Sanara & Ors v Munn [2001] NTSC 63

PARTIES:	SANARA, BAUN, Abdulla, AMIR, BUTIOP, Simon
	AND:
	MUNN, Michael Rex
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	20018648, 20018268, 20017888, 20018644
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JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL

Justice – appeal against sentence – use of a foreign boat in the Australian Fishing Zone – possession of a boat equipped with equipment for fishing within the Australian Fishing Zone – general deterrence – whether statistical evidence was sufficient to show an increase in prevalence such as to justify an increase in penalty.

REPRESENTATION:

Counsel:

Appellants:	I Read
Respondent:	G Fisher

Solicitors:

Appellants:	NTLAC
Respondent:	Commonwealth DPP

Judgment category classification:	B
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Mar0121

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

Sanara & Ors v Munn [2001] NTSC 63
Nos 20018648, 20018268, 20017888, 20018644

BETWEEN:

SANARA
ABDULLA BAUN
AMIR
SIMON BUTIOP
Appellants

AND:

MICHAEL REX MUNN
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 1 August 2001)

[1] Appeals against sentence. Each of the appellants pleaded guilty in the Court of Summary Jurisdiction at Darwin for that he:

1. did at a place in the Australian fishing zone contravene s 100(1) of the Fisheries Management Act 1991 (Cwth) in that he did use a foreign boat for commercial fishing, and

2. did at a place within the zone have in his possession or in his charge a foreign boat equipped with long lines, hooks and other equipment for fishing.

3. The offences were committed by each appellant independently of the others in separate boats, Sanara and Butiop on 9 November 2000,

Baun on 8 November 2000 and Amir on 1 November 2000. All had been in immigration custody until dealt with by the Court.

[2] The admitted facts in respect of each may be conveniently tabulated as follows:

1. refers to the distance in kilometres in the zone at which the vessel was detected;

2. refers to the number of long lines in the water;

3. the weight or quantity of dried fish and shark fin found on board the vessel;

4. refers to fresh shark on board or on hooks in the water;

5. the number of long lines on board (in each case there was additional fishing equipment);

6. the estimated value of the vessel, catch and equipment.

	1	2	3	4	5	6
		No of lines in water	Dried fish on board	Fresh fish etc		
Sanara	8			small quantity of shark fin	1 (+other lines)	$3,000
Baun	10		20 pieces & 40 kg Mullet	5	20	$4,600
Amir	30	1	10 kg	4 sharks, 1 cod	8 trawling lines	$4,050
Butiop	6.5	2	80 – 100 kg fish & shark fin	14 sharks	3	$4,600

[3] In each case the vessel was identified as a type III motorised Indonesian fishing vessel. All were equipped with working compasses and some with charts showing the boundaries of the Australian Fishing Zone marked on them.

[4] The appellants pleaded guilty and were each convicted for both offences and sentenced as follows:

- On count 1 Sanara was fined $2,000 in default imprisonment for four days. Baun was fined $4,000 in default nine days imprisonment, Amir was fined $6,000 and in default, two weeks imprisonment, Butiop was fined $4,000 with ten days imprisonment.

  No time was allowed to pay those fines.

- As to the second offence, the conviction was without passing of sentence and his Worship directed that each appellant be released upon his giving security by recognizance in the sum of 5,000 Australian dollars, conditioned upon his being of good behaviour for four years, and, further, that he not enter or remain inside the Australian fishing zone during the period of the bond.

[5] His Worship also dealt with similar charges brought against Agus at the same time. The vessel in question there was located on 1 November 2000 twelve nautical miles inside the zone. There were two long lines and other fishing equipment, ten kilograms of dried shark fin and some pieces of small tuna fish. He was fined $4,000 and in default of payment, six days

imprisonment and the same penalty as for the appellants was imposed in respect of the second count. No appeal was lodged on his behalf.

[6] The amended grounds of appeal in each case are:

1. That the learned Magistrate in imposing the fine gave insufficient weight to the financial circumstances of the appellant and the penalty effect of forfeiture.

2. That the learned Magistrate erred in his reasoning that effect would be given to general deterrence by the knowledge that like-minded persons might have to actually go to prison.

3. That the statistical evidence over a period of three (3) years put before the learned Magistrate was not sufficient to make a finding that offences of this nature have become more prevalent and accordingly warrant a greater emphasis on general deterrence.

[7] The Act provides in s 106 that where a court convicts a person of an offence under s 100, the court may order the forfeiture of all or any of the boat in relation to which the offence was committed, a net, trap or equipment on board that boat at the time of the offence, fish on board the boat at that time or in relation to which the offence is committed; upon a forfeiture order being made, the property becomes the property of the Commonwealth and may be disposed of in accordance with directions of the Minister. However, the masters of the vessels may deposit security for the release of their vessels and the amounts set out in the table, as the value of the catch and

equipment represents the amount assessed and paid in each case by way of that security. Upon conviction, those funds are used to pay for the property forfeited and the vessel may then be sailed back to Indonesia (see s 84(1)(g) and s 88).

[8] An accused person under this legislative regime is normally detained in immigration custody on board the vessel until the matter can be dealt with in the Court of Summary Jurisdiction. The length of time during which a person may be held in such custody varies from case to case, as here (see par 2). There is no provision for the imposition of penalty by way of imprisonment for breach of these laws. The maximum fine for each offence is $27,500 where it is dealt with summarily. As noted by others, the penalty of imprisonment where there is a default period fixed in respect of a fine, is a penalty for failure to pay the fine, not a penalty for violation of the fishery law.

[9] His Worship found on the submissions before him in relation to each of the appellants that they were people of limited means, the majority of them incurred debts, one who was not in debt at that time would incur a debt as a result of a loss of the vessel. His Worship accepted that they were people without funds and without assets which they could readily liquidate in order to pay fines. They were not lawfully in Australia, and granting them time to pay was not really an option. His Worship plainly recognised that by imposing the fines each of the appellants would necessarily spend time in gaol in default of payment.

[10] It is not suggested that his Worship erred by failing to take into account the financial circumstances of any appellant before imposing the fines in each case. Any fine to be imposed must reflect the gravity of the offence.

[11] None of the property forfeited was owned by any of the appellants, and it is accepted that the monies paid by way of security did not come from any of them. On the face of it, therefore, none of them suffered any penalty through that process. Since security was paid and the vessels released so that they could be sailed back to Indonesia, none of the appellants were deprived of the use of the relevant vessel, apart from the period he was detained. The forfeiture of vessels and equipment, or the loss of monies paid by way of security to have them released, is clearly directed as a deterrent to the owner of that property and designed to ensure, so far as it can be done, that the masters do not infringe the laws of Australia.

[12] The grounds of appeal do not extend to the effect of the giving of the security by the owners, but I note that the whole of that security, being equal to the estimated value of the property seized, has been lost to the owner. The appeal against sentence set out in ground 1 of the amended grounds of appeal only relates to the effect of the forfeiture order upon each appellant when taken with the fine imposed. There is no evidence as to the owner of any of the property seized.

[13] As to the relationship between fines and forfeiture, see for example *Fang Chinn Fa v Puffett* (1978) 22 ALR 149 and *Hwang Ming Heui v Mellon* (1980) 5 NTR 9 followed in *Tae Chang Fisheries Co Limited v Morris*

(1990) 102 FLR 212, *Caldow and Shannon v Hemming* (1991) 55 A Crim R 449 at 456 and *Cutting v Glover* (1987) 135 LSJS 35 and generally ch 6.4 commencing at p 507 Fox and Freiburg, "Sentencing State and Federal Law in Victoria", 2nd Edition.

[14] Although the effect upon each of the appellants of the loss of the security funds was not put forward in detail, it appears from the submissions made on their behalf, not contested by the prosector, that each of them, together with other members of the crew on each vessel, will be obliged to pay to the owner of the vessel the amount of money involved. Again, although it is not clear from the information provided to his Worship, it would appear that each of the appellants will lose the benefit to be derived from the fish and fish products which were forfeited. Just what arrangements were made between the owner and master as to the running costs of the vessel and the disposal of the proceeds of sale of the fish and fish products is not disclosed, and accordingly his Worship had very little to go on when trying to assess the effect of the forfeiture on each of the appellants.

[15] In dealing with the forfeiture and security paid, his Worship reminded himself that it was necessary to bear in mind that forfeiture is a substantial penalty and something which the court must factor into account in the sentencing process. He then reminded himself of the value of the vessels and other property subject to forfeiture, but it does not appear that he specially took into account the additional financial burden which would be shared by the masters in paying to the owner of the property a proportion of the bond. This court is in no position to make a precise assessment of the

burden which would fall upon each of the appellants on this account beyond saying that it would probably amount to a few hundred dollars. I am not satisfied that his Worship took into account that prospective financial burden when fixing the fines.

[16] Section 16C of the Crimes Act (Cwth) provides that before imposing a fine on a person for a federal offence, a court must take into account the financial circumstances of the person in addition to any other matters that the court is required or permitted to take into account, but that does not prevent the court from imposing a fine on a person because the financial circumstances of the offender cannot be ascertained by the court. In this case there was some information before the court as to the several appellants' income and assets (or lack of them) and his Worship acknowledged that there was no prospect of any fine imposed being paid. That would normally lead to the offender being imprisoned for a period determined by the court in default of payment of the fine. In reality, a court faced with persons such as the appellants has a very limited range of sentencing options available. The penalty for the offence does not include imprisonment. The fixing of a penalty by way of an order to be served in the community (in so far as they may be available pursuant to the Crimes Act and Northern Territory Sentencing Act) are usually not available in the case of people such as the appellants. (In a particular case it might be shown that that person is entitled to remain lawfully within Australia). Although the law of the Territory relating to the enforcement or recovery of a fine imposed on an offender applies for a person convicted in the Territory

of an offence against the law of the Commonwealth (Crimes Act s 15A) it is not suggested that there is any means by which a fine imposed upon a person such as the appellants can be enforced other than imprisonment.

[17] Having determined the quantum of the fine to be imposed in each case, his Worship then fixed the period for which each of the appellants would be imprisoned in default of payment. In this Territory there is no fixed formula in determining that period by reference to the quantum of the fine, but it must not exceed one day in prison for each $50 of the fine (*Newcastle v Coffey* (2000) 9 NTLR 168). In fixing the default period his Worship took into account the time that each of the appellants had spent in detention prior to being dealt with, their likely inability to pay the fine, and because the fines represented an increase in penalties (a matter to which I will return) the full force of that increase should not fall upon those particular appellants. His Worship foreshadowed that he thought that the period of time that an offender must spend in prison in default of payment of fines should be increased gradually, "So that the message can get through and hopefully it will be some deterrence". No part of the appeal goes to the periods so fixed by his Worship.

[18] It seems to be that the only realistic option to a fine lies in the exercise of the court's powers under s 19B and s 20 of the Crimes Act. Proceeding by way of discharge without a conviction under s 19B is a power which can only be exercised in the circumstances prescribed. The power under s 20 to conditionally release an offender after conviction is not so constrained.

[19] Grounds 2 and 3 of the amended grounds of appeal can conveniently be dealt with together since they are bound together. For reasons, such as availability of counsel, the five offenders, including these four appellants, came before the court at the same time. The prosecutor before his Worship indicated that the periods held in detention were dictated by the period of time it had taken for the money for the bonds to be paid. At the conclusion of submissions, his Worship immediately raised with the prosecutor the issue of prevalence of the offence noting that the five different vessels of the same type had all been apprehended within nine days and suggested that the prevalence of the offending did not seem to be dwindling particularly, despite the previous dispositions. The prosecutor had available a table of similar offences which had been previously seen by counsel appearing for the five defendants. The table showed that there had been 53 vessels involved until 28 November 2000 when these matters were before the Court of Summary Jurisdiction. During the previous year there were 27 and in 1998, 18. The prosecutor said that they represented the numbers that were being brought into Darwin and added that there were significant numbers going to Broome, although she did not have any figures in relation to that.

[20] In the prosecutor's submission, the penalties imposed in the Court of Summary Jurisdiction at Darwin "of late" had been bonds under s 20 of the Crimes Act with an increasing amount set as the security, and conditioned on the offender being of good behaviour for five years, the maximum permissible under that provision. If such a person fails to comply with the condition, he may be brought before the court which has power to, inter alia,

revoke the order and deal with the person for the offence in respect of which the order was made in any manner which he could have been dealt with for that offence if the order had not been made (s 20A(5)(b)). If that person has been brought before the court as a result of his further offending, then he would stand to be dealt with for that as well.

[21] It was submitted that deterrence by way of the usual order did not seem to be working nor did securing release of the seized property by payment by way of security. It was indicated in the course of those submissions that offenders who were not first offenders are dealt with by way of imposition of a fine and a period of default imprisonment, there being a recognition in those cases that although the offenders do not have the capacity to pay, the seriousness of the offence outweighed the imposition of a sentence by way of release on a bond. It was further submitted, in response to questions from his Worship, that the time had come for the imposition of fines on first offenders in an effort to deter the particular offenders and others of a like mind. His Worship reminded himself that it would be usual to make a judicial warning prior to the imposition of any increase in the general level of penalty for a particular offence, but doubted the value of doing so in cases involving people such as the appellants because they were from Indonesia. His Worship doubted that any such warning would be likely to be published in any newspaper that would be likely to be read, and he could not rely upon the appellants themselves informing people in Indonesia after they returned.

[22] It was common ground between the parties that the court had been gradually increasing penalties by increasing the amount of the recognizance and extending the period of good behaviour. The matter that particularly concerned his Worship was not so much the personal deterrent effect which might be achieved through that means, but that those increases in penalty had failed to have a general deterrent effect.

[23] In the course of discussion with counsel for the appellants his Worship again noted that he had the masters of five different vessels before him at the one time and the information on the table provided by the prosecution suggested that the number of vessels involved was doubling each year. To that counsel responded that he was unaware of how much of that arose as a result of increased surveillance of the northern coast by the authorities.

[24] In the course of his sentencing remarks, his Worship again referred to the number of offenders presently before him and the information conveyed by the prosecutor as to the number of offenders over the previous three years, and expressed the view that the dispositions of the Court of Summary Jurisdiction at Darwin had not served the aim of general deterrence. Given the personal circumstances of the offenders and the statistical material provided, his Worship expressed himself reasonably satisfied that penalty under s 20 of the Act would be sufficient to achieve the ends of personal deterrence.

[25] Clearly, his Worship was of the view that the imposition of a substantial monetary penalty, on a person unable to pay, with the inevitable

consequence of imprisonment, needed to be introduced to satisfy the purpose of general deterrence even where the offender was a first offender. He was concerned to do that because of the information before him indicating an increasing prevalence in the commission of this type of offending.

[26] As pointed out earlier, his Worship only had details of the number of vessels apprehended, in 1998, 18, 1999, 27, and to November 2000, 53. By consent, however, this court received much greater detail covering the years 1988 to November 2000, the total number of vessels apprehended and the number of type III long line vessels within that total.

Year	Total vessels apprehended	No of type III
1988	23	23
1989	13	13
1990	9	9
1991	34	29
1992	15	15
1993	17	8
1994	?	74
1995	37	36
1996	65	42
1997	91	77
1998	18	18
1999	27	12
To November 2000	50	36

[27] As to his Worship's concern that he was dealing with offences committed by the master of five separate vessels all apprehended within a space of a few days and brought before the court at the one time, the information before this court shows that there have been many occasions on which the masters of four or more vessels have been before the court simultaneously.

[28] Although I can not guarantee that the figures that follow are accurate, they do represent a fair assessment based upon the information available. They refer to the number of occasions in each of the nominated years during which offenders have been before the Court of Summary Jurisdiction at Darwin where the circumstances demonstrate that there were four or more vessels involved. In 1995 there were three such occasions, in 1996, three (on one occasion there were eight), 1997, two, 1998 nil, 1999 one, and this single occasion in the year 2000.

[29] The figures do not demonstrate to me any clear tendency for an increase in prevalence of this offence. They must be treated with caution given that they are dependent upon the adequacy and frequency of surveillance and the means to apprehend available.

[30] It should also be noted that it is not only the Court of Summary Jurisdiction at Darwin which has jurisdiction to deal with these types of offences. I do not think that any valid assessment could be made of prevalence without having statistical information of a like kind from other courts, for example, Broome in Western Australia. The availability of the surveillance and means of apprehension may have an effect upon whether offenders are taken to Darwin or Broome. There may well be other variables of which I am not aware.

[31] On the information now available, I do not think it is possible to decide judicially that this type of offence is aggravated by increasing prevalence such as to justify a more severe sentence than previously prevailed in the

hope that the incidence of the crime will decrease. His Worship acknowledged that it is unlikely that the increase in sentence would come to the notice of like minded people in Indonesia.

[32] The general subject of prevalence and deterrence is dealt with by Fox and Freiburg at par 2.346 and commencing at par 3.630 in their text. Bearing in mind the circumstances of these appellants and others who may be likely to offend in this way, I am attracted to the observation by the author of the Canadian textbook on sentencing, Ruby Sentencing 2nd Edition:

> "Deterrence does not threaten those whose lot in life is already miserable beyond the point of hope. It does not improve the morals of those whose value systems are closed to further modification, either psychologically or culturally …".

[33] It would be of benefit to know whether fines with imprisonment in default of payment are imposed in other jurisdictions for like offences, and whether that sentencing option has been shown to have had any deterrent effect.

[34] Although general deterrence is entrenched as a principle of sentencing, the material presently available does not indicate that a significant increase in the level of punishment, as was imposed on each of these appellants, was justified.

[35] The appellants have all returned to Indonesia after having served the terms of imprisonment to which they were sentenced and I invite submissions from counsel as to the appropriate orders to now be made.
