus a further one month and 14 days suspended sentence in respect of the 2004 offences (ie a total period of three months), with an operative period of 18 months running from 25 July 2005. During that period he was subject to supervision by Community Corrections.

File No. 20517410

[8] On this file the appellant was charged with a further offence of bringing liquor into the Papunya Restricted Area on 21 July 2005. On the morning of that day the appellant was a passenger in a Ford Falcon station wagon travelling from Alice Springs to Mount Liebig. Police observed the vehicle stationary on the Kintore Road within the restricted area. The appellant exhibited overt signs of intoxication. A five litre moselle cask was seen on the front passenger seat floor space. It was conceded that the appellant was the owner of the liquor.

[9] For some reason that has never been explained, a formal complaint was not taken in respect of this offence until well after the event. The complaint itself originally bore the date 28 July 2005, but this appears subsequently to have been altered on the document to 9 August 2005. Even then it was not brought before the Alice Springs Court of Summary Jurisdiction until 26 May 2006. Quite clearly, it ought to have been dealt with along with the other proceedings on 28 November 2005.

[10] Be that as it may, the appellant was, on 26 May 2006, convicted of the further offence on his plea of guilty. He was ordered to serve a term of 10 days imprisonment in respect of it, to run from 25 May 2006.

[11] On the occasion of the last-mentioned plea, the appellant was found by the learned magistrate to be in breach of the earlier suspended sentences, both by reason of his fresh conviction and also a failure to remain under the supervision of Community Corrections.

[12] As to the latter aspect, it appeared that he had gone to Mount Liebig because his grandmother lived there and was ill. He had omitted to inform Community Corrections that he was going there and they lost contact with him. Letters sent by them to him at Kintore were not received and, thus, not responded to.

[13] Having regard to the breaches, the learned magistrate dealing with the matters on 26 May 2006 said that he proposed to restore both outstanding suspended sentences, but ordered that each of them and the new sentence all

be served concurrently, commencing on 25 May 2005. As I construe the relevant transcript, read literally, the practical effect of the order made was that the appellant was required to serve an actual period of one month and 16/17 days, because the learned magistrate specifically directed that the outstanding sentences on each of the three relevant files be served concurrently.

Grounds of appeal

[14] The appellant complains that, in the circumstances, it was inappropriate to restore the previous sentences in their entirety because the offending did not constitute a breach of the suspension ordered on 28 November 2005 and that the sentence of 10 days imprisonment on the final sentence was, in any event, manifestly excessive. I take counsel for the appellant in effect to contend that the learned magistrate ought to have approached the sentencing task as if all matters had been disposed of at the same time on 28 November 2005.

Relevant factual circumstances

[15] The appellant is a 27-year-old Pintubi man. He first attended school at Kintore and then progressed to Yirara where he remained until he was about 14 years of age. He can read and write English to a limited extent.

[16] Having finished school, he returned to the Kintore Community and seems to have led a fairly traditional life. He married and has a five-year-old

daughter of that relationship. The marriage ended in separation, but his wife and daughter live at Mount Liebig and he visits them there. His grandmother also lives at that community.

[17] The learned magistrate was informed that the appellant regularly works in the CDEP scheme at Kintore when resident at that community and earns about $500 per fortnight. He is a football player and an active participant in the Kintore team. His mother lives at Kintore, but his father is very ill in Alice Springs, requiring dialysis. The appellant has the need to travel there and spend time with his father.

[18] It was submitted on behalf of the appellant that he had gone to Mount Liebig for about a month because his grandmother was ill and he had overlooked telling Community Corrections what he was doing. He did not receive the warning letters written by them to him regarding his failure to remain in contact.

[19] It was said that at the time of his arrest he had come to Alice Springs from Mount Liebig both to visit his father and also purchase a pair of football boots. At some time during the day his sister had purchased the cask of moselle and given it to him. He drank some of it, including whilst in the car en route back to Mount Liebig. He had, it was said, simply omitted to get rid of the unconsumed portion of the cask before the vehicle had entered the restricted area. Counsel for the appellant submitted that the appellant was

not, in fact, normally a heavy drinker and that the offence was, in the circumstances, not a serious one of its type.

[20] A copy of the appellant's antecedent record, as tendered to the learned magistrate, is not extensive. It relates almost entirely to motor vehicle offences and extends back only to early 2004. Apart from the offences already summarised above, his convictions are few and of a minor nature.

The principles and statutory provisions applicable

[21] It is trite to say that this Court will only interfere with the exercise of a sentencing discretion on the basis adverted to by the High Court in the well-known authority of *House v The King* (1936) 55 CLR 499 at 504. It is not enough that the appellate Court considers that had it been in the position of the sentencing judicial officer it would have taken a different course.

[22] The appellant bears the clear onus of demonstrating that some error has occurred in the exercise of the sentencing discretion. As the members of the High Court said in *House*:

> "If the judge acts on upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate Court may exercise its own discretion in substitution for his if it has the materials for doing so."

[23] It was further pointed out in *House* that it may not appear how a primary judicial officer has reached the result embodied in the impugned order, but, if upon the facts it is unreasonable or plainly unjust, the appellate Court may

infer that in some way there has been a failure properly to exercise the sentencing discretion. In such a case it must be demonstrated by an appellant that the relevant sentence is clearly and obviously and not just arguably excessive (*Liddy v R* [2005] NTCCA 8 at [15]).

[24] In applying those principles it is necessary to bear in mind that the breach applications dealt with by the learned magistrate fell to be disposed of in accordance with the provisions of s 43 of the Sentencing Act. The specific portions of that section that were applicable stipulate as follows:

> "(5) Where --
>
> (a) on the hearing of an application under subsection (1) or on the hearing of its own motion under subsection (4A), a court is satisfied, by evidence on oath or by affidavit or by the admission of the offender, that, during the operational period of the suspended sentence, the offender committed another offence against the law in force in the Territory or elsewhere that is punishable by imprisonment; or
>
> (b) on the hearing of an application under subsection (2) or on the hearing of its own motion under subsection (4B), a Court is satisfied, by evidence on oath or by affidavit or by the admission of the offender, that the offender has breached a condition of the order,
>
> the court may --
>
> (c) subject to subsection (7), restore the sentence or part sentence held in suspense and order the offender to serve it;
>
> (d) restore part of the sentence or part sentence held in suspense and order the offender to serve it;
>
> (e) in the case of a wholly suspended sentence, extend the operational period to a date after the date of the order suspending the sentence;

(ea) in the case of a partially suspended sentence -- extend the operational period to a date after the date specified in the order suspending the sentence; or

(f) make no order with respect to the suspended sentence.

(6) Where a court orders an offender to serve term of imprisonment that had been held in suspense, the term shall, unless the court otherwise orders, be served --

(a) immediately; and

(b) concurrently with any other term of imprisonment previously imposed on the offender by that or any other Court.

(7) The court shall make an order under subsection (5) (c) 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".

Issues arising in relation to the appeal

[25] It is fair to say that the submissions of Ms Aickin, of counsel for the appellant, can be distilled down to the following core propositions:

(1) It cannot be said that the fresh offending under the Liquor Act was similar offending to that which was the subject of File No. 20423225 -- nor was it of a similar order to that the subject of File No. 20324711;

(2) Whilst the learned magistrate obviously appreciated that the failure to deal with the offence the subject of File No. 20517410 had operated to the disadvantage of the appellant, he appears to have failed to give due regard to the fact that such offence was committed prior to the imposition of the sentence of 28 November 2005 and, thus, was incapable of constituting a breach of the conditions of suspension imposed at that time;

(3) It follows that no proper basis in law had been established to warrant restoration of the suspensions ordered on that date by reason of the commission of the offence of 21 July 2005;

(4) The failure to maintain contact with Community Corrections, while constituting a technical breach, was not grave and was at least explicable in the circumstances. There was no evidence of that breach prior to 19 April 2006 and its nature did not warrant the condign punishment imposed;

(5) At the very least, the impugned disposition offended the totality principle. It was simply "too much", having regard to the relatively trivial offence that triggered off that disposition (cf R v Faulkner (1972) 56 Crim App R 594 at 596); and

(6) In any event, the sentence of 10 days imprisonment for the offence of 21 July 2005 was manifestly excessive having regard to –

- the fact that it could and should have been dealt with on 28 November 2005;
- the appellant's young age and modest antecedents;
- the actual circumstances of the offending itself;
- the small quantity of liquor involved;
- the positive aspects of the appellant's personal background; and
- the steps that he, himself, had taken towards his own rehabilitation.

[26] Mr Roberts, of counsel, for the respondent very fairly conceded that the appellant had plainly demonstrated error in the sentencing process. He accepted that the learned magistrate appears to have proceeded on the footing that the offence of 21 July 2005 was a breaching offence for the purposes of s43 (5) (a) of the Sentencing Act whereas it was not; and that this must have influenced his thinking.

[27] He agreed that, in the circumstances, it fell to this Court to re-sentence the appellant.

[28] However, Mr Roberts said that he could not concur in Ms Aickin's submission that the making of a Community Work Order would be an appropriate disposition of the matter. Indeed, he argued that,

notwithstanding the error that had been demonstrated, it was not unreasonable to suggest that the circumstances were such that the appeal might properly be dismissed pursuant to the provisions of s177 (2) (f) of the Justices Act, on the basis that no substantial miscarriage of justice had actually occurred.

[29] He founded that submission on two features of the relevant circumstances, namely:

(a) that, on any view, the appellant had knowingly breached a specific condition of the suspension in not maintaining the supervision of Community Corrections and advising them of his wish to travel to Mount Liebig. Whilst the breach was, perhaps, not as serious as some that come before the Court, nevertheless, it should not be treated lightly; and

(b) that, whilst the offence of 21 July 2005 was not a breaching offence, it was certainly a second offence against the Liquor Act and, had it been dealt with on 28 November 2005, it would have stood as an additional breaching offence in addition to the matters then being dealt with. If it had then been taken into account and disposed of, the resultant outcome may well have been more severe than the disposition that actually occurred. In its own right, this second liquor related offence well warranted an appropriate custodial sentence.

Conclusion

[30] Ms Aickin's riposte to the respondent's argument was essentially to the effect that it simply did not give proper recognition to the relatively young age of the appellant and his quite limited antecedent record. To allow the impugned orders to stand would also be to give rise to a penalty that was disproportionate to the offending conduct and in breach of the totality principle.

[31] In my opinion there is force in that contention. Whilst I entirely agree with Mr Roberts that neither the breach of the supervision condition nor the second liquor offence ought to be treated as of little consequence, by the same token, there needs to be a proper sense of proportionality.

[32] As to the liquor offence of 21 July, this was of a vastly different order from that which had led to the original conviction. On the most recent occasion, the amount of liquor was small and was only for personal consumption by the appellant. Although I am of the view that a sentence of 10 days imprisonment was not inappropriate having regard to the policy of the legislation and the fact that this was a second liquor offence, I am by no means convinced that, had it been dealt with on 28 November 2005, it would have had a significant impact on the sentencing strategy actually adopted at that time.

[33] I consider that it is most likely that the learned magistrate then dealing with the relevant matters would simply have ordered such a sentence to be served concurrently with the custodial periods that were actually restored by her.

[34] On the other hand, Mr Roberts is on solid ground when he argues that the breach of the supervision condition must be recognised in some proper manner. Not to do so would clearly undermine the efficacy of supervision orders generally.

[35] The hurdle which confronts the appellant in this case is that no true emergency situation prevented him from making proper contact with

Community Corrections and, had he done so, he would no doubt have been given approval to visit his sick grandmother. However, he made no attempt to fulfil his obligations in that regard at any stage and his breach was a knowing one. In so saying I by no means ignore Ms Aickin's point that he did apparently fulfil his reporting obligations for about the first four months of his operational period.

[36] At the end of the day I have come to the conclusion that it is inappropriate to resort to the provisions of s177 (2) (f) of the Justices Act. To do so would be to produce a result that is too draconian having regard to the degree of culpability of the appellant. I consider that he should be required to serve a modest custodial term, but by no means *all* of the outstanding suspended periods.

[37] Accordingly, the orders that I make are as under:

(a) The appeals will be allowed with regard to files Nos 20324711 and 20423225 and the orders restoring the whole of the periods in suspense set aside. In lieu, there will be an order with regard to each file restoring the sentence in question as to 14 days, credit to be given for any time actually served on or after 25 May 2006. The service of each of the two periods of 14 days is to be concurrent. The operational period as to each balance of the suspended sentences is to continue at 18 months from 25 July 2005.

(b) The appeal on file No 20517410 is allowed for the purpose of amending the terms of the sentence imposed, so as to require the appellant to serve 10 days imprisonment concurrently with the restored periods on the other two files.

ADDENDUM

[38] Having published the foregoing reasons on 19 July 2006, counsel further researched the history of this matter in view of some doubt that had arisen concerning the status of the various sentences that had been under consideration. It subsequently became common ground that, by reason of the alternative provisions of s 43(5) of the Sentencing Act, the sentences imposed on File No 20423225 had been beyond power. Accordingly, on 4 August 2006 and by consent, I recalled the orders indicated above and substituted orders to the following effect:

(a) that the orders made in respect of file 20324711 on 28 November 2005 be revoked;

(b) that the sentence on file 20423225 may not be restore, as the appellant has served the full term of that sentence; and

(c) that no order be made in respect of either sentence on files 20324711 and 20423225.

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