Jettner v Peach [2002] NTSC 59

PARTIES:	WENDY LOUISE JETTNER
	v
	DAVID NICHOLAS PEACH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	No. JA 45 of 2002 (20102927)
DELIVERED:	7 OCTOBER 2002
HEARING DATES:	4 SEPTEMBER 2002
JUDGMENT OF:	ANGEL J

REPRESENTATION:

Counsel:

Appellant:	I J Rowbotham
Respondent:	M Carter

Solicitors:

Appellant:	Woodcock Solicitors
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Jettner v Peach [2002] NTSC 59
No. JA 45 of 2002 (20102927)

IN THE MATTER OF the *Justices Act*

BETWEEN:

WENDY LOUISE JETTNER
Appellant

AND:

DAVID NICHOLAS PEACH
Respondent

REASONS FOR JUDGMENT

(Delivered 7 October 2002)

ANGEL J*:*

[1] This is an appeal against conviction and sentence in respect of a charge that between 31 January 2000 and 18 August 2000 at Darwin in the Northern Territory of Australia the appellant did steal credit valued at $2805.60 the property of Darwin Toy Library.

[2] On 1 November 2001 the appellant pleaded not guilty before the Court of Summary Jurisdiction to 17 charges in all. Eventually all charges other than the stealing charge were dismissed. In reaching his conclusion that the appellant was guilty of the stealing charge, his Worship said that he was satisfied beyond reasonable doubt of the following facts:

(a) that the Darwin Toy Library was an incorporated association;

(b) that from about 11 November 1999 until a date prior to 31 July 2000 the appellant was employed by the Darwin Toy Library as Director, her duties including undertaking the financial record keeping for her employer;

(c) that during her time as Director she had the use of a Darwin Toy Library credit card, that is, she was given a credit card where debits incurred on the credit card were billed to the Darwin Toy Library and not to her personally;

(d) that she was never told expressly that the card could not be used for her private use;

(e) that during the appellant's time as Director she used the corporate credit card for her private use and that debits on the card for her private use totalled $2805.60, not $3218.07 as alleged by the prosecution;

(f) that on 18 October 2000 the appellant gave the President of the Darwin Toy Library one Julie Baronio, a cheque for $4139.84 following a conversation between them wherein Mrs Baronio had referred to "inappropriate use" of the credit card by the appellant and "an abuse of her position as Director";

(g) that the appellant did not have permission to use the corporate credit card for her private use and that her use of the card for private use did not occur in the exercise of a claim of right or an honest and reasonable but mistaken belief in the existence of such permission.

[3] The grounds of appeal attacking the conviction were twofold:

(1) that the learned Magistrate erred in reversing the onus of proof in respect to whether the appellant held a mistaken belief as to authorisation, and

(2) that the finding of guilty was unsafe and unsatisfactory.

[4] As to the first ground I agree with the submissions of the respondent that neither the issue of authorisation nor the related issue of honest and reasonable but mistaken belief that the conduct was authorised were properly raised during the hearing. The appellant neither gave nor called evidence about such a belief. In her record of interview with Police the appellant withdrew an earlier assertion that she had consent to use the credit card for her personal use, a matter to which the learned Magistrate in his reasons expressly adverted. (See pp 353–53 of the transcript of 26 February 2002). No witness called said that personal use of the credit card by the appellant was authorised. This ground of appeal should be dismissed.

[5] I am also in agreement with the respondent's submission that in the absence of express authorisation the learned Magistrate properly drew the inference that the appellant had no honest belief she was authorised. This was demonstrated, amongst other things, by her failure to restore the credit she used for her purposes on a monthly basis. As the learned Magistrate said, if the appellant truly believed she was entitled to use the card for her own use so long as the credit was replenished, she would have made payments on a monthly basis so as to replenish the Darwin Toy Library's credit. She only presented a cheque once spoken to by the President Mrs Baronio. The adverse inference drawn by the learned Magistrate was clearly open to him and I am satisfied that no substantial miscarriage of justice has occurred in the finding of guilty. The conviction is safe and satisfactory and the appeal against conviction should be dismissed.

[6] On 26 February 2002, having found the appellant guilty, the learned Magistrate after hearing submissions imposed a sentence of six months imprisonment with two months to serve. The grounds of appeal against that sentence are fourfold:

(a) that it was manifestly excessive in all the circumstances;

(b) that the learned Magistrate erred in his application of *Bird's* case, (1988) 56 NTR 17;

(c) that the learned Magistrate erred in failing to sentence the appellant in accordance with the *Sentencing Act (NT)*;

(d) that the learned Magistrate erred in sentencing the appellant "to serve actual imprisonment on the basis, in part, that the appellant's children were beneficiaries of the offence".

[7] In sentencing the appellant the learned Magistrate acknowledged that the prisoner had no prior convictions and correctly took into account that the $2805.60 consisted of 29 instances of theft over a period of in excess of seven months and in breach of trust, that she was not entitled to a discount for a plea of guilty, and that restitution in full had been made. A defendant with no previous convictions, whose first convictions are for numerous offences committed over an extended period of time but in respect of which charges are made simultaneously, can not receive the leniency which would be extended to one whose conviction is for one offence or for two or more committed at the same time; *Napper v Samuels* (1972) 4 SASR 63. The learned Magistrate specifically adverted to the fact that the appellant was 33 years of age and that she had two children aged five and three. He referred to the Court of Criminal Appeal's decision in *Nagas* (1995) Northern Territory Judgments 1447 at 1466 where reference was made to Thomas, Principles of Sentencing, 2nd ed, at 211 and exceptional family hardship being an exception to the rule that family hardship is normally not a circumstance the sentencer may take into account.

[8] As the respondent argued, consistent with *Bird's* case (supra), a sentence of immediate imprisonment is the usual punishment for stealing in a position of trust unless exceptional circumstances exist or the amount of money is

small. The evidence in the present case is that the father who occupied and worked a mining tenement could care for the children in the event the appellant was imprisoned albeit he would need to adjust his work routine to do so. The learned Magistrate specifically said specific as opposed to general deterrence was warranted in the present case because 29 conscious decisions were made by the appellant to steal that to which she was not entitled "and something has to be done to get into the defendant's mind to let her know that she can not help herself to the property of other people".

[9] In my view the sentence can not be said to be manifestly excessive in the circumstances and the learned Magistrate did not err in his application of *Bird's case* (supra). At the hearing on appeal counsel for the appellant withdrew the ground of appeal alleging failure to sentence in accordance with the *Sentencing Act (NT)*.

[10] As to the final ground of appeal against sentence the comments of the learned Magistrate which are complained of are as follows, comments made in the course of addressing relevant sentencing factors identified in *Bird's* case:

> "In relation to the second consideration, that of an offender who is the mother of young children, Mrs Jettner is the mother of young children aged 5 and 3. Again I pay or I do not consider that exception to be a mitigating circumstance in this case. Again the sentencing principle of general deterrence to my mind is paramount. I also make the observation that it would appear that as a result of Mrs Jettner's offending that the children benefited and I say this in this sense, the offending consisting of the obtaining of goods and services had the ability to free up other funds in the family situation which could be utilised by the family, including the children.

> I also see entries like Mitchell Street Child Care and I would anticipate the children benefited from that offending. Their bed and breakfast in South Australia. I would anticipate the children benefited by that and then petrol purchase could well have involved the children being ferried around in a motor vehicle."

[11] What the learned Magistrate said in reference to the children of the appellant was really an aside not relevant to his task. He makes reference to general deterrence being a paramount consideration in the passage complained of and it was immediately followed by the following:

> "The other thing – the other exception to my mind is not relevant. Both parents being imprisoned. Mr Jettner's not charged with anything. He's not been found guilty of anything. He's not going to gaol. Other things circumstances mean that the imprisonment of one parent effectively deprives the children of parental care. Mr Jettner will be available to care for the children on those occasions when he's not pursuing his vocation.
>
> The short answer in this case is that we have a situation where the defendant has been found guilty after a hearing of the theft of credit of an amount that cannot be considered to be large, but is not small involving 29 thefts over a period in excess of 7 months where a breach of trust was involved. To my mind there has to be a gaol term to indicate to the community that you cannot steal from your employer. There has to be a gaol term or warn and tell others in the community. There's also an aspect of specific deterrence."

[12] In my view there is no substance in this ground of appeal and that also must be dismissed. The learned Magistrate's exercise of his sentencing discretion has not been demonstrated to be in error. The sentence he imposed is not beyond the bounds of his discretion.

[13] The appeal is dismissed.