

CITATION *Meneri v Court* [2017] NTSC 89

PARTIES: MENERI, Joshua

v

COURT, Michael

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING APPELLATE  
JURISDICTION

FILE NO: LCA 17 of 2017 (21637013)

DELIVERED ON: 12 December 2017

DELIVERED AT: ALICE SPRINGS

HEARING DATE: 7 December 2017

JUDGMENT OF: SOUTHWOOD J

APPEAL FROM: THE LOCAL COURT EXERCISING  
ITS CRIMINAL JURISDICTION

**CATCHWORDS:**

CRIMINAL LAW – SENTENCING - SUSPENDED SENTENCE –  
FAILURE TO SIGN ORDER – APPLICATION FOR BREACH OF  
SUSPENDED SENTENCE - APPEAL AGAINST FINDING OF BREACH  
PROVEN – Suspended sentence with conditions – whether s 102A of the  
*Sentencing Act* (NT) is a condition precedent to the order having operational  
effect – s 101 and s 102 complied with – appeal dismissed

*Sentencing Act* (NT) s 40(1), s 40(2), s 40 (3), s 40(6), s 41, s 42(1), s 42(1)(b), s 42(2), s 43, s 43(5)(b) to (f), s 43(7), s 100, s 101, s 102, s 102A, s 102A(2), s 102A(3), s 103

*Dinsdale v The Queen* [2000] HCA 54; *R v Ford* (2008) 100 SASR 94; 181 A Crim R 398; *Griffiths v The Queen* (1977) 137 CLR 293; *R v Palliaer* (1983) 35 SASR 569; *R v Simmons* [1998] 2 VR 14; *R v Warfield* (1994) 34 NSWLR 200, referred to

## **REPRESENTATION:**

### *Counsel:*

Appellant:	G Dooley
Respondent:	S Robson

### *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 DARWIN

*Meneri v Court* [2017] NTSC 89  
No. LCA 17 of 2017 (21637013)

BETWEEN:

**JOSHUA MENERI**  
Appellant

AND:

**MICHAEL COURT**  
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 12 December 2017)

**Background**

- [1] On 29 August 2016 his Honour Borchers J, presiding in the Local Court at Alice Springs, convicted the appellant of the crime of aggravated assault and sentenced him to a term of 21 days' imprisonment. The sentence was suspended on the rising of the court on conditions. Under s 40(6) of the *Sentencing Act* (NT), an operational period of 12 months was fixed.
- [2] Contrary to s 102A(2) of the *Sentencing Act*, the appellant left the precincts of the court without signing the notice of suspended sentence of imprisonment. He did so despite being told to remain in court until he had signed the notice. Under s 102A(3) of the Act, upon leaving the court the appellant became liable to be arrested without warrant.

- [3] Prior to sentencing the appellant, the sentencing Judge received a supervision assessment under s 103 of the *Sentencing Act*. The assessment report is dated 22 August 2016. The author of the report, Ms Shantel Klarenbeek, stated: “The general conditions associated with a supervision order were clearly explained to [the appellant], as well as the consequences of failing to abide by them. The offender agreed he understood and was prepared to comply.”
- [4] It is the invariable practice of probation and parole officers, who undertake supervision assessments under s 103 of the *Sentencing Act*, to explain any proposed conditions of a suspended sentence and the consequences of non-compliance to the offender; and ask the offender if he agrees to comply with the proposed conditions. The offender’s response is reported to the sentencing Judge and the parties. This is the usual manner in which courts in the Territory are informed that an offender has been given the necessary explanations about such orders and consents to an order suspending a sentence with attached conditions.
- [5] Ms Klarenbeek recommended to the Local Court that the following conditions be imposed on the offender.
1. The offender must not during the period of the order in force, commit another offence (whether in or outside the Territory) punishable on conviction by imprisonment;
  2. The offender is under the ongoing supervision of a probation and parole officer, and must report to a probation and parole

officer within 2 clear working days after the order comes into force;

3. The offender must tell the probation and parole officer of any change of address or employment within 2 clear working days after the change;
4. The offender must not leave the Territory except with the permission of a probation and parole officer;
5. The offender will not purchase or consume alcohol, and will submit to testing as directed by a probation and parole officer or a police officer;
6. The offender will participate in Alcohol assessment, counselling and/or treatment as directed by a probation and parole officer;
7. The offender will at the direction of a probation and parole officer, attend and complete a Family Violence Program, participate fully and do nothing to cause their (sic) early discharge.

[6] The recommended conditions are standard conditions for offenders who have engaged in domestic violence and have a problem with the misuse of alcohol.

[7] The appellant was represented by Ms Cuppidge on 29 August 2016 and an interpreter, Mr Bruce Sharp, was present. Ms Cuppidge told the court she had an opportunity to go over the appellant's supervision assessment and did not have any further submissions to make.

[8] The conditions imposed by his Honour Borchers J when sentencing the appellant included recommended conditions 1 to 5, which are general conditions, and his Honour added the following condition 6:

The [appellant] is to immediately leave Alice Springs and for a period of 6 months from today's date not return or remain in Alice Springs except with the permission of his probation and parole officer or to attend to personal medical or dental emergencies.

- [9] Before his Honour Borchers J pronounced condition 6, he asked Ms Cuppaidge if there was any reason why the appellant would need to come to Alice Springs during the 6 month period. She said, "No, your Honour", and did not object to the imposition of that condition. After pronouncing the full sentence on the appellant, his Honour told the appellant to have a seat in the back of the court and that when his Honour vacated the bench, he could sign his order and is then free to go. Despite this direction, the appellant left the court without signing the notice.
- [10] There is a hand written note of all of the sentencing orders on the court file and a transcript of Borchers J's sentencing remarks. It is clear that the conditions were explained to the appellant and the appellant consented to the order suspending the sentence and the attached conditions before his Honour made the order and attached the conditions.
- [11] On 5 December 2016 the appellant appeared before his Honour Birch J in the Local Court on an application for breach of his suspended sentence. He was represented by Mr Thomas of counsel. On instructions, Mr Thomas told the court the appellant admitted the breach. His Honour found the breach proven but took no further action.

[12] The Breach and Compliance Report, which was exhibit 1 in the application, described the appellant's breach as follows:

On 29 August 2016, the [appellant] was explained the conditions of his order at the Alice Springs Court House as well as the consequences should he fail to comply, he stated his full understanding.

On 3 September 2016 the [appellant] failed to report [to his probation and parole officer] within 2 clear working days.

The [appellant] did not report or contact this service from the commencement of the order until 23 October 2016 when the [appellant] was located by Community Corrections.

On 24 October 2016, the [appellant] commenced engaging and has not failed to report with this service and is engaging well with his supervising officer.

[13] On 19 June 2017 the appellant appeared before his Honour Borchers J in the Local Court at Hermannsburg. Once again, he appeared on an application for a breach of his suspended sentence. Mr Dooley appeared on his behalf. He advised the court the appellant had not signed the notice of suspended sentence of imprisonment which contained the conditions which were attached to the order suspending the sentence. Mr Dooley submitted that, as the appellant had not signed the notice, he had not entered the suspended sentence of imprisonment and the application for breach of conditions should be dismissed. In response, the Police Prosecutor submitted the appellant should be sentenced to a term of actual imprisonment of 21 days. In reply, Mr Dooley submitted it was not the appellant's fault he did not sign the notice. He was a poor speaker of English and, mostly likely, he did

not understand what was required of him before he left the court on 29 August 2016. As a result, the court could not conclude that the appellant had failed or was no longer willing to comply with the conditions of his suspended sentence. His Honour accepted Mr Dooley's submissions and dismissed the application. However, the appellant was required to remain in court until he signed the notice of suspended sentence which he did almost one year after he had been sentenced.

### **Grounds of appeal**

[14] The appellant now seeks an extension of time to appeal against the order his Honour Birch J made on 5 December 2015 and, if leave is granted, an order quashing his Honour's finding that the breach of the conditions of the suspended sentence was proven. The sole ground of appeal is:

That his Honour erred in finding that a suspended sentence had been breached and proved in circumstances where the suspended sentence had not been entered into by the appellant.

[15] On behalf of the appellant, Mr Dooley submitted the following. On 29 August 2016, by failing to obtain the appellant's signature on the order, the Local Court failed to obtain the appellant's consent to the making of the order suspending the appellant's sentence of imprisonment and attaching the conditions. The appellant did not give his consent in any other way. The standard procedure for obtaining an offender's consent to such an order is through securing their signature on the typed order. In the present case, this practice was not followed.

[16] In light of my finding at [10] and the reasons set out below this submission cannot be sustained. Further, to suggest that the consent of the appellant, who speaks English poorly, would be demonstrated by him placing his signature on the notice of suspended sentence does not make sense. It is most unlikely that he would be able to read the document, let alone fully comprehend it. The process that was undertaken in this case was a far more appropriate way of ensuring the appellant's consent to the order suspending the sentence and the attached conditions was real and comprehending.

### **The main issue**

[17] The main issue in the appeal is whether an offender's compliance with the provisions of s 102A of the *Sentencing Act* is a condition precedent to an order suspending a sentence having operational effect. In my opinion, it is not; and the application for an extension of time in which to appeal should be dismissed.

### **Suspended sentences**

[18] The *Sentencing Act* sets out a hierarchy of sentencing dispositions. The most serious disposition is a custodial sentence which must be served in full. The least serious disposition is a no conviction bond or fine. Amongst the custodial dispositions is a suspended sentence of imprisonment. The disposition is primarily dealt with in Subdivision 1 of Division 5 of Part 3 of the Act. Subdivision 1 is comprised of sections 40, 41, 42 and 43 of the Act. In addition, it is necessary to have regard to Division 1 of Part 6 of the Act.

Part 6 is headed, ‘Making of sentencing and other orders’. Division 1 is headed, ‘Conditions, requirements and signing of orders’, and includes sections 100, 101, 102 and 102A of the Act. Section 100 of the Act is not relevant to this appeal.

[19] Subsections 40(1), (2) and (3) of the *Sentencing Act* states:

- (1) A court which sentences an offender to a term of imprisonment of not more than 5 years *may make an order* suspending a sentence where it is satisfied that it is desirable to do so in the circumstances.
- (2) An order suspending a sentence of imprisonment may suspend the whole or part of the sentence and the order may be subject to such conditions as the court thinks fit.
- (3) A court must not impose a suspended sentence of imprisonment unless the sentence of imprisonment, if unsuspended, would be appropriate in the circumstances having regard to this Act.

[20] There are numerous cases dealing with the operation of these and similar provisions in other jurisdictions. Those authorities establish the following principles. A court must first decide if a sentence of imprisonment is an appropriate penalty.<sup>1</sup> Having decided that imprisonment is the appropriate penalty a sentencing court must then decide the appropriate head sentence.<sup>2</sup> After determining the appropriate head sentence, the court must determine if the sentence should be suspended in whole or in part and whether any

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<sup>1</sup> *R v Palliaer* (1983) 35 SASR 569 at [571]; *R v Simmons* [1998] 2 VR 14; *Dinsdale v The Queen* [2000] HCA 54 at [79]; *R v Ford* (2008) 100 SASR 94; 181 A Crim R 398 at [51] – [52].

<sup>2</sup> *R v Palliaer* (1983) 35 SASR 569 at [571]; *R v Ford* (2008) 100 SASR 94; 181 A Crim R 398 at [51] – [52].

conditions should attach to the order suspending the sentence.<sup>3</sup> A court is not to impose a suspended sentence if the sentence of imprisonment by itself is not an appropriate disposition in all the circumstances.<sup>4</sup> There must be good reason for suspending the sentence.<sup>5</sup> Good reason will usually be derived from circumstances personal to the offender and the offender's prospects of rehabilitation.<sup>6</sup> There must be something about the personal circumstances of the offender or the offence that would render it inappropriate to imprison the applicant in circumstance where imprisonment is the appropriate penalty.<sup>7</sup>

[21] There are a number of parts to the imposition of a suspended sentence:

(1) the passing of an appropriate sentence of imprisonment; (2) the making of an order suspending the sentence of imprisonment; and (3) the fixing of appropriate conditions, if any, for the supervision of the offender in the community. The conditions must relate to the character of the particular crime and to the purpose of punishment for that crime, including deterrence and rehabilitation. However, the ultimate sentencing disposition is a singular disposition. A sentence is an order which definitively disposes of the consequences of conviction. It is a definitive decision by the sentencing

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<sup>3</sup> *R v Palliaer* (1983) 35 SASR 569 at [571]; *Dinsdale v The Queen* [2000] HCA 54 at [79]

<sup>4</sup> *R v Simmons* [1998] 2 VR 14; (1997) 93 A Crim R 589 at [16].

<sup>5</sup> *R v Ford* (2008) 100 SASR 94; 181 A Crim R 398 at [51] – [52].

<sup>6</sup> *R v Ford* (2008) 100 SASR 94; 181 A Crim R 398 at [51] – [52].

<sup>7</sup> *R v Ford* (2008) 100 SASR 94; 181 A Crim R 398 at [51] – [52].

Judge on the punishment which is to be the consequence of an offender's conviction.<sup>8</sup>

[22] Section 41 of the *Sentencing Act* states:

An offender in respect of whom a suspended sentence has been imposed under section 40 has to serve the sentence or part of the sentence held in suspense *only* if he or she is ordered to do so under section 43.

[23] Subsections 42(1) and (2) of the *Sentencing Act* state:

- (1) A court which has made an order wholly or partially suspending a sentence of imprisonment on certain conditions may, on application under this subsection, if satisfied that:
  - (a) the circumstances of the offender have materially altered since the order was made and as a result the offender will not be able to comply with any condition of the order; or
  - (b) the offender has failed or is no longer willing to comply with a condition of the order;

vary or cancel the order and, subject to subsection (2), deal with the offender for the offence or offences with respect to which the order was made in any manner in which the court could deal with the offender if it had just convicted the offender of the offence or those offences.

- (2) In determining how to deal with an offender following the cancellation of an order suspending a sentence of imprisonment, the court must take into account the extent to which the offender had complied with the order before its cancellation.

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<sup>8</sup> *Griffiths v The Queen* (1977) 137 CLR 293; *R v Warfield* (1994) 34 NSWLR 200 at 205.

[24] The provisions of s 42 of the Act enable a court to vary or cancel an order suspending a sentence of imprisonment and resentence an offender if the circumstances of the offender have materially changed or the offender has failed or is no longer willing to comply with a condition of the order.

[25] Section 43 of the *Sentencing Act* enables a sentencing court to deal with an offender who breaches a condition of the offender's suspended sentence of imprisonment or commits another offence during the operational period. So far as is relevant to this appeal s 43(5)(b) to (f) and (7) of the Act state:

(5) Where:

(a) [...]

(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; or

(d) restore part of the sentence or part sentence held in suspense and order the offender to serve it; or

(e) for a wholly suspended sentence, extend the operational period to a date after the date of the order suspending the sentence; or

- (ea) for 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.

[...]

- (7) A court must 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 must state its reasons.

[26] In substance, s 43 of the *Sentencing Act* provides that if a sentencing court is satisfied there has been a breach of a condition of a suspended sentence of imprisonment, the court must restore the sentence or part of the sentence held in suspense unless the court considers that it would be unjust to do so.

[27] Section 101 of the *Sentencing Act* states:

A court *must not make an order* which has attached to it conditions [...] unless the conditions are explained to the offender in accordance with section 102 *and the offender consents* to:

- (a) the order being made and to the conditions being attached; [...]
- (b) [...].

[28] Section 102 of the *Sentencing Act* states;

- (1) Where a court proposes to make an order which has attached to it conditions to which an offender is required to consent or which requires an offender to give an undertaking, it must, before making the order, explain or cause to be explained to

the offender, in language likely to be readily understood by the offender:

- (a) the purpose and effect of the proposed order; and
  - (b) the consequences that may follow if the offender fails without reasonable excuse to comply with the proposed order; and
  - (c) where the proposed order requires the offender to undertake a program referred to in section 100, the benefits and detriments of the program, including the medical risks and benefits of any drugs used in the program; and
  - (d) the manner in which the proposed order may be varied.
- (2) Non-compliance with subsection (1) does not affect the validity of the order.

[29] Sections 101 and 102 of the Act are important sections. They establish two preconditions to the making of an order suspending a sentence of imprisonment. The first precondition is that the offender must consent to the order and to any conditions attached to the order. The consent must be real and comprehending as the second precondition is that the court must explain or cause to be explained to the offender the purpose and effect of the proposed order and any attached conditions, the consequences if the offender fails to comply with the proposed order and attached conditions once they are imposed, the benefits and detriments of any program the offender will be required to undertake, and the manner in which the proposed order may be varied.

[30] Offenders cannot be effectively supervised and assisted to rehabilitate themselves in the community if their consent to an order suspending a sentence is not real and comprehending. Such consent is a fundamental tenant of rehabilitation of any offender. For rehabilitation to be successful, an offender must be prepared to change his or her ways and they must understand how they will be assisted to do so. Given the importance of these matters, the best practice is for the sentencing Judge to (1) inform an offender of the conditions that are to be imposed, (2) give the offender the explanation required by s 102, and (3) ask the offender's counsel if the offender consents to the order and the attached conditions before sentence is passed on the offender.

[31] Both s 101 and s 102 of the *Sentencing Act* are predicated on the basis that the necessary explanations are given and consent is obtained before the order suspending the sentence is made and any conditions are attached. That is, before the order suspending the sentence is pronounced.

[32] Section 102A of the *Sentencing Act* states:

(1) This section applies to the following orders:

(a) an order made under section 11, 13, 40 or 78K;

[...]

(f) an order varying or confirming an order mentioned in paragraphs (a) to (e).

- (2) On the making of the order, the offender must not leave the precincts of the court without signing the order.
- (3) A police officer may, without a warrant, arrest an offender who the police officer suspects, on reasonable grounds, has failed to comply with subsection (2).

[33] The purpose of s 102A of the Act is to ensure: (1) there cannot be any misunderstanding by an offender of the precise terms of the conditions that have been imposed on and consented to by the offender; (2) Community Corrections have a record of the conditions under which an offender is to be supervised; (3) a record of the conditions is made before the offender leaves the court; and (4) there is a written record which facilitates the proof and identification of any conditions that have been breached by an offender. The requirements of s 102A facilitate proper supervision of an offender who is serving a suspended sentence.

[34] There is nothing in the text of s 102A of the *Sentencing Act* which suggests that fulfilment of the requirements of s 102A(2) is a condition precedent to an order suspending a sentence of imprisonment, with attached conditions, having operative effect. Section 102A comes into operation upon an order suspending a sentence being made. The section is predicated upon a valid order being made. If the order suspending the sentence is invalid, the offender could not be required to sign the order. He or she would be entitled to say, for example, they did not consent to these orders or none of this was explained to them. Subject to any requirement to spend some time in actual imprisonment, the order suspending the sentence and the attached conditions

take effect when the order and conditions are pronounced by the sentencing court. Section 101 provides that an order suspending a sentence cannot be made unless the purpose and effect of the proposed order and the consequences of a breach of the conditions have been explained to an offender and an offender consents to the order.

[35] Subject to obtaining a report in accordance with s 103 of the *Sentencing Act*, consent and the necessary explanations about the purpose and effect of the order and attached conditions are the only conditions precedent to an order suspending a sentence of imprisonment. The signing of the order by the offender is not. The text of s 101 of the Act is prospective, it addresses what must be done before an order suspending the sentence of imprisonment can be made by a court. Section 102A does not.

[36] If it were otherwise, the processes of the sentencing court would be significantly hampered. It would be impossible to know the date from which the operational period runs. The failure of an offender to sign the order would potentially be a mechanism by which the offender could shorten the operational period and the time he is supervised in the community. It is arguable that if the order suspending the sentence is invalid because the order was not signed by the offender, the offender is to go to prison for the whole of the head sentence of imprisonment which was imposed on him. This clearly was not the intention of the sentencing court. The sentencing court would be beholden to the offender to render its sentencing orders

valid, authoritative and enforceable. This cannot have been the intention of the legislature.

[37] The fact that an offender is amenable to arrest without a warrant if an offender does not sign the order, does not require a different construction of s 102A of the *Sentencing Act*. If an offender is arrested under s 102A, the offender is to be brought before the court and dealt with under s 42(1)(b) of the *Sentencing Act*. Once the offender is before the court, the court will determine if the offender's failure to sign the order means the offender is no longer willing to comply with the conditions attached to the order suspending the sentence of imprisonment. If so, the sentencing court is able to vary or cancel the sentence or deal with the offender as if the court had just convicted the offender. If not, the court can require the offender to sign the order before being released from the court. The court may also deal with any concerns the offender has about the conditions. The operation of s 42 of the Act is also predicated on a valid order being made in the first instance.

### **Conclusion**

[38] The application for an extension of time to appeal and, to the extent necessary, the appeal are dismissed. The terms of s 101 and s 102 of the *Sentencing Act* were complied with in this case. The orders made by the Local Court on 29 August 2016 are valid and were valid and took effect at the time they were pronounced. It follows that the order made by his Honour Birch J on 5 December 2016 is also valid.

[39] There was no basis for the Local Court to dismiss the application for breach which was heard and determined on 19 June 2017.

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