Watt v R [1999] NTSCCA 81

PARTIES:	WATT, Michelle
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 17 of 1998
DELIVERED:	13 August 1999
HEARING DATES:	1 June 1999
JUDGMENT OF:	MARTIN CJ, GALLOP & MILDREN JJ

REPRESENTATION:

Counsel:

Appellant	Mr Lawrence
Respondent:	Mr Wild QC with Ms O'Rourke

Solicitors:

Appellant:	Melanie Little
Respondent:	DPP

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mar99017
IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

Watt v R [1999] NTSCCA 81
CA 17 of 1998

BETWEEN:

MICHELLE WATT
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN CJ, GALLOP & MILDREN JJ

REASONS FOR JUDGMENT

(Delivered 13 August 1999)

MARTIN CJ:

[1] I have had the benefit of a draft of the judgment of Gallop J, and agree with his Honour that the grounds of appeal arising from the sentence imposed by the learned trial Judge are without merit. The offending was calculated and systematic involving ten separate incidents over a three month period. A substantial amount of money was stolen. There was no acceptable explanation for the stealing, nor as to what happened to the money stolen. The funds had been provided by the Commonwealth for the benefit of the education of Aboriginal students. The offending amounted to a very significant breach of trust.

[2] However, the Court has been requested to receive evidence which was not, and could not have been available to tender to his Honour. As Justice Gallop points out, the fact that the appellant was the mother of two young children was known to his Honour, and it is plain that it was anticipated that proper arrangements could be made for their day to day care. It was not submitted that the consequences which could be normally expected to arise as a result of separating the children from their mother were such as to weigh against a sentence of imprisonment. With respect I entirely agree with what fell from Winneke P. in *R v Panuccio*, unreported 4 May 1998, Victorian Court of Appeal. As to this Court taking into account the effect of imprisonment upon an offender's children, see *R v Nagas* (1995) 5 NTLR 45 at pp 53, 54.

[3] The evidence sought to be replied upon comprises observations by the children's grandmother and others who were in a position to observe the family on a personal basis before and after the appellant was incarcerated. That material was made available upon the application for bail when the appeal was lodged in September last year. They speak of the adverse effects which they have observed upon the children's health and general behaviour during the three weeks they were separated from their mother.

[4] This Court has also been asked to receive reports prepared by a psychologist, Dianne Knox. She reported on her observations of the children in early October 1998, and offered the opinion that both children had been seriously affected by the sudden departure of their mother. The

effect on the youngest child, Tidga, was the most noticeable, demonstrating very signficant behavioural of emotional and psychological reactions. In the context of the bail application, the psychologist also said that if the separation continued, there may be long term behavioural psychological effects for the children. I do not think that any of that would be regarded as being "exceptional".

[5] In a later report the psychologist expressed her particular concern regarding Tidga, aged 15 months at the time of separation; she was not eating or drinking and had lost a considerable amount of weight in the three and a half weeks that she had been separated from her mother. After the appellant was released on bail, the elder girl was apparently able to make a full recovery, but the younger had not recovered fully from the trauma of the precipitous separation, and the psychologist ventured the opinion that if the appellant were imprisoned again, then the children would be re-traumatised and the attachment to their mother permanently damaged, Tidga particularly being at risk for the long term effects to her mental health and development.

[6] The psychologist reported that Tidga had already demonstrated an extreme grief reaction to the three and a half weeks separation from her mother, and the consequences of a five month separation (the balance of the term of imprisonment not suspended) when the effect of the original traumatic separation had not been completely healed, would be far worse. The grief reaction was outside the normal range, and she observed a significantly traumatised child who was showing signs of depression such that Ms Knox

feared she would need to be hospitalised. Neither the quality of the substitute care provided by her father and others, nor the ability to visit her mother in hospital, could reproduce the original attachment bond nor provide consolation.

[7] The respondent Director is correct in the submission that much of the effect upon the children had been brought about by their mother's attitude. Although said to be a good mother, the psychologist's opinion was that she was in shock and denial once her offending had been discovered, for the most part she did not believe she had done anything wrong, she was not aware that she was facing the prospect of imprisonment, she was humiliated and ashamed and did not want to involve her family in what she saw as being her problem. She may not have been thinking clearly and able to make decisions objectively as a result of postnatal depression when Tidga was born. Nothing had therefore been done to prepare the children for the impending separation. But none of that detracts from the fact that the effect upon the younger child, in particular, as a consequence of the sentence, has been "exceptional" or "extreme".

[8] The evidence goes to events occurring after the passing of sentence, but it is for the purpose of explaining the full extent and implications of the effect upon the children. The mother/child relationship was a fact in existence at the time that sentence was passed, but the particular susceptibility of the younger child to be so effected by the separation from the mother was not known, nor could it be, since the circumstance had not arisen. It is usually

the case that young children who suffer temporary disruption of parental care are able to be adequately looked after by others. No doubt there is a detrimental effect in many cases, but the law must put that to one side considering the courts primary function of imposing an appropriate sentence.

[9] The evidence brought forward on the appeal should be received. It establishes the type of case where a court can properly take into account the exceptional serious impact upon a member of the offender's family. In my opinion it shows that the true significance of the circumstances at the time of the original sentencing was such that had that significance been known, it would probably have led the learned sentencing judge to reach a different sentence *Siganto v The Queen* (unreported Court of Criminal Appeal, 13 May 1999)

[10] I would quash the sentence imposed, not because of any errors being demonstrated in it, but because the new evidence sheds new light upon the facts before the learned sentencing Judge.

[11] At the conclusion of submissions on appeal, counsel for the appellant urged that an appropriate sentencing order would be an order that the appellant serve a term of imprisonment to be suspended upon her entering into a home detention order. A report has been received from the Director of Correctional Services stating the matters referred to in s 45 of the

Sentencing Act 1995 (NT). The appellant consents to the making of the order.

[12] I was astounded to find upon reading the report that the appellant is again pregnant, the date of confinement being put at 23 November 1999. She was imprisoned on 16 September 1998 and released on bail on 9 October 1988, pending the hearing of the appeal. The outcome of the appeal was unpredictable, and yet the appellant fell pregnant prior to the hearing on 1 June 1999. The fact of her pregnancy was not made known to the Court on that occasion and is only disclosed by way of the Director's report. It appears to me that the appellant's psychological condition has not improved.

[13] However that may be, I am of the opinion that the appropriate outcome should be in accordance with that suggested by the appellant's counsel. Whilst the order is in force, the appellant will be subject to the custodial regime prescribed by s 48 and other provisions of the *Sentencing Act*, and the *Prisons (Correctional Services) (Home Detention Orders) Regulations*. If the appellant breaches the order the Court may revoke it, and she may then be imprisoned for the term suspended by the Court as if the order had never been made, notwithstanding the period she may have served under the order. Although a home detention order imposes significant restrictions upon an offender's movements and conduct, it is not, in my view, to be regarded as being as onerous as punishment by way of imprisonment. That is especially so in this case, since the home detention order will have the

effect of relieving the appellant from agitated concern over the wellbeing of her children.

[14] The appellant was sentenced to 18 months imprisonment to be suspended after serving six months, and a period of two years was fixed during which she was not to re-offend if she was to avoid being dealt with under s 43 of the Act. She was in custody pursuant to that sentence for about three and a half weeks.

[15] I propose that there be imposed a sentence of 12 months imprisonment and that it be ordered to be suspended upon the appellant entering into a home detention order specifying the premises at 5 Wearing Crescent, Karama as the place at which she is to reside or remain, and that the period that the order is to remain in force be 8 months.

[16] The order should be subject to the following conditions:

(a) that the appellant not leave the place specified in the order except at the times and for the periods as prescribed or as otherwise permitted by the Director or a surveillance officer;

(b) that the appellant obey the reasonable directions of the Director;

(c) upon discharge from the Court, the appellant report immediately to the Community Corrections Court's officer.

[17] I note that the appellant is not to leave the precincts of the Court until she signs the order (s 44(4)).

GALLOP J:

[18] This is an appeal against the sentence imposed by a Judge of the Supreme Court on 16 September 1998. On that day, the appellant was arraigned upon an indictment charging her with one offence that between 25 March 1994 and 23 June 1994 at Lajamanu in the Northern Territory of Australia, she stole money to the sum of $17,790, the property of the Aboriginal Student Support and Parents Awareness Committee. Upon her arraignment, she pleaded guilty. The Crown presented a statement of facts of the offence, none of which was disputed. There were in fact ten asportations of money by the use of cheques and the total amount obtained in that way and without authority was $17,790 as charged. That was all the evidence tendered by the Crown on the question of sentence.

[19] The appellant then adduced certain evidence but did not give evidence herself. His Honour received submissions and, later on the same day, he recorded a conviction and sentenced the appellant to 18 months imprisonment and directed that she be released after serving six months of that term. He further directed that the period during which she was not to re-offend be a period of two years. He also made an order for restitution of the sum of $17,790.

[20] On 9 October 1998, another Judge of the Court gave leave to appeal against the sentence imposed and granted the appellant bail on certain terms and conditions, including that the bail was to extend to such period until called upon by notice by the Office of the Director of Public Prosecutions. At the time of the hearing of the appeal to this Court, no notice had been served by the Director of Public Prosecutions upon the appellant.

[21] The grounds of appeal argued on behalf of the appellant were,

> "(b) That the sentence imposed took insufficient regard to the applicant's family background and personal disposition and in particular her rehabilitation and the fact that she was the principal caregiver of her two infant children.
>
> (c) That the learned sentencing Judge erred in finding that the applicant had stolen from vulnerable people.
>
> …
>
> (e) That leave be granted for fresh evidence to be admitted as to the effect the applicant's incarceration has had on the welfare of her two infant children."

[22] There was evidence before the sentencing judge about the appellant's family background and the fact that she was the principal caregiver of her two infant children. The evidence was that at the date of sentencing she was in a de facto relationship of 14 years duration. She had two daughters, whose dates of birth were respectively 26 August 1995 and 6 June 1997 (three years and 15 months respectively).

[23] In the course of his submissions, counsel for the appellant addressed the sentencing judge in the following terms,

> "Another factor that your Honour can take into account was her age then and her age now. Further, sir, an important factor in your consideration, in my respectful submission, should be that she is the mother of two young children, one three and one aged one. I'm not saying, your Honour, that if she was to be sentenced to a term of imprisonment that the children would not have any care, certainly her partner is in a position to care for the children.
>
> But nevertheless given that they are infants, there may be some difficulty in relation to their day to day care, but nothing that would put it to the level that is required by the authorities, certainly much higher than what we have here today before – I should say, sir, certainly not as high as the authorities require for that factor to become of itself a matter where an immediate term of imprisonment could be avoided, but it's certainly a consideration that your Honour, in my respectful submission, should take into account."

[24] In the course of his sentencing remarks, his Honour said,

> "She is in a stable de facto relationship with steady employment and she has the support of family and friends. She has two infant children. She was 25 at the time of offending and it was in the course of her first employment. She has a good work record both before and after the offending.
>
> She has not re-offended since these offences. She is a first offender of prior good character. She is held in high regard by those who know her who regard this offending as out of character."

[25] It is to be noted that at the time of the commission of the offence the appellant had no children.

[26] In support of the grounds of appeal based upon fresh evidence, counsel for the appellant ultimately relied upon three reports dated 8 October 1998,

31 May 1999 and 1 June 1999 from Dianne Knox, psychologist, and three statutory declarations, all declared on 22 September 1998. In her reports, Ms Knox detailed her interviews and observations of the appellant and her two small children. She expressed the opinion in her first report that both children had been seriously affected by the sudden departure of their mother. It is unnecessary to set out Ms Knox's opinion about the impact of the appellant going to gaol between the date of sentencing and the grant of bail, a period of about three weeks. It is sufficient to observe that, particularly in relation to the younger child, the consequences of separation from their mother were extremely serious, even life-threatening.

[27] In her later reports she emphasised how traumatic the experience had been and how extreme the grief reactions of both children, particularly the younger one. Ms Knox went so far as to say that she felt that that child had given up the will to continue living as she was not eating or drinking and had lost a considerable amount of weight in the three and a half weeks. She expressed her concern that if the situation continued, the child might end up in hospital due to failure to thrive.

[28] In the last report of 1 June, she expressed her fear that the younger child would be re-traumatised by a second separation and would most probably follow the same pattern as before and become depressed, stop eating and drinking and may need hospitalisation.

[29] In the statutory declarations, the declarants outlined their observation of the traumatic reactions of both children. The submission on behalf of the appellant was that the reaction of the children as detailed in the above evidence takes this case into the exceptional category of fresh evidence. Reference was made to the various authorities.

The Law

[30] The *Criminal Code* provides a right of appeal by a person found guilty on indictment to this Court and with the leave of the Court against the sentence passed on the finding of guilt (s 410(c)). On an appeal against sentence, this Court is empowered to quash the sentence appealed against and to pass some other sentence in substitution therefor (s 411(4)). There is a power to receive fresh evidence (s 419).

[31] In *Anderson* (1997) 92 A Crim R 348, the Court of Criminal Appeal of Western Australia referred to the principles which guide courts in the reception of fresh evidence on appeal. The applicant for leave to appeal against sentence had been sentenced to a total of three and a half years imprisonment following his pleading guilty to 27 counts of fraud (involving a total amount of $74,338) contrary to s 409 of the *Criminal Code* (WA). In 1992 the youngest of the appellant's three children developed leukaemia but the illness was in remission at the time of sentencing. At the time there were concerns for a relapse of the child's illness, but it was some two months after the applicant was sentenced that the seriousness of the child's

condition was diagnosed. The medical advice also expressed the opinion that if the child were able to see the applicant this would provide emotional, physical and parental support during therapy and during a planned bone marrow transplant.

[32] In the course of the proceedings, the Crown conceded that the hardship constituted exceptional circumstances and that a suspended term of imprisonment most likely would have been imposed if the present medical information had been known by the sentencing judge.

[33] In allowing the appeal the court said that although the review of a sentence in the light of subsequent events is generally a matter for the Executive Government and not one for the Court of Criminal Appeal, the most appropriate course was to grant the appeal for two reasons.

[34] First, the sentencing court is entitled, in an extreme cases, to take into account the fact of serious illness suffered by a member of the offender's family where the member will be subject to an unusual measure of hardship as a result of the offender's imprisonment and where the offender himself will also be subjected to an unusual measure of hardship as a result of his imprisonment.

[35] Secondly, where fresh evidence after sentencing sheds new light on matters considered by the sentencing judge in mitigation of penalty and which (as the Crown conceded) very probably would have altered the sentence

imposed had it been known at the time of sentencing, that evidence might be received on an appeal against the sentence imposed."

[36] In the course his reasons, Steytler J cited the observations of King CJ in *Smith* (1987) 44 SASR 587, at 588,

> "The proper purpose of fresh evidence on an appeal against sentence is to bring before the court facts which were in existence at the time of the imposition of sentence but were not known to the sentencing judge or to explain facts which were before the sentencing judge so as to put them in a new light. It is not open to the Court of Criminal Appeal to intervene upon the basis of events which have occurred since the imposition of sentence, *O'Shea* (1982) 31 SASR 129; 8 A Crim R 219 and fresh evidence is therefore not receivable to establish the occurrence of such events. A clear distinction is necessary between fresh evidence as to events occurring before sentence and evidence as to events occurring after sentence.
>
> While the evidence sought to be admitted on this appeal in a sense establishes the occurrence of events occurring after the passing of sentence, it does so for the purpose of explaining the full extent and implications of the appellant's condition of health which existed at the time of sentence. I think that the authorities show that it is permissible to have regard to events occurring after sentence for the purpose of showing the true significance of facts which were in existence at the time of sentence. In *Green* (1918) 13 Cr App R 200 evidence was admitted on appeal to show the true character and value of information given by the appellant to the police before sentence, as disclosed by subsequent events."

[37] This Court has made similar observations in *McCarthy v Trenerry*, (unreported, Northern Territory Supreme Court, Martin CJ, 30 March 1999). Martin CJ said at p9,

> "The purpose of an appeal is to review the decision of the Court at first instance in the light of the evidence before that Court. The qualified provisions enabling evidence to be introduced on appeal must be related to the time when sentence was passed, either to make up for a deficiency in that evidence which could have brought

> forward at that time, or to better explain the evidence which was before that Court. That is the judicial function upon appeal".

[38] In *Siganto v The Queen* (unreported, Court of Criminal Appeal of the Northern Territory, Martin CJ, Kearney and Priestley JJ, 13 May 1999) this Court said,

> "We note that it is clear that this Court in any event has power to receive such fresh evidence on appeal, if it considers it necessary or expedient to do so in the interests of justice. However, that power is sparingly exercised. The appeal against sentence under Code s 410(c) is an appeal in the strict sense. But credible evidence of events post-September 1996 would be admissible to show that the true significance of the circumstances at the time of the original sentencing was such that had that significance been known it would probably have led the learned sentencing judge to reach a different sentence. For example, evidence of post-September 1996 events may bear on the appellant's prospects for rehabilitation. This approach to the reception of fresh evidence on appeal is adopted in other jurisdictions, with legislation similar to s 411(4). See, in Victoria, *R v Carroll* [1991] 2 VR 509, *R v Eliasen* (1991) 53 A Crim 391 at 394 per Crockett J, *R v Rostom* [1996] 2 VR 97 at 101 per Charles JA, *R v Young* (1996) 85 A Crim R 104 at 108-9 per Charles JA, *R v Babic* [1998] 2 VR 79 at 81-2 per Brooking JA and *R v W.E.F.* [1998] 2 VR 385 at 388-9 per Winneke P; in Queensland, *R v M* [1996] 1 Qd R 650 and *R v Maniadis* [1997] 1 Qd R 593; in New South Wales, *Fordham* (1997) 98 A Crim R 359 at 377 per Howie AJ; and in Western Australia, *Catts* (1996) 85 A Crim R 171 at 177 per Anderson J."

[39] Thus instructed, I do not consider that the fresh evidence proposed by the appellant serves the purpose of bringing before the Court facts which were in existence at the time of the imposition of sentence but were not known to the sentencing judge. I recognise, however, the strength of the argument that the fresh evidence may explain facts which were before the sentencing judge so as to put them in a new light. However, I do not think that the new

evidence, taken at its highest, does explain the full extent of the children's dependence upon their mother which existed at the time of sentence.

[40] There is another reason why I am of the opinion that the fresh evidence should not be received. In my opinion, that reason cannot be better expressed than in the judgment of Winneke P in *R v Panuccio*, (unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Brooking and Charles JJA, 4 May 1998) where his Honour said,

> "Although the court is not, both as a matter of compassion and common sense, impervious to the consequences of a sentence upon other members of the family of a person in prison, such factors will need to be "exceptional" or "extreme" before the court will tailor its sentence in order to relieve the plight of those other family members. Such a principle is clearly an obvious one, because the court's primary function is to impose a sentence which meets the gravity of the crime committed by the person who is being sentenced. There will rarely be a case where a sentence of imprisonment imposed does not have consequential effects upon the spouse, children or other close family members who are dependent in one form or another upon the person imprisoned.
>
> Thus it has been often stated that it is a general principle of sentencing that the court should usually disregard the impact which the sentence will have upon the members of a prisoner's family unless exceptional circumstances have been demonstrated. The principle has been so often stated that it does not need repeating, but I refer to, amongst other cases, *R v Matthews* (1996) 130 FLR 230 at 233; *R v Lynch and Ratcliffe* (Court of Appeal, unreported, 18 April 1996), particularly the judgment of Charles JA at 5; *R v Yaldiz* (Court of Appeal, unreported, 4 December 1996), particularly per Hayne JA at 12; *R v Yates* (Court of Appeal, unreported, 17 February 1998); *R v Kim* (Court of Appeal, unreported, 18 March 1998). It goes without saying, I think, that the graver the crime for which the prisoner is being sentenced the more difficult it will be to find exceptional circumstances, because the relief usually sought and generally necessary to alleviate the plight of the relevant family members affected will require absolution from incarceration.

> Whilst I have sympathy for the plight of the applicant's mother and father in this case, I cannot accept that the learned judge failed to give sufficient weight to their circumstances in imposing the sentences which he did. Although it is apparent from the evidence before him that the applicant is the one upon whom the parents are mainly dependent, there are other members of the family who can, and apparently do, share the burden of caring for the parents. Indeed it would seem to me that it was the parents' circumstances which in all probability led his Honour to fix a shorter than normal non-parole period."

[41] For those reasons I do not think the fresh evidence should be received and accordingly, the sentence should not be altered or adjusted on account of that evidence.

[42] The final ground of appeal argued on behalf of the appellant was that the sentencing judge erred in finding that the appellant had stolen from "vulnerable" people. In my opinion such a finding was open. The appellant exploited a situation where she had cheques signed by a former committee member who was very ill and no longer was involved in the committee's work. It was the committee and the members of the organisation for whose benefit the funds were administered, who were vulnerable. His Honour was saying no more, really, than that any person in a position of trust can use that position to the detriment of the beneficiaries who are always vulnerable to fraud.

[43] I would dismiss the appeal.

MILDREN J:

[44] I have had the advantage of reading the judgments of the other members of the Court in draft form.

[45] I agree with Martin CJ and with Gallop J for the reasons they express, that the appellant has failed to show any sentencing error on the part of the learned trial judge.

[46] As to the fresh evidence sought to be relied on by the appellant, I agree with Martin CJ that the evidence should be received for the reason which his Honour expresses. Further, in my view, the discretion to receive fresh evidence is not as narrowly confined in this Territory as it apparently is in South Australia. I agree with the opinion of Malcolm CJ in *Anderson* (1977) 92 A Crim R 348 at 350, that the principles to be applied should be those which would apply to the admission of fresh evidence and new evidence on appeal against conviction, particularly where, in the light of subsequent events, the sentence imposed has resulted in injustice. The power conferred by s419(1) of the *Criminal Code* is exercisable wherever the Court "thinks it necessary or expedient in the interests of justice", and in my opinion cannot be confined, as a matter of logic, to facts and to events which were in existence at the time of sentence.

[47] In my opinion, the fresh evidence establishes that the effect of imprisonment on the appellant could have extreme consequences for the appellant's youngest child which are well beyond that which is usual or normal. In

those circumstances I am satisfied that had the learned trial judge been aware of the fresh evidence, his Honour would have tailored his sentence in order to relieve that child from those possible (if not probable) consequences. In this case, the offence was not so serious that a suspended sentence of home detention was not an available alternative to actual imprisonment. As Martin CJ observes, this court has had the benefit of a favourable report from the Director of Correctional Services pursuant to s45 of the *Sentencing Act*. I would therefore consider that the appeal should be allowed. I concur with the sentencing orders proposed by Martin CJ.
