Schluter v Perry [2003] NTSC 8

PARTIES:	BRADLEY JAMES SCHLUTER
	v
	RUSSELL LAWRENCE PERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 69/02 (20113368)
DELIVERED:	25 February 2003
HEARING DATES:	4 February 2003
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL - JUSTICES - appeal against sentence - aggravated unlawful use of motor vehicle - whether magistrate erred in ordering restitution without inquiring as to the appellant's capacity to pay such order - Justices Act 1928 (NT) - interpretation of s 55(1) and s 55(3) of the Juvenile Justice Act 1999 (NT) - whether the maximum amount of restitution that can be ordered under the Juvenile Justice Act is $5000 for one or more offences, irrespective of how many offences have been committed.

Juvenile Justice Act 1999 (NT) s 53(1)(g), s 55(1), (2), (3); *Interpretation Act 1999* (NT) s 24(b)

Salmon and Chute (1994) 94 NTR 1, *Raggett, Douglas & Miller v R* (1990) 50 A Crim R 41, *Clarke C&J Ltd v Inland Revenue Commissioners* [1973] 1 WLR 905, *R v Daniel Pilkington* [2002] NTSC, applied.

REPRESENTATION:

Counsel:

Appellant:	H. Spowart
Respondent:	M. Johnson

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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

Schluter v Perry [2003] NTSC 8
JA 69/02 (20113368)

BETWEEN:

BRADLEY JAMES SCHLUTER
Appellant

AND:

RUSSELL LAWRENCE PERRY
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 25 February 2003)

[1] This is an appeal from a decision of a stipendiary magistrate sitting in the Juvenile Court at Darwin delivered on 23 April 2002.

[2] On that date the learned stipendiary magistrate convicted the appellant on certain charges and imposed sentences including orders for restitution.

[3] The Notice of Appeal sets out charges 26 and 27 being two of the charges upon which the appellant was convicted. These charges are as follows:

> "Between the 31st day of July and 17th day of August 2001 at Palmerston in the Northern Territory of Australia
>
> 26. unlawfully used a motor vehicle, namely, Holden Station Wagon SA VYT-929

AND that the said unlawful use involved the following circumstances of aggravation:

(i) that as a result of the said unlawful use the whereabouts of the said Holden Station Wagon SA VYT-929 remained unknown to the person entitled to lawful possession of the said Holden Station Wagon SA VYT-929, namely, Henry WHITE for longer than 48 hours, namely, unknown to owner.

Contrary to Section 218 of the Criminal Code.

AND FURTHER

Between the 1st day of August 2001 and 3rd day of August 2001 at Berrimah in the Northern Territory of Australia

27. unlawfully used a motor vehicle, namely, Holden Commodore Sedan NT 382-740.

AND THAT the said unlawful use involved the following circumstance of aggravation:

(i) That the property unlawfully used was damaged by the said Bradley SCHLUTER and the cost of repairing the same was $1,000.00 or more, namely, $4,000.00.

Contrary to Section 218(1) and (2)(c) of the Criminal Code."

[4] The learned stipendiary magistrate imposed the following sentence (tp 28):

> "On charges 12, 15 and 23, you're found guilty of each, convicted of each and ordered to be detained for seven months on each concurrent to commence today. On charge 13, 16, 24, 26 and 27, you're found guilty of each, convicted of each and ordered to be detained for four months on each concurrent and to commence today. In additional charges 26 and 27, the two unlawful use matters, you're disqualified from holding or obtaining a licence or driving for a period of three months from now. Additional charge 26, I order you to pay restitution in the sum of $5000 to Steve Muir (?).
>
> On charge 27, I order you to pay restitution in the sum of $4000 to Satellite City Autos. I don't impose any default in relation to paying that. I note that $5000 is the maximum that can be awarded against a juvenile anyway. …"

[5] His Worship imposed a total sentence of nine months detention for these and other offences. This was suspended on the appellant entering a bond in the sum of $500 own recognisance to be of good behaviour for two years.

[6] The appellant's grounds of appeal are that:

> "1. That the learned stipendiary magistrate erred in imposing orders for restitution totalling $9,000.00 in respect of counts 26 and 27 on court file 20113368 without inquiring as to the Appellant's capacity to pay such orders.
>
> 2. That the learned stipendiary magistrate erred in law and exceeded his jurisdiction in imposing separate restitution orders in relation to counts 26 and 27, the combined total of which was $9,000.00."

[7] Ms Spowart, on behalf of the appellant, submitted that the learned stipendiary magistrate made no inquiries as to the appellant's capacity to make restitution.

[8] Section 55 of the Juvenile Justice Act makes provision for orders for restitution. The relevant provisions are:

> "55. Restitution
>
> (1) Where the Court thinks fit, it may, subject to subsection (3), make an order for restitution by way of monetary compensation or performance of service in respect of compensation for an offence.
>
> (2) The Court shall, on making an order under subsection (1), have regard to the amount of loss or damage suffered as a result of the offence, and the ability of the offender to make restitution.
>
> (3) Where the Court makes an order under subsection (1) for monetary compensation, it shall not exceed $5,000, and may be paid in a lump sum or by instalments as directed by the Court."

[9] In the Juvenile Court the appellant's counsel had submitted that the appellant was 17 years of age. He did not have employment. He had made efforts to obtain employment with a plumbing company. At the time of the hearing of these matters those efforts had not been successful. The

appellant's mother lives in Perth. In his reasons for sentence the learned stipendiary magistrate noted (tp 26):

> "Your father has his own alcohol or other problems and has not been able to be much support to you."

[10] A pre-sentence report presented to the learned stipendiary magistrate stated the appellant received Centrelink benefits of $160 per week. He paid $115 for rent. At the time of the offending he had been living on the streets.

[11] It is the submission on behalf of the appellant that the learned stipendiary magistrate failed to have regard to the "ability of the offender to make restitution" - s 55(2). The appellant submits the learned magistrate erred in making orders for restitution which the appellant had no ability to pay.

[12] I accept the general principles applicable to appeals against sentence are as set out in the written submissions of Mr Johnson, counsel for the respondent:

> "It is fundamental that an exercise of sentencing discretion not be disturbed on appeal, unless error in that exercise is shown. The presumption is that there is no error.
>
> > *Salmon and Chute* (1994) 94 NTR 1 at 24 where Kearney J repeated the comments made in *Raggett, Douglas and Miller v R* (1990) 50 A Crim R 41 at 42.
>
> 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 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."

[13] Counsel for the respondent submits that the learned stipendiary magistrate did not make any reference to the appellant's ability to pay the restitution as required by s 55(2) of the Juvenile Justice Act. My reading of his Worship's reasons for sentence confirm the submission made on behalf of the respondent. The respondent concedes this ground of appeal. The respondent further submits that the learned stipendiary magistrate erred in failing to make an order as to how restitution should be paid, that is, either in a lump sum or by instalments.

[14] I agree with the submissions by both counsel that the learned stipendiary magistrate fell into error.

[15] On the basis that his Worship failed to have regard to the appellant's ability to make restitution in the sum ordered, I would allow the appeal.

[16] Having allowed the appeal on Ground 1, it is not really necessary for me to consider Ground 2 of the appellant's appeal. However, counsel for both the appellant and respondent submitted that the point raised in Ground 2 had not previously been the subject of a ruling by the Supreme Court and such a ruling may be of assistance.

[17] Accordingly, I will deal with Ground 2 of the appeal.

Ground 2: That the learned stipendiary magistrate erred in law and exceeded his jurisdiction in imposing separate restitution orders in relation to counts 26 and 27, the combined total of which was $9000.

[18] It is convenient to again set out the provisions of s 55(1), (2) and (3) of the Juvenile Justice Act:

> "55. Restitution
>
> (1) Where the Court thinks fit, it may, subject to subsection (3), make an order for restitution by way of monetary compensation or performance of service in respect of compensation for an offence.
>
> (2) The Court shall, on making an order under subsection (1), have regard to the amount of loss or damage suffered as a result of the offence, and the ability of the offender to make restitution.
>
> (3) Where the Court makes an order under subsection (1) for monetary compensation, it shall not exceed $5,000, and may be paid in a lump sum or by instalments as directed by the Court."

[19] The appellant submits s 55(1) does not empower the Court to make separate restitution orders for separate offences where the total exceeds $5000. Further in expressing as subject to s 55(3) the power of the Court to make restitution orders with respect to juveniles is bound by the monetary limit in s 55(3); the Court may not make an order exceeding a total of $5000 regardless of the number of offences involved.

[20] Counsel for the appellant refers to the provisions of s 24(b) of the Interpretation Act which provides as follows:

> "24. **Sex and number**
>
> In an Act –
>
> …
>
> (b) words in the singular shall include the plural and words in the plural shall include the singular."

and also refers to the following authority *Clarke C & J Ltd v Inland Revenue Commissioners* [1973] 1 WLR 905 at 911:

> "In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing, if there is collision, the phrase shows what is to prevail."

[21] The appellant's submission is that s 55(1) includes offences by reference to s 24(b) of the Interpretation Act. Ms Spowart for the appellant, submits that if Parliament had intended to do otherwise it would have used clear and unequivocal language.

[22] The respondent considers that the learned stipendiary magistrate was not in error. The learned stipendiary magistrate had ordered $5000 with respect to charge 26 and $4000 with respect to charge 27. Neither amount exceeded the statutory maximum of $5000. The learned stipendiary magistrate had made reference (tp 28) to the restitution of $5000 being the maximum amount of restitution. His Worship in making two orders for restitution totalling $9000 clearly interpreted the maximum of $5000 applied to each offence.

[23] Counsel for the appellant draws an analogy with s 53(1)(g) of the Juvenile Justice Act which provides as follows:

> "(1) If the Court finds a charge proven against a juvenile it may, as it thinks fit, whether or not it proceeds to conviction, but subject to subsection (2), do one or more of the following –
>
> …

(g) subject to subsection (10), order that the juvenile to be detained at a detention centre or imprisoned for a period not exceeding the maximum period that may be imposed under the relevant law in relation to the offence or 12 months, whichever is the lesser;"

[24] This refers to "a charge" however whether the juvenile is sentenced for a charge or a number of charges, the maximum total period is 12 months detention or imprisonment.

[25] In the matter of *R v Daniel Pilkington* [2002] NTSC Martin CJ said at p 2:

> "The actual penalties for those various offences range up to 14 years' imprisonment. The maximum period of detention which can be imposed under the Juvenile Justice Act is 12 months. There the sentences cannot be accumulated and they must all run concurrently. That is the law in that jurisdiction."

and further on p 5:

> "Various people have lost as a result of your conduct, and applied for compensation. The maximum which may be ordered under the Juvenile Justice Act is $5000. In any event, given that you have nothing and are unlikely to have anything by way of income or any other means to pay, such an order would, I think, be futile. Your victims have, of course, other remedies if they wish to pursue them. It must be said that the prospects of recovery as against you are virtually nil."

[26] Section 53(1) refers to "a charge proven" subsection (g) refers to 12 months detention. This is the maximum total period of detention that can be imposed irrespective of how many charges are proven.

[27] I agree with counsel for the appellant that the amount of $5000 is the maximum amount of restitution that can be ordered irrespective of how

many offences have been committed. If the legislation intended it to be $5000 per each offence, then I would expect that to have been clearly stated.

[28] My interpretation of s 55(1) and (3) is that the maximum amount of restitution that can be ordered under the provision of this section is $5000 for one or more offences.

[29] The appeal having been allowed under Ground 1, I will ask the parties to address me on the actual orders that are sought.

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