Cant v The Queen [2003] NTSC 13

PARTIES:	CRAIG CANT
	v
	THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	9900592
DELIVERED:	7 March 2003
HEARING DATES:	22 January 2003
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPLICATION – Extension of time sought extending the time within which this application may be brought.

CRIMINAL LAW – JURISDICTION - PRACTICE AND PROCEDURE – Jurisdiction – application to re-open sentencing proceedings – whether error occurred at the time sentenced imposed and whether sentence was imposed according to law – whether court has jurisdiction to re-open proceedings to correct a sentence where a prior conviction has been quashed on appeal and circumstances have changed.

INTERPRETATION – Interpretation of sections 112(1)(a) and (b) Sentencing Act (NT) 1995.

Sentencing Act 1995 (NT), s 112(1)(a) & (b); *Customs Act 1901* (Cth*)*, par 233B(1)(d); *Penalties and Sentences Act 1992 (Qld)*, s 188

Melville v R (1999) 107 A Crim R 70, *Davis v R* (1992) 109 A Crim R 314, *R v Daniel Robert Voss; Ex parte Attorney-General (Qld)* [2001] QCA 483, applied.

REPRESENTATION:

Counsel:

Applicant:	D Dalrymple
Respondent:	G Fisher

Solicitors:

Applicant:	Dalrymple & Associates
Respondent:	Office of the Commonwealth Director of Public Prosecutions

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

Cant v R [2003] NTSC 13
No. 9900592

BETWEEN:

CRAIG CANT
Applicant

AND:

THE QUEEN
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 7 March 2003)

[1] This is an application pursuant to s 112 of the Sentencing Act seeking an exercise of the Court's discretion to re-open sentencing proceedings in this matter which were finalised on 23 November 2001. The application is brought on on the basis that a prior conviction taken into account in sentencing has subsequently been quashed. The relief sought is as follows:

> "(1) granting of an order extending to 25/11/02 the time within which this Application may be brought;
>
> (2) the re-sentencing of the Applicant in accordance with the law."

The background to this matter is as follows:

[2] On 9 November 2001, the applicant was found guilty by a jury of being knowingly concerned in the importation of a commercial quantity of 3, 4 methylenedioxymethamphetamine (MDMA), contrary to paragraph 233B(1)(d) of the Customs Act.

[3] On 23 November 2001, the applicant was sentenced to a term of imprisonment of 14 years and 8 months in respect of that offence. At the time of being sentenced, on 23 November 2001, the applicant was already serving a sentence imposed on him in respect of a prior offence against par 233B(1)(d) of the Customs Act.

[4] On 23 November 2002 a new combined head sentence of 21 years and 6 months was fixed with a new combined non-parole period of 13 years.

[5] On 17 September 2002 the Court of Criminal Appeal in proceeding CA 14 of 2000 quashed the applicant's prior conviction and ordered a new trial in respect of that charge.

[6] The application is that this court re-sentence the applicant on the basis that he now does not have that particular prior conviction.

[7] The applicant also seeks an order extending the time within which this application may be brought, to 25 November 2002, being the date on which the application was filed.

[8] It is relevant to set out the provisions of s 112 of the Sentencing Act which provides as follows:

"**112. Court may reopen proceeding to correct sentencing errors**

(1) Where a court has in, or in connection with, criminal proceedings (including a proceeding on appeal) –

(a) imposed a sentence that is not in accordance with the law; or

(b) failed to impose a sentence that the court legally should have imposed,

the court (whether or not differently constituted) may reopen the proceedings unless it considers the matter should more appropriately be dealt with by a proceeding on appeal.

(2) Where a court reopens proceedings, it –

(a) shall give the parties an opportunity to be heard;

(b) may impose a sentence that is in accordance with the law; and

(c) may amend any relevant conviction or order to the extent necessary to take into account the sentence imposed under paragraph (b).

(3) A court may reopen proceedings –

(a) on its own initiative at any time; or

(b) on the application of a party to the proceedings made not later than –

(i) 28 days after the day the sentence was imposed; or

(ii) such further time as the court allows.

(4) An application for leave to make an application under subsection (3)(b)(ii) may be made at any time.

(5) Subject to subsection (6), this section does not affect any right of appeal.

(6) For the purposes of an appeal under any Act against a sentence imposed under subsection (3)(b), the time within which the appeal must be made starts from the day the sentence is imposed under subsection (2)(b).

(7) This section applies to a sentence imposed, or required to be imposed, whether before or after the commencement of this section."

[9] I will deal firstly with the application for an extension of time within which to bring the application. In his affidavit filed 25 November 2002, Mr

Dalrymple deposes to the fact that the reason for the delay in filing the application was the time needed to research the issue of whether an application under s 112 of the Sentencing Act could validly be made on behalf of the applicant.

[10] I accept the matters set out in the affidavit of Mr Dalrymple. I order that time within which the application may be brought is extended to 25 November 2002.

[11] I now turn to deal with the substantial application.

[12] Mr Dalrymple on behalf of the appellant stated that he was relying on the Northern Territory Court of Criminal Appeal decision in the matter of *Melville v R* (1999) 107 A Crim R 70 and in particular the comments of Kearney J at p 77 - 78. Kearney J referred to the Queensland decision in *Woodford* (1996) 89 A Crim R 146, in *Deacon* (1993) 65 A Crim R 261 and *Boyd v Sandercock; Ex Parte Sandercock* [1990] 2 Qd R 26 at 29; 46 A Crim R 206 at 209 and stated "It is clear that the view in Queensland is that jurisdiction to re-open proceedings under a provision such as s 112(1) exists only if the sentence was imposed in circumstances involving legal error". Kearney J reviewed the authorities in New South Wales *Ho v DPP (NSW)* 1995 37 NSWLR 393; 82 A Crim R 80 which involved a discussion of s 24 of the Criminal Procedure Act 1986 (NSW) Kirby P had noted that this "remedial legislation" should "not be subjected to a narrow construction" and that the court "should afford the language of the section the broadest

available construction so as to achieve its stated objects" and that it "should be given the widest possible operation" for "the correction of arguable mistakes in sentencing". Kearney J expressed himself as being in agreement with these observations and that they were applicable to s 112(1)(a) of the NT Sentencing Act.

[13] Mr Dalrymple on behalf of the applicant urged a similarly broad interpretation approach to the Northern Territory section, in the context of the circumstances of Mr Cant. Mr Dalrymple stated he could not suggest that at the time the sentence was imposed on 23 November 2001 it was not in accordance with the law. He submitted that fundamental circumstances having changed it was amenable to the interpretation of being not in accordance with the law.

[14] With respect to the provisions of s 112(1)(b) Sentencing Act, Mr Dalrymple submits that the issue of what the court should have done can be looked at retrospectively in order to achieve the fairness and the beneficial intent of the legislation. It is his submission that part of the reason for this is to enable flexibility to correct sentences. It is the contention on behalf of the applicant that this flexibility would be defeated if the court could only apply the criteria of what it should have done, or what was in accordance with the law at the time of sentencing.

[15] In Mr Dalrymple's submission the fact that Mr Cant did have a prior conviction at the time he was sentenced should not mean that the changed

circumstances are not available as the basis for exercising a discretion under s 112(1)(b) of the Sentencing Act to amend the sentence.

[16] Mr Fisher, on behalf of the respondent, referred to two decisions of the Queensland Court of Appeal dealing with par (c) of s 188 of the Penalties and Sentencing Act (Qld). The first is decision of *Davis v R* (1992) 109 A Crim R 314. The provisions of s 188(1) of the Penalties and Sentencing Act (Qld) is set out in the decision of Thomas JA at 316:

> "Section 188 (1) of the Penalties and Sentences Act provides:
>
> 'If a court has in, or in connection with, a criminal proceeding, including a proceeding on appeal -
>
> (a) imposed a sentence that is not in accordance with the law; or
>
> (b) failed to impose a sentence that the court legally should have imposed; or
>
> (c) imposed a sentence decided on a clear factual error of substance;
>
> the court, whether or not differently constituted, may reopen the proceeding.'"

McMurdo P at p 314 - 315

> "The question for this Court is whether a judge, who has sentenced an offender on the basis of an accurate criminal history at the time of sentence, and the offender subsequently pleads guilty to a further offence which occurred before the offence the subject of the first sentence, originally 'imposed a sentence decided on a clear factual error of substance' under s 188(1)(c) of the Penalties and Sentences Act, entitled the judge to re-open the first sentencing proceeding.
>
> The relevant time for determination of the question whether there was 'a clear factual error of substance' must be the time of the original sentencing proceeding sought to be re-opened. The subsequent conviction cannot alter the fact that at the time of the imposition of the original sentence the offender's criminal history placed before the sentencing judge was factually correct. In such

circumstances it is not proper to re-open the sentencing proceedings under s 188(1)(c) of the Penalties and Sentences Act."

and Thomas JA at p 318:

> "In my view the plea of guilty that was entered in July 1999 in respect of the 1993 offence did not have retrospective effect such as to convert an impeccable sentencing procedure on 17 June into 'a sentence decided on a clear factual error of substance'. Neither did the judge's reliance on the criminal record that was tendered on the former date proceed from a factual error. The record tendered was the applicant's actual criminal record at that time.
>
> The learned sentencing judge therefore did not have jurisdiction to resentence the applicant for the 1998 offence on 16 July 1999. His jurisdiction was limited to sentencing the applicant for the 1994 offence to which the applicant then pleaded guilty. In imposing a sentence on that occasion his Honour was entitled to consider what would be the total sentence appropriate for the 1998 offence and the 1994 offence had both matters been dealt with at the same time, and to fashion a further sentence to achieve what is sometimes referred to as appropriate totality. …"

[17] In the decision of *R v Daniel Robert Voss Ex Parte Attorney-General* (Qld)

[2001] Queensland Court of Appeal 483, McMurdo P at p 2 par 5:

> "Second, the time for determining whether there was a clear factual error is the time of the original sentencing proceeding sought to be re-opened2. The 'clear factual error of substance' under s 188(1)(c) of the Act could not be the fact that the prosecution later abandoned the murder charge as this was not an error of fact at the time of the original sentence."

and Ambrose J at p 7 par 43 - 44:

> "[43] The only alteration in the factual situation that intervened between the decision of this court refusing leave to appeal against sentence and the application to re-open that sentence for variation seems to be that the Crown entered a nolle prosequi upon the indictment for murder and therefore, the respondent was not thereafter held in custody in respect of that charge. It is undeniable however, that he had been lawfully so

held, both at the time he was sentenced on 21 January 2000 and at the time his application for leave to appeal against that sentence was dismissed on 12 May 2000. To the extent that even arguably, that could amount to a change in any relevant factual situation, it clearly occurred long after the sentencing judge imposed sentence in January 2000 and indeed long after this court dismissed an application for leave to appeal against that sentence in May 2000.

[44] Critical to the proper exercise of jurisdiction under s 188(1)(c) is an error of fact made by the sentencing court at the time when the sentence is imposed. See *R v Cassar*: *ex parte Attorney-General* (Qld) [2000] QCA 300 par 11 to par 16."

[18] The submission by Mr Fisher on behalf of the respondent, is that under s 188(1)(c) of the Queensland Penalties and Sentences Act the error must have occurred at the time of sentencing and that a subsequent change of events will not give jurisdiction under s 188.

[19] Further, the Crown does not accept the analogy put forward on behalf of the applicant that the pillar on which the sentence, sought to be altered, was based, has been pulled away. The Crown points out that at the time of sentence on 23 November 2001, Mr Cant was not sentenced on the basis that the conviction imposed by Bailey J was a prior conviction for sentencing purposes. Rather regard was had to the fact that the second offence was committed whilst the applicant was on bail in respect of the offence of knowingly import a prohibited import charge.

[20] Mr Fisher agrees that there may need to be an adjustment made to the sentence following the retrial of Mr Cant with respect to the first offence. However, it is his contention on behalf of the Crown that I do not have jurisdiction to re-open the sentence under s 112 of the Sentencing Act as at

the time of sentencing Mr Cant on 23 November 2001 there was no error and the sentence was imposed according to law.

[21] I have come to the conclusion that s 112(1)(a) or (b) only gives jurisdiction to the Court to re-open proceedings to correct a sentencing error which was an error made at the time of the sentence. In this case it is conceded there was no error made at the time of imposing sentence.

[22] The fact that there have been a change of circumstances means there can be an adjustment to the sentence at the conclusion of the retrial of the first offence or the Court of Criminal Appeal decision in respect of the appeal on the second offence.

[23] The applicant is not precluded from renewing the application at an appropriate time.

[24] However, at present I am of the opinion this Court does not have the jurisdiction to re-open the proceedings.

[25] For these reasons the application is dismissed.

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