Wilson v Malogorski [2011] NTSC 27

PARTIES:	DONNA MARIE WILSON v MARK ANTHONY MALOGORSKI
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 56 of 10 (21010499)
DELIVERED:	1 April 2011
HEARING DATES:	28 February 2011
JUDGMENT OF:	BARR J

CATCHWORDS:

APPEALS – *Justices Act* – Application to dispense with compliance with condition precedent – recognizance on appeal – whether appellant has done whatever 'reasonably practicable' – evidentiary deficiencies – inability to reach opinion required to dispense with compliance

Justices Act s 165, s 167, s 167(1), s 168, s 169, s 171(1), s 171(2)
Misuse of Drugs Act s 9(1), s 2(f)(ii)

Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd (1987) 47 NTR 8; *Wilfred v Rigby* [2004] NTSC 31, referred to

REPRESENTATION:

Counsel:

Appellant:	J Brock
Respondent:	M Aust

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
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

Wilson v Malogorski [2011] NTSC 27
No. JA 56 of 10 (21010499)

BETWEEN:

DONNA MARIE WILSON
Appellant:

AND:

MARK ANTHONY MALOGORSKI
Respondent:

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 1 April 2011)

Application to dispense with compliance with condition precedent to appeal

[1] On 14 October 2010 the appellant pleaded guilty to one charge of administering cannabis to herself and not guilty to a second charge of unlawfully possessing a separate quantity of cannabis plant material.[1]

[2] On 22 October 2010, the appellant was found guilty on the second charge and convicted. She wished to appeal the finding of guilty and her conviction, and instructed her solicitor to appeal.

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1 contrary to s 9(1) & s (2)(f)(ii) *Misuse of Drugs Act.*

[3] Under the *Justices Act* an appeal must be instituted within one month from the date of the conviction or sentencing order sought to be appealed.[2]

[4] An appeal is instituted by a combination of (1) written notice of appeal, which must be served upon both the clerk of the justice(s) appealed and the respondent; (2) entering into a recognizance on appeal as required under s 167 and s 168 of the Act; and (3) payment of a fee.[3]

[5] Under s 167(1), the recognizance on appeal must contain conditions requiring an appellant to duly prosecute the appeal, to abide the order of the Supreme Court on the appeal, and to pay such costs as may be awarded by the Supreme Court.

[6] In the present case, the notice of appeal was filed and served on 22 November 2010, and the fee paid, but no recognizance was entered into.

[7] A condition precedent to the valid institution of the appeal was thus not satisfied.[4]

[8] The non-compliance may be dispensed with under s 165 of the Act, which reads as follows:-

> "The Supreme Court may dispense with compliance with any condition precedent to the right of appeal, as prescribed by this Act, if, in its opinion, the appellant has done whatever is reasonably practicable to comply with this Act."

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2 s 171(2) *Justices Act.*
3 s 171(1) *Justices Act*.
4 *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8; *Wilfred v Rigby* [2004] NTSC 31.

[9] It is argued on behalf of the appellant that she has done whatever was reasonably practicable to comply with the Act.

[10] On the affidavit evidence of Ms Georgia Lewer, who appeared as counsel for the appellant in the Court of Summary Jurisdiction, after the appellant was found guilty of the charge on 22 October 2010, she gave Ms Lewer, "full instructions to institute an appeal against that conviction".

[11] Ms Lewer has also deposed, relevantly, as follows:-

> "4. I advised her that I would seek approval to institute an appeal and would draft the Notice of Appeal. Unfortunately due to other commitments on that day I was unable to draft the grounds of appeal then nor have Ms. Wilson enter into a recognizance to prosecute an appeal at that time.
>
> 5. I did not at that time advise Ms. Wilson of the requirement to enter into a recognizance. ....
>
> 7. On return to the office I spoke to my supervisors who approved filing an appeal in this matter.
>
> 8. I then drafted grounds of appeal and caused a Notice of Appeal to be filed on 22 November 2010.
>
> 9. Before the Notice was filed I wrote to Ms. Wilson at her address in Batchelor enclosing a recognizance form to be completed by her. It was not returned.
>
> 10. I also made attempts to contact her by her mobile telephone but was unable to do so.
>
> 11. On 20 December 2010 my secretary (Ms. Tahnee Clarke) advised me that she had spoken to Ms. Wilson on the telephone. Ms. Clarke brought to Ms Wilson's attention that she must complete the Recognizance. However, shortly after the conclusion of her court

case she had moved from Batchelor to the remote Queensland Community of Urandangie (Urandangi). She had commenced employment at the pub there, which is the only commercial entity in the community. She was speaking from the landline at the pub in Urandangie. She said that there was no mobile reception there.

12. Ms. Wilson advised that she could not complete the Recognizance as there was no Justice of the Peace available in Urandangie.

13. On 21 December 2011, I telephoned Ms. Wilson who confirmed that she was unable to complete the recognizance because there was no Justice of the Peace. The closest location that would have one was Mount Isa which was hours drive away. Ms. Wilson did not anticipate that she would be travelling there soon.

14. I made enquiries through the Queensland Justice of the Peace website and confirmed that there are no Justices of the Peace located in or near Urandangie. I made further telephone enquiry of the Boulia Shire Council and confirmed that Urandangie has a population of between 30 and 40 people."

[12] It is well established that where a layman has provided to his solicitor all necessary information and proper instructions within a reasonable time so as to enable his solicitor to lodge an appeal on his behalf within time and the failure to lodge the relevant documents within time is due to the fault of the solicitor, he will have done everything which is reasonably practicable for him to comply with the provisions of the Act.[5]

[13] I am satisfied that the appellant gave her counsel instructions to appeal on the day of her conviction on 22 October 2010. However, the evidence in support of the application is unsatisfactory as to what then happened. I

[5] *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8 at18.10; *Wilfred v Rigby* [2004] NTSC 31 at [6].

focus on the period of one month within which the appeal had to be instituted: 22 October to 22 November 2010, although the period subsequent to that could also be relevant.

[14] There are technical deficiencies in the affidavit evidence. Par 11 and par 12 of Ms Lewer's affidavit contain second hand hearsay, and the evidence is therefore inadmissible. However, the entire affidavit was tendered and read without objection, and so for present purposes I will treat the evidence as admissible and consider it for the purposes of determining whether the applicant has done whatever was reasonably practicable to comply with the Act.

[15] With reference to the period identified by me in par [13] above, it is not clear as to when, precisely, the appellant left her home in Batchelor to re-locate to the remote Queensland settlement of Urandangie. The evidence in par 11 of the affidavit indicates only that it was "shortly after the conclusion of her court case". It is not clear as to when, precisely, Ms Lewer wrote to the appellant (as referred to in paragraph 9 of her affidavit) enclosing the recognizance for her signature. Ms Lewer indicates only that it was before filing the Notice of Appeal on 22 November. It is not clear whether the appellant received the recognizance, and, if she did, whether she received it within the relevant 1-month period, and whether she received it before or after she had relocated from Batchelor to Urandangie.

[16] If, for example, the appellant had received the recognizance at a reasonable time prior to 22 November, while she was still in Batchelor, and for whatever reason did not take steps to enter into the recognizance before a Justice of the Peace when (and where) there were Justices available; or, if when travelling to Urandangie, having received the recognizance, she did not stop or detour to see a Justice of the Peace, then arguably she would not have done whatever was reasonably practicable to comply with the Act.

[17] On the other hand, if the appellant did not receive the recognizance inside the relevant 1-month period, or if she received the recognizance within the 1-month period but after she arrived in Urandangie, where no Justice was available, the Court might well be able to find in favour of the appellant that, having given the instructions to appeal on the day of her conviction and not having been advised at that time that she had to enter a recognizance, she had done whatever was reasonably practicable to comply with the Act.

[18] There is no evidence from the appellant herself in relation to the factual matters, known only to her, on which the Court could more readily assess whether she has done whatever was reasonably practicable to comply with the Act.

[19] Although the appeal was not validly instituted, I am able to dispense with the appellant's non-compliance with the condition precedent that she enter into a recognizance. However, I am not of the opinion required by s 165 of the Act that "the appellant has done whatever was reasonably practicable to

comply with the Act", because of the evidentiary deficiencies identified above. I do not know enough about what happened in the relevant 1-month period (and thereafter) to enable me to reach a conclusion one way or the other.

[20] My inability to reach the opinion required by s 165 of the Act is unfortunate for the appellant. I note that if she had entered into a recognizance in the presence of a lay person and not a Justice of the Peace, I could rightly conclude that such a recognizance was "insufficiently entered into, or ... otherwise defective or invalid", in which case, pursuant to s 169 of the Act, I could permit the substitution of a "new and sufficient recognizance", or dispense with the recognizance altogether.[6] It seems unusual that, where there is no recognizance, the Supreme Court has no express power of dispensation.

[21] I will hear from the parties as to whether they or either of them wishes to make any application arising from this decision, and as to what orders I should now make.

[6] s 169(1)(b).