Atkinson v Eaton [2010] NTSC 72

PARTIES:	ATKINSON, John Allan v EATON, Donald
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 22 of 2010 (21032633) JA 23 of 2010 (20810281)
DELIVERED:	17 December 2010 (via video link to Alice Springs)
HEARING DATES:	30 November 2010
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Court of Summary Jurisdiction at Alice Springs

CATCHWORDS:

CRIMINAL LAW – SENTENCING – JUSTICES APPEAL – appeals against sentences imposed on two files by a Stipendiary Magistrate on grounds that they are manifestly excessive in all of the circumstances – appeal allowed in part.

Sentencing Act (NT)
Domestic and Family Violence Act (NT)

Gokel v Silverthorne (unreported) [2000] NTSC 22: *Kelly v The Queen* [2000] NTCCA 3; *Leaney v Bull* (1992) 108 FLR 360: *Midjumbani v Moore* (unreported) [2009] NTSC 27; *Olsen v Sims* [2010] NTCA 8

REPRESENTATION:

Counsel:

Appellant:	R. Anderson
Respondent:	R. Micairan

Solicitors:

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

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Atkinson v Eaton [2010] NTSC 72
No. JA 22 of 2010 (21032633)
No. JA 23 of 2010 (20810281)

BETWEEN:

JOHN ALLAN ATKINSON
Appellant

AND:

DONALD EATON
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 17 December 2010)

Introduction

[1] On 29 September 2010 the Appellant was sentenced after entering guilty pleas in the Court of Summary Jurisdiction at Alice Springs as follows:

File 20810281

- Breach of a good behaviour bond imposed on 12/11/2008 under s 13 *Sentencing Act*; re-sentenced on the original offence of failing to comply with a restraining order to 21 days imprisonment. The date of the original offence was 12 April 2008.

File 21032633

- For the offence of engaging in conduct that contravenes a domestic violence order, convicted and sentenced to 21 days prison and for the offence of resisting police in the execution of their duty, convicted and sentenced to seven days imprisonment.

[2] All sentences were ordered to be served concurrently. The total term was 21 days imprisonment commencing 28 September 2010.

[3] The conduct giving rise to the breach of bond on file 20810281 was the same conduct as that comprising the breach of the restraining order on file 21032633. On 12 November 2008 (file 20810281) the Appellant had been placed on a $800.00 own recognisance good behaviour bond for two years with conditions he (i) not approach Lee Kara Palmer when consuming or under the influence of alcohol and (ii) submit to a random breath test when directed by a police officer for the purposes of the order.

[4] Condition (i) of the good behaviour bond was breached in early December 2009 and the Appellant was dealt with on 22 December 2009 for a breach proven by drinking alcohol with Ms Palmer. Apart from being warned by the Magistrate, no further breach action was taken.

[5] Relevantly the terms of the Domestic Violence Order commencing on 17 December 2009, (the Domestic Violence Order the subject of count 1 on file 21032633) were that the Appellant was restrained from approaching,

contacting or remaining in the company of protected persons when consuming or under the influence of alcohol or another intoxicating drug or substance. As with the good behaviour bond the Appellant was required to submit to a breath test or analysis on request of police.

[6] In contrast to the good behaviour bond however, the domestic violence order included three children as protected persons in addition to Ms Palmer. One child was the child of the Appellant and Ms Palmer and two of the children were Ms Palmer's children from a previous relationship who ordinarily resided with Ms Palmer and the Appellant. The domestic violence order was due to expire on 6 December 2010.

Proceedings in the Court of Summary Jurisdiction

[7] The agreed facts were that on 28 September 2010 the Appellant consumed an unknown quantity of alcohol at number 6 Ellery Drive in Alice Springs. Also present in the house were all of the protected persons. Police attended as a result of a complaint that some of the protected persons had become frightened of the Appellant's behaviour and had hidden themselves and their pets in a cupboard in a locked room. Police found the Appellant in the company of a protected person (Ms Palmer) and was arrested. While being escorted to the police vehicle the Appellant tensed both of his arms and threw his body from side to side in an attempt to escape custody. He was handcuffed and participated in a breath analysis that returned a reading of .172 per cent alcohol in his blood.

[8] When asked if he had a reason for being in the protected person's company while under the influence of intoxicating liquor, he replied "it was her choice".

[9] On behalf of the Appellant the Court was told he had been drinking with his partner (Ms Palmer) in the afternoon and although he knew he should not have been drinking with her, he was surprised police attended. The Court was told he knew nothing of allegations of protected persons and pets hiding in cupboards. He had struggled with police because he was upset and intoxicated; from his perspective, one minute he was sitting on the couch with his de-facto partner, the next minute police arrested him.

[10] As to the Appellant's personal circumstances the Court was told he had been in a de-facto relationship with Ms Palmer (one of the protected persons) for about four years. They lived together with the children. At the time of these offences he was 26 years of age. The Appellant had a work history (previously) as an apprentice butcher; he had later done fencing work, station work, gardening, maintenance and house keeping. He and Ms Palmer were on family parenting payments and both looked after the children. He had been in custody overnight and pleaded guilty on the first morning he appeared before the Court. It was emphasised there was no harm to the protected person(s); Ms Palmer and the Appellant had been drinking together; the Appellant was young and the plea was at the earliest opportunity.

Grounds of Appeal

[11] It is alleged the sentences are manifestly excessive in all of the circumstances. On Appeal particular attention was drawn to the re-sentencing on the original offence of fail to comply with a restraining order, (an order no longer in force), as a result of the breach of the good behaviour bond.

[12] The learned Magistrate was re-sentencing under s 15(4), (5) *Sentencing Act* (NT) that provides as follows:

> (4) Where, on the hearing of an application under subsection (1) or on the hearing of its own motion under subsection (3A), a court is satisfied, by evidence on oath or by affidavit or by the admission of the offender, that the offender has failed without reasonable excuse to comply with a condition of the order, it may:
>
> (a) vary the order;
>
> (b) confirm the order originally made; or
>
> (c) cancel the order (if it is still in force) and, whether or not it is still in force, subject to subsection (5), 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 found the offender guilty of the offence or those offences.
>
> (5) In determining how to deal with an offender under subsection (4)(c), a court shall take into account the extent to which the offender had complied with the order before its cancellation or expiration.

[13] In the re-sentencing process for the offence that was committed on 12 April 2008, there was very little information before the Court about the offending,

the relevant facts and the circumstances of the Appellant at that time. Although the learned Magistrate was entitled to have regard to the breach of bond by drinking alcohol with Ms Palmer in December 2009 and the current breach, in determining how to deal with the Appellant (s 15(5) *Sentencing Act* (NT)), there is nothing in the facts that indicated the Appellant's first offence of fail to comply with a restraining order was of a nature that warranted imprisonment.

[14] The Appellant had convictions in 2007 and early 2008 for assault and aggravated assault respectively. Clearly he receives no mitigation for positive good character. The most the Court was told of the breach of the restraining order for which the Appellant was placed on a good behaviour bond was that it was for an expired domestic violence order where the breach involved consumption of alcohol in the presence of the same protected person.[1] There was apparently no allegation any children were present or were envisaged to be protected by the domestic violence order or the bond. Although counsel for the Respondent did not concede this point, counsel was unable to point to factors that would justify the sentence of imprisonment in terms of a re-sentencing exercise for the first offence of breaching a restraining order.

[1] Raised by counsel for the Appellant before the Court of Summary Jurisdiction, T at 8.

[15] Counsel for the Respondent referred to *Leaney v Bull*[2] where Kearney J stated:

> "His Worship was entitled to treat that fact as suggesting that the appellant had no great regard for the law, or for his obligations under the bond, and as casting doubts upon the likelihood of his being of good behaviour in the future or taking advantage of any similar leniency his Worship might extend to him".

[16] Accepting there was certainly a case for the learned Magistrate to doubt the regard, capacity, or ability of the Appellant to abide by conditions concerned with alcohol, that alone does not, in my respectful view permit treating the original offending as worthy of a term of imprisonment when there was no material to show that proportionately the offending was significant enough to warrant imprisonment.

[17] I am persuaded error has been shown in relation to the imposition of a term of imprisonment on the sentencing disposition for the breach of the bond. The sentence of imprisonment cannot be justified on the basis of totality with the sentences for the breach of the recent restraining order and resist arrest (on file 21032633) as seems to be faintly suggested on the part of the Respondent. Applied in that way would be a distortion of the principle of totality. The breach of the recent restraining order was subject to the provisions of s 121(2) and (3) *Domestic and Family Violence Act* (NT) and involved distinct considerations. The fact of this later offending cannot of itself justify the sentence of imprisonment on first offence in time. The

[2] (1992) 108 FLR 360 at 363. Cited also by Martin CJ in *Gokel v Silverthorne* (unreported) [2000] NTSC 22.

bond was reasonably lengthy (two years) and although there had been two breaches of the bond, without knowing something more significant of the objective facts at the time of the original offence it is difficult to reason how imprisonment was justified. It is important that bonds not be treated as one and the same as suspended sentences. In my view the re-sentencing to a term of imprisonment was manifestly excessive and will be set aside.

[18] I do not share counsel for the Appellant's view that as a result of an error being identified in the proceedings for the breach of bond, it automatically flows that the Appellant should be re-sentenced on the later offending of breaching a restraining order and resist arrest. The learned Magistrate referred specifically to s 121(3) *Domestic and Family Violence Act* (NT) in regard to the second conviction for breach of a restraining order. As this was the Appellant's second breach of a domestic violence order the mandatory seven days imprisonment applied unless the criteria under s 121(3) *Domestic and Family Violence Act* (NT) was met. Section 121 *Domestic and Family Violence Act* (NT) provides:

> **121 Penalty for contravention of DVO – adult**
>
> (1) If an adult is found guilty of an offence against section 120(1), the person is liable to a penalty of 400 penalty units or imprisonment for 2 years.
>
> (2) The court must record a conviction and sentence the person to imprisonment for at least 7 days if the person has previously been found guilty of a DVO contravention offence.
>
> (3) Subsection (2) does not apply if:

(a) the offence does not result in harm being caused to a protected person; and

(b) the court is satisfied it is not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence.

(4) In addition, subsection (2) does not apply to a police DVO that has not been confirmed by the Court under Part 2.10.

(5) The court must not make an order for a person who has previously been found guilty of a DVO contravention offence if the order would result in the release of the person from the requirement to actually serve the term of imprisonment imposed.

(6) If the person is sentenced to serve a term of imprisonment for the offence while already serving another term of imprisonment for another offence, the court must direct the term of imprisonment to start from the end of the other term of imprisonment.

(7) This section applies despite the *Sentencing Act*.

[19] As has been previously determined,[3] and with respect I agree, the requirements set out in s 121(3) are cumulative and it is for an offender seeking to rely upon the provision to raise matters which may bring him or her within the ambit of the subsection.[4] I note Riley J (as he then was) also stated that:

> the particular circumstances of the offence should be given a wide interpretation to achieve the purpose of the legislation. Where appropriate such circumstances will include relevant circumstances of the offender. Such factors as immediate remorse, immediate cooperation with the authorities and an early plea of guilty may be so

[3] *Midjumbani v Moore* (unreported) [2009] NTSC 27, Riley J.
[4] *Midjumbani v Moore,* para 12.

closely connected to the offender's culpability as to effect the seriousness of the offence.

[20] No harm was caused to any of the protected persons. In examining the "particular circumstances" one matter the learned Magistrate found was significant was the admitted fact that the children who were protected persons and present were in fear. Although that was initially an agreed fact, during the course of submissions before the Court of Summary Jurisdiction counsel for the Appellant told the learned Magistrate his client knew nothing of this.[5]

[21] The Appellant did not seek to give evidence about that point or to seriously challenge that fact. Clearly His Honour signalled it was of significance.[6] The Appeal must, in my view proceed on the basis of the admitted facts as His Honour came to view them. Counsel for the Respondent argued that this fact meant it was appropriate to sentence the Appellant to not only the seven days imprisonment but to the 21 days imposed. Counsel for the Respondent also submitted the sentences were at the "upper end of the scale" but "that it is open for this Court to re-sentence the appellant in terms of the length of the sentence and suspension".[7]

[22] Overall I have been persuaded the 21 days imprisonment was manifestly excessive, however in re-sentencing I have come to similar conclusions as the learned Magistrate with respect to s 121(2) and (3) *Domestic and Family*

[5] T at 6.
[6] See eg. T at 9.
[7] Summary of Submissions on behalf of the Respondent, para 9.

Violence Act (NT). I have some sympathy with the learned Magistrate's dilemma. This was the second breach of a domestic violence order and by the same conduct was simultaneously the second breach of a bond in similar terms. Protected persons had been placed in fear. The Appellant had resisted arrest. His Honour was asked to consider a suspended sentence and His Honour indicated he would be sympathetic if he was dealing solely with the "first file".[8] His Honour's doubts about the Appellant's ability to comply with Court orders is hardly surprising given the Appellant's history. In his reasons for imposing 21 days imprisonment, His Honour said:

> "not withstanding your plea today, which I have taken into account in relation to the sentences on file 21032633, I am satisfied that on the basis of the history before me, the instructions you provided to Mr Anderson, that you have shown no remorse, you are not taking any responsibility for your behaviour on these occasions, you are not in any way facing up to the reality of your behaviour with alcohol and how that affects your partner and children and it is time for you to – it is past the time of fines and rulings from the bench will be in effect".

[23] In my view because of the factors concerning the children who were protected persons and the fear they held, His Honour could not be said to be in error for regarding this second offence as of significant gravity justifying a short term of imprisonment in the order of the seven days. Although there was an immediate plea of guilty, it must be remembered the Appellant also resisted arrest. The resist arrest would have to be considered at the lower end of the scale, however in the context of enforcement of domestic violence orders and the problems that arise when people are intoxicated, it has some

[8] T 12.

significance. This cannot be said to be a case of "immediate cooperation" in the sense it was expressed in *Midjumbani v Moore* as a mitigating factor.[9]

[24] Beyond the seven days imprisonment, given all of the factors including age, the early plea, (the extent to which it was taken into account is difficult to see), the living circumstances of the Appellant with the primary protected person and that there was no violence offered or threatened, I am persuaded the term of imprisonment greater than the seven days under s 121(3) *Domestic and Family Violence Act* (NT) is disproportionate to the gravity of the offending. It was excessive. I will re-sentence the Appellant.

[25] In re-sentencing the Appellant, I am going to order the Appellant serve seven days imprisonment for the breach of the restraining order and a concurrent seven days imprisonment for the resist arrest, (as was the sentence of the learned Magistrate). The imposition of the minimum seven days imprisonment under s 121(3) *Domestic and Family Violence Act* (NT) must still be a sentence proportionate to the gravity of the offending.[10] I agree the factors taken into account by His Honour justify seven days imprisonment. I note the alcohol reading taken from the Appellant was significant. He was noticeably intoxicated.

[26] There was room to have regard in some identifiable way, to the plea of guilty. The *Sentencing Act* (NT) provides the Court shall have regard to

[9] *Midjumbani v Moore* (unreported) [2009] NTSC 27, Riley J, set out in para 19 above.
[10] *Olsen v Sims* [2010] NTCA 8, especially Southwood J at para [58].

whether the offender pleaded guilty and if so, the stage in the proceedings.[11] Transparency is desirable in identifying and quantifying any reduction.[12] The fact of the early timely plea is one reason I will not sentence the Appellant to any further time beyond the seven days. If not for the early plea I would sentence him between 7 - 14 days imprisonment or would order partial accumulation of the two offences.

[27] Given the history of breaches in my view it is not appropriate to suspend the sentence even though I am advised the Appellant has complied with bail conditions since being released on appeal bail. There is a need for personal deterrence. Although it is not a serious example of resist arrest, it was committed during the enforcement process of a domestic violence order. These are difficult and often emotional situations. The facts of the two offences are related and it is appropriate the sentences be served concurrently.

[28] In terms of the breach of bond, given it is the same conduct for which the Appellant has been dealt with by way of imprisonment for the breach of the domestic violence order, I will not impose a further sentence on that matter other than to record the breach. Had there not been the penalty of imprisonment imposed on the breach of the domestic violence order I would have forfeited the recognizance.

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[11] Section 5(2)(j) *Sentencing Act*.
[12] *Kelly v The Queen* [2000] NTCCA 3.

Orders

1. File 20810281, JA No 23 of 2010.

The Appeal is allowed.

The sentence is quashed.

The breach of bond is found proven. No further penalty imposed.

2. File 21032633, JA 22 of 2010.

The Appeal is allowed in part. The sentence of 21 days imprisonment is quashed.

The Appellant is re-sentenced as follows:

Counts 1 and 2, Convicted on each count and sentenced to 7 days imprisonment on each count. The sentences are to be served concurrently and are back dated to commence on 14 December 2010 to take into account time already served in custody.

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