Scrymgour v Moore [2006] NTSC 98

PARTIES:	SCRYMGOUR, Richard Maurice v MOORE, David Steven
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	OLSSON AJ

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CRIMINAL LAW – Declaratory Act – Intention of amending legislation – Applied prospectively or retrospectively – Section 48 Justice Legislation Amendment Act (No 2) 2006 – Section 78BA Sentencing Act – Section 136 Youth Justice Act

R v Dursley (1832) 3 B & Ad 465;
Fisher v Hebburn Ltd (1960) 105 CLR 188;
Re Gardiner [1938] SASR 6;
Liddy v The Queen [2005] NTCCA 4
Maxwell v Murphy (1957) 96 CLR 261
Cf Smith v Callander [1901] AC 297;
Young v Adams [1898] AC 469;

Pearce and Geddes "Statutory Interpretation in Australia" (6th Ed)

REPRESENTATION:

Counsel:

Appellant:	J C A Tippett QC
Respondent:	T McNamee

Solicitors:

Appellant:	North Australian Aboriginal Justice Association
Respondent:	Office of the Director of Public Prosecutions

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

Scrymgour v Moore [2006] NTSC 98
No. JA 44 of 2006 (20614427)

IN THE MATTER OF the *Criminal Code* and the *Sentencing Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

SCRYMGOUR, Richard Maurice
Appellant

AND:

MOORE, David Steven
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 18 December 2006)

Introduction

[1] The appellant pleaded guilty to a charge of unlawful assault on Stephen Summers contrary to s 188(1) of the Criminal Code. The maximum penalty for that offence is imprisonment for one year. On 25 August 2006 he was convicted and sentenced to imprisonment for two days.

[2] He originally appealed against that sentence on the following bases:

(1) The sentence was manifestly excessive in all the circumstances.

(2) The learned magistrate did not place enough emphasis on principles of rehabilitation.

(3) The learned magistrate placed excessive emphasis on general deterrence and punishment.

[3] On the hearing of the appeal the appellant sought and obtained leave to amend the notice of appeal to include an additional ground averring that the learned magistrate erred in law in applying the provisions of s 78BA of the Sentencing Act in sentencing the appellant to an actual period of imprisonment. That ground ultimately became the key focus of the appeal.

The narrative facts

[4] The circumstances of the offending were the subject of agreement. On 27 May 2006 the appellant attended at the Vic Hotel where he consumed a quantity of alcohol and was asked to leave the premises. He then went to Rorke's Drift where he consumed further alcohol and then moved on to the Lost Arc Nightclub where he continued to consume alcohol. At about 2.30 am he was escorted from the Lost Arc Nightclub by security officers who informed him that he had previously been banned from entering the nightclub. He walked to the main entrance and began verbally abusing his victim who was a security officer. He then punched the security officer once to the head. He continued to behave in an aggressive manner and had to be restrained by his victim and other security staff. The victim received a

small scratch to his nose and soreness to the area of the blow. The appellant was arrested. On the following day he was interviewed and made no admissions as to the incident. When asked what happened he replied: "I'll get to that when I go to court". When asked why he punched his victim he said: "I don't reckon I punched him in the head".

Sentencing submissions

[5] The appellant pleaded guilty. In submissions on his behalf the court was informed that he had recently been in a motor vehicle accident and had suffered a laceration to his head. He had not sought medical attention. He was also upset because of a break-up with his former partner with whom he had four children. The court was informed that he claimed to have no knowledge of being banned from the Lost Arc Nightclub and became upset and aggressive when told of the banning.

[6] The appellant had members of his family in court to support him. The court was informed that he had a good work history. He completed year 10 at school and started year 11. He then did an agriculture course and a coxswain's course in order to obtain a licence to drive boats of up to 24 metres. He had worked on his family's cattle station and on a barramundi farm for some five years as a technician. Following this incident he attended at Amity House where he began addressing his drug and alcohol problems and undertook an anger management course. At the time of sentencing he was back at work.

[7] The court was provided with four references from people who supported him.

[8] The appellant had a criminal history. When he was a juvenile he was dealt with on two occasions for assault. The first related to an incident in July 1999 and in that regard he was released on a good behaviour bond without proceeding to conviction. The second was in 1998 when he was placed on community service for 56 hours and again without proceeding to conviction. He had no offences of violence since 1999. However, in 2003 he was convicted of cannabis charges and sentenced to imprisonment for four months, suspended immediately.

The approach of the learned magistrate

[9] The learned magistrate took, as his commencement point, that by reason of his prior offending the appellant came within the terms of the mandatory sentencing provisions contained in s 78BA of the Sentencing Act. The learned sentencing magistrate accepted that it was possible for the appellant to be sentenced to the rising of the court in order to satisfy that provision.

[10] The learned sentencing magistrate expressed detailed reasons for proceeding as he did. He noted the plea of guilty and gave credit for that. He characterised the offending as a "serious type of assault" which he observed was "far too prevalent". He noted that there were far too many incidents of young men leaving licensed premises after drinking too much and becoming involved in altercations and fights in this area of Darwin. He noted,

correctly in my view, that matters of this kind call for a sentence that will act as a general deterrent.

[11] Whilst acknowledging the seriousness of the offending, the learned sentencing magistrate observed that there were factors that reduced the level of seriousness. He noted that the blow was of a glancing kind and that the officer received only a small scratch and some soreness. The officer was able to continue his work. There was no more than the one blow.

[12] His Honour noted that the appellant was 24 years of age and, although he had been in trouble earlier in his life, he had been out of trouble for some time.

[13] His Honour went on to consider the application of s 78BA of the Sentencing Act and noted that a sentence to the rising of the court would be appropriate "in many circumstances" and where there was "a very low grade assault". In relation to this matter he said:

> "The question is, what to do. I am obliged to impose a term of imprisonment. Given the circumstances of the assault I do not consider that any term of imprisonment that I would be imposing would be a lengthy term. In my view it would be a short term. I accept that I have a discretion to sentence the defendant to the rising of the Court. I accept that that is what is being pressed upon me by Mr Scrymgour's counsel. I accept that (the) prosecution don't suggest that it is out of the range in the circumstance.
>
> It's not an easy thing to do. It would be far easier just to accede to what both sides are asking me to do, but this Court is not a court of consent. The Court must do what it considers right even if it is a harder thing to do. It is harder to send someone to gaol than to accept the submissions from both sides. The defendant has a strong

> family support, as evident by the number of people in Court today. The defendant is seeking through Amity House to address his problems and hopefully that will continue. The present system is not, as I said, an ideal place for people to address anger management problems. If anything, anger management is likely to be more a problem in prison or after prison than outside of it.
>
> The question is, what to do, what to do in relation to this defendant so that whatever happens he will not be dissuaded from the path of rehabilitation that he is hopefully undertaking. What I am going to do is, I am going to reduce the period of imprisonment down to the bare bones and also to try and hopefully ensure that he can continue his employment. While the defendant is making steps himself to rehabilitate himself and the Court does need to impose an operational period, I think that the defendant is now, if he wasn't before, he is now fully aware of the provisions of s 78BA and he knows that if he comes back with a similar type of offence he will have to go back to gaol and if that does not lead to rehabilitation then nothing else will.
>
> In exercising my discretion the defendant on the charge be found guilty will be convicted and sentenced to imprisonment for two days from today."

[14] The complaint of the appellant is that the sentence was manifestly excessive in all of the circumstances and that the learned magistrate erroneously applied the provisions of s 78BA of the Sentencing Act to a situation to which they were not, in fact, relevant.

[15] The principles applicable to an appeal such as this are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless an error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it can be shown that the sentencing judge 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 judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously and not just arguably excessive: *Liddy v The Queen* [2005] NTCCA 4.

The relevant statutory provisions

[16] Section 78BA of the Sentencing Act stipulates that, where the Court finds an offender guilty of a violent offence and the offender has one or more times before been found guilty of a violent offence, a conviction must be recorded and the Court must order that the offender serve a term of actual imprisonment that may be partly, but not wholly, suspended.

[17] The statute defines a "violent offence" as being one of the offences referred to in Schedule 2 to the enactment. It is not disputed that the offence of which the appellant was convicted by the learned magistrate was a violent offence.

[18] The appellant conceded that he had committed prior violent offences as a juvenile in 1998 and 1999 respectively. However, it appears that the possible implications of the fact that no conviction was recorded on either occasion were not the subject of debate before the learned magistrate.

[19] At the time of the prior offending conduct s 90 of the Juvenile Justice Act provided that:

> Where a juvenile has, whether before or after the commencement of this Act, been found by Court to have committed an offence but no conviction was recorded by the Court, no evidence or mention of that offence may be made to, or the offence be taken into account by, a court other than the Juvenile Court.

[20] Subsequently to the offending conduct in 1999 and prior to the date on which the appellant appeared before the learned magistrate, the Juvenile Justice Act was replaced by the Youth Justice Act 2005, which came into operation on 1 August 2006.

[21] Section 136 of that statute was expressed as under:

> "(1) If a youth has been found guilty of an offence by a court but the court does not record a conviction, no evidence or mention of that offence may be made to, or the offence be taken into account by, a court other than the Youth Justice Court.
>
> (2) Subsection (1) does not apply if the offence was committed after the youth had turned 15 years of age."

[22] It is argued by counsel for the appellant that, in the circumstances, the learned magistrate fell into error by taking into account the prior offences in respect of which no conviction had been recorded.

[23] However, the riposte of counsel for the respondent is to the effect that s 136 was later amended by s 48 of the Justice Legislation Amendment Act (No 2) 2006, which came into operation on 3 November 2006, ie subsequently to the date on which the appellant was sentenced by the learned magistrate.

[24] As amended, s 136 of the Youth Justice Act reads as follows:

> "136. Certain findings of guilt not to be mentioned
>
> (1) If a court finds a youth guilty of an offence but does not record a conviction, no evidence or mention of the offence may be made to, nor may the offence be taken into account by, a court other than the Youth Justice Court.
>
> (2) Subsection (1):
>
> (a) applies whether the offence was committed, or the finding of guilty made, before or after the commencement of this section: but
>
> (b) does not apply if the offence was committed after the youth had turned 15 years of age."

[25] Counsel for the respondent has invited attention to the second reading speech of the Honourable the Attorney-General on 30 August 2006 in relation to s 48 of the Justice Legislation Amendment Act (No 2) 2006, in which the intention of the amendment was described in these terms:

> "Section 136(2) is amended to clarify that it applies whether the findings of guilt of a youth who has turned 15 at the time were made before or after the commencement of the Act. Section 136(2) was a new provision that provides that the unrecorded conviction of the youth can be taken into account by any court if the offence resulting in the finding of guilt was committed after the youth turned 15 years of age. For removal of a doubt that has been raised, the amendment clarifies that from the date of commencement of the Act, mention can be made in an adult court to the criminal history of findings of guilt where the offence was committed after 15 years of age, and whether those findings of guilt were made before or after the commencement of the Act."

The primary issue

[26] It is not disputed that the appellant had turned 15 years of age at the time of the commission of each of the two violent offences dealt with by the Juvenile Court in 1998 and 1999 respectively.

[27] Counsel for the respondent contended that the effect of the amendment in 2006 was to retrospectively confirm the removal the prohibition imposed by s 136 of the Youth Justice Act in situations in which an offender had been found guilty of committing an offence after 15 years of age. As a consequence, the learned magistrate was entitled to take into account, as was done, the two findings of guilt made by the Juvenile Court.

[28] Mr Tippett, of senior counsel for the appellant, stressed that not only had his client pleaded guilty but that he had also actually been sentenced at a time prior to the 2006 amendment to s 136 of the Youth Justice Act.

[29] He urged that the court ought to be slow to accord the legislation an effect that would necessarily have the result of rendering the appellant subject to any sentencing regime more stringent than would otherwise have been the case.

[30] His commencement point was that the well-established principle was that amending legislation effecting substantive changes to the law was to be construed as being prospective in operation unless the legislation unequivocally decreed otherwise in explicit terms (*Maxwell v Murphy*

(1957) 96 CLR 261, Fisher v Hebburn Ltd (1960) 105 CLR 188, Cf Smith v Callander [1901] AC 297, Young v Adams [1898] AC 469).

[31] He contended that, given the form in which s 136 of the Youth Justice Act was initially enacted, the prima facie effect of it was that, as at the time when the appellant was sentenced, his prior juvenile offences were not to be taken into account, because it could not be said that subsection (2) of that section, as originally enacted, unequivocally applied retrospectively to offences committed and/or findings of guilt made prior to its enactment.

[32] This being so, the learned magistrate had erred in according it retrospective operation - given that, in making sentencing submissions before him, counsel for the appellant had tacitly, if not expressly, conceded that subsection (2) *did* operate so as to enliven s 78BA of the Sentencing Act.

[33] In my opinion, the difficulty that arises in accepting such an argument is that it simply cannot prevail in the face of the specific provisions of the amendment effected by s 48 of the Justice Legislation Amendment Act (No 2) 2006.

[34] That amendment necessarily falls to be construed in the context of the relevant contents of the second reading speech of the Attorney-General, as above recited (see s 62B of the Interpretation Act).

[35] There cannot, in my view, be the slightest doubt that s 48 of the Justice Legislation Amendment Act (No 2) was intended to be a declaratory

enactment, specifically designed to clarify the intended mode of operation of s 136 of the Youth Justice Act. As such, it is to be treated as coming into operation on the date on which the latter provision came into operation (cf *Re Gardiner [1938]SASR 6, R v Dursley(1832) 3 B & Ad 465* at 469).

[36] As the learned authors of *Pearce and Geddes "Statutory Interpretation in Australia"* (6th Ed) point out in their text at paragraph 10.13, the reasoning behind that approach is that declaratory Acts do not alter the law, but merely make its meaning clearer. Persons affected by the law are therefore not subjected to any greater liability than previously existed and thus the rationale of the presumption against retrospectivity is negated.

[37] It must be conceded that the original drafting of s 136 of the Youth Justice Act left something to be desired, in that it was not entirely clear as to whether subsection (2) was intended to apply to relevant offences prospectively or retrospectively.

[38] The recently enacted subsection (2) is, itself, somewhat curiously expressed, but it seems abundantly clear that its intention was to make it obvious that the exception to subsection (1) was to operate retrospectively, regardless of when the previous offences were committed or a finding of guilt was made in respect of them. So it is that, as at the time at which the learned magistrate sentenced the appellant, he was bound, as he indeed did, to apply the provisions of s 78BA of the Sentencing Act. It therefore cannot be said that he fell into error, as asserted by the appellant.

[39] That being so, it only remains to consider the general assertion of the appellant that the sentence imposed was manifestly excessive in the circumstances.

[40] The short riposte to such a contention is that the appellant has fallen far short of demonstrating that, given the mandatory requirement of s 78BA, the sentence imposed was, on the face of it, so excessive as to manifest error.

[41] In fairness, Mr Tippett QC was quite properly constrained to concede that, if it was the case that s 78BA was applicable, the period of imprisonment imposed could scarcely be said to be outside of a range of potential sentencing outcomes that could reasonably have been imposed, having regard to the relevant facts.

Conclusion

[42] It follows that no sentencing error has been identified and the appeal must be dismissed. There will be an order of dismissal accordingly.
