Marshall v Court [2013] NTSC 75

PARTIES:	MARSHALL, Terry v COURT, Michael WRIGHT, Simone Yvette and EATON, Donald John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA-AS 4, 5 and 6 of 2013 (21318825); (21245504); (21227333)
DELIVERED:	13 November 2013
HEARING DATES:	24 September, 14 October and 28 October 2013
JUDGMENT OF:	MILDREN AJ
APPEALED FROM:	MR BORCHERS SM

CATCHWORDS:

CRIMINAL LAW – Sentencing – Appeal – Further material on resentence

APPEAL – Justices Appeal – Appeal against sentence – Fresh evidence – Appeal de novo – Further material on resentence.

Justices Act 1979 (NT) s 176A
Sentencing Act 1995 (NT) s 43(7)

Clair v Brough (1985) 37 NTR 11;
Leaney v Bell (1992) 108 FLR 360;
Seears v McNulty (1987) 89 FLR 154;
Smith v Torney (1984) 29 NTR 31, applied.

McCarthy v Trenerry [1999] NTSC 29, followed.

Long v Westphal [2010] NTSC 55;
Michael v Eaton [2010] NTSC 56;
Rontji v Westphal [2010] NTSC 67, referred to.

REPRESENTATION:

Counsel:

Appellant:	M O'Reilly
Respondent:	T Jackson

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service Inc
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 ALICE SPRINGS

Marshall v Court [2013] NTSC 75
No. JA-AS 4, 5 and 6 of 2013
(21318825); (21245504); (21227333)

BETWEEN:

TERRY MARSHALL
Appellant

AND:

MICHAEL COURT, SIMONE YVETTE WRIGHT and DONALD JOHN EATON
Respondents

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 13 November 2013)

Introduction

[1] In each of these matters the appellant has appealed against sentences imposed by the Court of Summary Jurisdiction on various grounds. As well, the appellant has sought to lead new evidence pursuant to s 176A of the Justices Act. After hearing submissions from the parties, I admitted that evidence and heard submissions concerning the re-sentencing of the appellant on the basis that the nature of the appeal had changed to a hearing de novo: see *Seears v McNulty*;[1] *Leaney v Bell*.[2]

[1] (1987) 89 FLR 154 at 160.

[2] The appellant had pleaded guilty to breach of bail (No 21318825); driving unlicensed; driving an unregistered and uninsured vehicle on a public street, and driving a vehicle which was unsafe to drive (No 21245504); and breach of a suspended sentence (21227333). The learned Magistrate sentenced the appellant as follows:

> File 21245504: Imprisonment for 28 days for driving unlicensed; fines for the other counts.
>
> File 21318825: Imprisonment for 1 month cumulative on 21245504.
>
> File 21227333: sentence of 1 month restored and ordered to be served concurrently with the sentence on file 21245504.

The findings of the learned Magistrate

[3] His Honour found that on 1 December 2012 the appellant had been driving a family-owned Toyota Spacio at a time when he was unlicensed. He had been subject to a roadside inspection which revealed he was unlicensed and that the vehicle was unregistered, uninsured and unsafe to drive. He was arrested and charged, and bailed to attend court on 4 December 2012 but did not attend. He was arrested on 6 May 2013 and when asked why he breached his bail, he replied "I forgot it." At the time of committing the offences the Appellant was subject to a suspended sentence of imprisonment for one month on file 21227333 which had been imposed on 21 August 2012 for driving unlicensed.

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[2] (1992) 108 FLR 360 at 369.

[4] The appellant had numerous prior convictions for driving without a licence, and for driving whilst disqualified. The learned Magistrate said of the defendant's past record:

> The seriousness of this offence is seen in the context of your prior driving record. You have 14 prior convictions for driving whilst unlicensed between 1995 and last year, that's a period of 18 years. You also have four convictions for driving whilst disqualified, that's a total of 18 convictions for driving whilst unlicensed or whilst disqualified, one every year since 1995. You have been gaoled on three separate occasions, being 1996, 1997 and 2007. Also you came to this court on the 21 August last year and you made a solemn promise to the court that you would stay out of trouble for 12 months. You did so knowing full well that if you break that promise you'd go to gaol for 28 days or a part thereof. You broke your promise 3 months and 10 days into your 12 month promise. What that indicates to the court is that the promise wasn't worth anything, you didn't take it seriously and possibly had little or no intention of keeping your promise.

[5] As to the breach of bail his Honour said:

> You signed bail in the presence of a police officer on Saturday 1 December last year. You made a promise that you go to court four days later, that is on the Tuesday, Tuesday the 4th. You didn't go into court and you say you forgot. I don't accept that you forgot. Clearly you had been locked up by the police, that's an important issue, you would have remembered that. You were given the bail papers, you had those bail papers, you chose not to come to court because you knew you were in trouble. I say that and I make that inference because of course you did nothing, if you had forgotten you could easily, given your constant contact with the court system, the Police and Aboriginal legal aid, have made arrangements to come to court and surrendered on the basis that you did forget, you could have done so almost immediately and there would have been little difficulty for you but you chose to do nothing, you chose to evade the court and you're only here because you were arrested yesterday at your house.

[6] At the sentencing hearing, counsel for the appellant had informed the learned Magistrate that the appellant was 35 years old, from Papunya with

basic literacy and schooling. He was living at Hidden Valley with his wife and children. His wife is on dialysis and he receives a carer's pension for looking after his disabled mother-in-law. He was unemployed and lived off the pension. He was driving, with his wife as a passenger in order to go to a shop to buy food. His wife has a licence, but she asked him to drive because she was not feeling well. He had in the past gone to the police station at Haasts Bluff to get a licence. He was given a yellow form, but he did not understand what it meant. It was difficult for Aboriginal people to get licences from remote police stations, but he intended, now that he was living in Alice Springs, to try and see about getting a licence from the Motor Vehicle Registry. He had in the past done a driving course through DASA, and he had been trying consciously to do something about his alcohol consumption with some success, and that it was to his credit that he was not driving whilst intoxicated. It was submitted that a prison sentence was very unusual for driving without a licence. As to the breach of bail, it was submitted that the appellant did forget, and that when he realised he had missed going to court, he did not know what to do about it. It was an early plea, and he asked that the appellant not be sentenced to imprisonment. No submission was made that some disposition other than a fine should be imposed.

[7] As noted above, the learned Magistrate did not accept that the appellant had forgotten to answer his bail. No indication was given by the learned

Magistrate before he pronounced sentence that he did not accept the appellant's excuse.

The fresh evidence

[8] Section 176A of the *Justices Act* permits this court to receive evidence not adduced in the court below if:

- The evidence is likely to be credible and would have been admissible at the time of the hearing appealed from;
- The evidence was not adduced at the hearing appealed from;
- There is a reasonable explanation why it was not adduced previously;
- Notice of intention to rely on the evidence is given to the respondent to the appeal.

[9] If these conditions are satisfied, the "shall" admit the evidence, unless the court is satisfied that the evidence, if received, would not afford a ground for allowing the appeal.

[10] I permitted the appellant to tender a number of affidavits despite objection from counsel for the respondents which was to the following effect. The appellant is the lead singer and guitarist of the Tjintu Desert Band. He has been a member of the band since 2002. Ms Hutchins is the Music Touring Manager of Artback NT: Arts Development and Touring, responsible for engaging indigenous bands and preparing them for touring activities. The

Tintju Desert Band toured a number of remote towns and communities in the Northern Territory between 24 April and 5 May 2013. Another indigenous band had been booked to do a national tour in July 2013. In late April 2013 she had concerns about whether this band would be able to honour its commitments to complete the tour, and she was considering the Tjintu Desert Band as a potential replacement. On 6 May 2013, she drove to Papunya “as a last ditch attempt aimed at allowing the band a final opportunity to undertake the tour.” On 8 May she decided to change the band. On 9 May she went to CAAMA Music, which manages the appellant’s band, to see if the Tjintu Desert Band would be available to do the tour. CAAMA Music had already been approached in late April about this possibility. Timelines and availability were confirmed on 9 May. The appellant took part in these discussions on that day (even though he was apparently in prison). The Tjintu Desert Band was finally confirmed as an acceptable alternative on 21 May 2013. There is no specific evidence about how much money the appellant would receive, but Ms Pitt, the Marketing and Communications Manager for CAAMA deposed to the appellant having contractual obligations and she also stated that CAAMA assists with the resolution of difficulties facing indigenous artists in a wide range of areas including financial and social issues. I infer that the appellant would receive appropriate remuneration for his services. The object of the tour was to present indigenous contemporary music to a national audience.

[11] The appellant had been sentenced on 7 May 2013 and was released on bail pending his appeal on 28 May 2013. At the time of his sentence, he was not aware of the possibility that the Tjintu Desert Band and he would be taking place on the national tour, and nor was his counsel. In fact the band successfully performed at nine venues in New South Wales, Queensland, Victoria and the Australian Capital Territory from 29 June to 20 July 2013.

[12] In *McCarthy v Trenerry*[3] BF Martin CJ reviewed the authorities which discuss the circumstances when evidence on appeal will be admitted under s 176A. The conclusion reached was expressed in par [20]:

> The purpose of an appeal is to review the decision of the Court at first instance in the light of the evidence before that Court. The qualified provisions enabling evidence to be introduced on appeal must be related to the time when sentence was passed, either to make up for a deficiency in that evidence which could have been brought forward at that time, or to better explain the evidence which was brought before that Court. That is the judicial function on appeal.

[13] No argument was mounted that this decision was wrong, and not warranted by the language of s 176A, and I therefore considered that I should follow it. In this case, Mr O'Reilly submitted that there were facts present at the time of sentence which were not known to the appellant, namely that there was a good chance that the appellant would have an opportunity to go on the tour and earn remuneration. The significance of those facts went beyond merely improving the appellant's earning capacity. If the appellant was imprisoned, this would have made it more difficult for him to be included in the tour, bearing in mind that there would be a period of two weeks for rehearsals,

[3] [1999] NTSC 29

and without him, it is likely that Artback NT would have needed to source either a new lead singer or a different band to go on the tour if one could be found, or perhaps the tour might have had to be abandoned.

[14] I was of the opinion that this evidence would have been admissible at the original sentencing hearing. It was credible, and it was not adduced at the original hearing for the reason that the appellant was not aware of it at that time. I could not be satisfied that if admitted, it would not be a ground for allowing the appeal. The conditions of admissibility were therefore met.

Resentence

[15] Mr O'Reilly produced a schedule of a random selection of 98 cases where the Court of Summary Jurisdiction imposed sentences for the offence of driving whilst unlicensed between 19 January 2010 and 27 August 2013 with a view to demonstrating the current range of sentences for this offence. In none of the cases was a sentence of imprisonment imposed. In nearly every case a fine was imposed. In some cases, the offender had significant priors for the same offence. There were cases where the offender had eight priors but a fine of only $300; nine priors, but a fine of $900; eight priors and a fine of $200; eight priors and a fine of $100; and 11 priors and four disqualifications resulting in an aggregate fine of $1450 for also driving an unregistered and uninsured vehicle. The material establishes that the tariff for this offence is a fine ranging between $100 and $500, with a significantly higher fine if there is an aggregate sentence for other driving offences.

[16] In *Rontji v Westphal*[4] Blokland J dealt with an appeal against sentence where the appellant had been sentenced to 21 days imprisonment for driving unlicensed. The appellant had nine prior convictions. The maximum penalty was imprisonment for 12 months or 20 penalty units. The driving was not aggravated by other poor driving or alcohol. She had pleaded guilty. Her Honour received a schedule of prior sentences imposed between 19 January 2010 and 28 July 2010. None of the persons in the schedule had been sentenced to imprisonment. All were dealt with by way of fines, and many had aggregate fines with other traffic offences. Included in that assessment were people with between seven and 10 previous convictions. The range of fines for repeat offenders was between $125 and $500. Her Honour allowed the appeal on the ground that the sentence imposed was manifestly excessive, and imposed a fine of $500. Her Honour said:[5]

> In this matter it is difficult to see how departing from the established sentencing standard could be justified. There was no other errant driving noted and no alcohol was involved. The previous drive unlicensed conviction was dealt with in 2008 for an offence committed in 2007. Although concerning and somewhat frustrating, the offending does not have the features of a contumelious breach of the law. Despite the previous convictions an assessment must be made of the objective seriousness of the offending. In my respectful view the particular offending did not justify a term of imprisonment and is plainly excessive when viewed in the light of the usual sentencing range and recently considered decisions. [referring to *Long v Westphal*[6] and *Michael v Eaton*[7]]

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4 [2010] NTSC 67.
5 At [8].
6 [2010] NTSC 55.
7 [2010] NTSC 56.

[17] Where there is an established sentencing tariff, that is, a normal range of sentences for a particular offence, sentences imposed by different magistrates should fall within the range, unless the circumstances of the offence or of the offender are exceptional.[8] As Mr Jackson for the respondents correctly submitted, there were two reasons why the circumstances of this case, so far as the driving unlicensed offences are concerned, were exceptional. First, the appellant was on a suspended sentence for similar offending when the offence was committed. Secondly, the appellant's persistent repeat offending showed a contumelious disregard for the law. There was no acceptable excuse for the offending on this occasion. As the learned Magistrate pointed out, there was no demonstrated need to drive the car to do the shopping. There was a shop which sold food within walking distance from the appellant's home. Bearing in mind the sentence imposed, it could not be said that it was excessive when compared to the maximum penalty.

[18] Once I had embarked on a rehearing de novo, I do not consider that I am confined only to the evidence which has been admitted before the learned Magistrate and under s 176A of the Justices Act. Because this is a fresh sentencing exercise where the court is exercising original and not appellate jurisdiction, I can receive any further evidence which the parties wish to tender, even if it is not admissible under s 176A. That appears to be the

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8 *Clair v Brough* (1985) 37 NTR 11 at 14.

effect of *Smith v Torney*[9] where Muirhead J said, in relation to the discretion to receive further evidence on appeal, that the duty of the court is to determine the rights of the parties by reference to the circumstances as they then exist at the conclusion of the appeal and to give such judgment as ought to have been given if the case at that time came before the court of first instance. *Smith v Torney* was followed in *Seears v McNulty*[10] per O'Leary CJ. In *Leaney v Bell*[11] Kearney J followed *Seears v McNulty*, and also admitted new evidence, after he had concluded that the evidence properly received under s 176A had changed the nature of the appeal. It is important to understand therefore, that I am not resentencing the appellant as if I were sitting at the time of the learned Magistrate but with all of the information which was before him at that time and only the further evidence admitted under s 176A. If I were so sitting, I would have to consider what I would have done if I were thinking about a prison term which would have meant that the appellant would not be able to go on the tour. As things now stand, the tour is over and done with.

[19] The further evidence goes to the appellant's character. I have received a letter from Michael Smith, the manager of CAAMA Music which is to the effect that he has known the appellant for four years, and has found him to be gentle, hardworking and trustworthy. Ms Hutchins in her affidavit states that the appellant was a "fantastic ambassador for indigenous music culture

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9 (1984) 29 NTR 31 at 162.
10 (1987) 89 FLR 154 at 162.
11 (1992) 108 FLR 360 at 362.

throughout both touring performances. He was incredibly professional and dealt well with a busy timeline, performance and media commitments. As a leader he assisted the band in coping with high pressure situations." He was "considered, thoughtful, mature and a pleasure to work with."

[20] In my opinion the fresh evidence does not persuade me that a different sentence should now be imposed for the driving whilst unlicensed charge. I consider that a sentence of 28 days imprisonment is entirely appropriate, notwithstanding the appellant's good character. I note that even since his release on bail he has still not obtained a driving licence. Of course, as Mr O'Reilly submitted, he is not obliged to do so. His obligation is not to drive unless he does hold one. But I am not confident that he has as yet entirely learnt his lesson. A sentence of imprisonment will act as a personal deterrent, and as a deterrent to those who contumeliously disobey the law.

[21] As to the breach of the suspended sentence, the learned Magistrate was right to restore the whole of the sentence. The breach occurred three months and 10 days into the 12 month period of the suspended sentence. The fresh evidence does not persuade me that I should take a different course. Sub-section 43(7) of the *Sentencing Act* requires a court to order that the whole sentence be restored unless the court is of the opinion that it would be unjust to do so in view of all of the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence. I am not persuaded that the whole sentence should not be restored.

[22] As to the breach of bail, the appellant has a long history of always answering his bail. He has not previously failed to comply with bail conditions. I do not draw the inference that the learned Magistrate did, that the appellant deliberately failed to appear. I am prepared to accept that he forgot to attend court and did not know what to do about it. Of course the appellant should have sought advice as to what to do about it, when he realised he had not attended court when he should have done so. There is no evidence that the appellant had deliberately absconded, or had tried to hide from the authorities. I think that having regard to the fresh evidence admitted under s 176A and the additional evidence as to his character and the fact that this is a first offence, a community work order is a suitable punishment in all of the circumstances of that offence and of the offender.

[23] The orders of the Court are:

1. Appeal allowed.
2. Orders of the learned Magistrate set aside.
3. In relation to matter number 21245504, for driving without a licence, he is convicted and sentenced to imprisonment for 28 days backdated to 23 October 2013 to take into account time already served.
4. In relation to matter number 21227333, the breach of the suspended sentence, I order that the sentence be restored and commit the appellant to serve it. This sentence is to be served concurrently with the sentence imposed in relation to matter 21245504.

5. In relation to matter 21318825, the appellant is convicted and sentenced to perform 60 hours community work, such work to be completed within six months from the date of his release from prison. There is also a victim impact levy of $150.00.

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