Fejo v Sims & Anor [2014] NTSC 9

PARTIES:	**FEJO, Bianca**
	v
	SIMS, Erica
	and:
	DWYER, Justine
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 3 of 2014 (21213350) and JA 4 of 2014 (21349979)
DELIVERED:	27 March 2014
HEARING DATES:	13 March 2014
JUDGMENT OF:	BARR J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE
Stealing – shoplifting – maximum penalty five years' imprisonment – sentence of seven days was neither manifestly excessive nor contrary to principle – relevant prior criminal record for stealing – offence committed during operational period of a suspended sentence for stealing – no extenuating circumstances – appeal dismissed

CRIMINAL LAW – APPEAL – APPEAL AGAINST RESTORATION OF SUSPENDED SENTENCE
Requirement under s 43(7) of *Sentencing Act* that suspended sentence be restored unless unjust – fresh offending of the same nature – no material disparity between the fresh offending and the sentence to be restored – no error shown in exercise of magistrate's discretion – appeal dismissed

Criminal Code s 210
Justices Act (NT) s 120(1), s 177(2)(f)
Sentencing Act (NT) s 40(6), s 43(5)(c), s 43(7), s 122

House v The King (1936) 55 CLR 499, applied

Bugmy v The Queen (2013) 87 ALJR 1022; *Veen v The Queen* (No 2) (1987-88) 164 CLR 465, considered

Bukulaptji v The Queen [2009] NTCCA 7, referred to

REPRESENTATION:

Counsel:

Appellant:	P Bellach
Respondent:	D Dalrymple

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Bar1403
Number of pages:	13

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Fejo v Sims & Anor [2014] NTSC 9
No. JA 3 of 2014 (21213350) and JA 4 of 2014 (21349979)

BETWEEN:

BIANCA FEJO
Appellant

AND:

ERICA SIMS
Respondent (21213350)

AND:

JUSTINE DWYER
Respondent (21349979)

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 27 March 2014)

Introduction

[1] This is an appeal against severity of sentence in relation to the imposition of a sentence of seven days' imprisonment for a stealing offence (shoplifting), to be served concurrently with a restored 14-day sentence for an earlier stealing offence.

[2] The earlier stealing offence occurred on 6 April 2012. The appellant stole a wallet containing $80 cash at the Leanyer Waterpark.

[3] The 14-day suspended sentence for that offending was imposed on 28 May 2012, on court file 21213350. An operational period of 18 months was fixed.[1] An order for restitution was also made.

[4] The appellant's prior criminal record was relevant to the imposition of the 14-day suspended sentence. The amalgamated record of the appellant's offending in the Northern Territory and Western Australia was as follows:[2]

- 17 April 2003 – stealing – no conviction recorded; fined $150.
- 12 June 2008 – stealing (from shop) – convicted; released on a 12-month good behaviour bond.
- 5 April 2011 – common assault – fined $1,000.
- 27 May 2011 – stealing – fined $500.
- 10 January 2012 – stealing – fined $350.

[5] In that context,[3] it can be seen that the imposition of a 14-day suspended sentence for a further stealing offence, on 6 April 2012, was unexceptional.

[6] On 27 June 2013, the appellant stole a 1-litre bottle of Jim Beam Bourbon from Liquorland, Palmerston ("the shoplifting offence"). The value of the stolen property was $68.00. The appellant selected the bottle of Jim Beam and held it closely to the side of her body, assisted by a co-offender who pressed herself against the body of the appellant. The bottle was thus tucked

---

1 *Sentencing Act*, s 40(6).
2 The dates shown are the dates of offending, taken from Exhibit P2 in file 21213350.
3 In *Veen v The Queen* [No 2] (1987-88) 164 CLR 465 at 477, the majority explained that the antecedent criminal history is relevant to whether the instant offence indicates a continuing attitude of disobedience of the law.

in and secreted between the bodies of the two women, who then walked from the store without paying.

[7] The appellant was identified by CCTV footage and was interviewed by police some 4½ months later, on 6 November 2013. She told the police that she had wanted to get drunk because it was her birthday. She said that she had formed the intention to steal the Bourbon once inside the store because she did not have enough money.

[8] The shoplifting offence was committed 13 months after the imposition of the suspended sentence for the earlier stealing offence. The operational period of the suspended sentence still had some five months remaining.

Court proceedings on 9 January 2014 – file 21349979

[9] On 9 January 2014, the appellant appeared before the Court of Summary Jurisdiction and pleaded guilty to the shoplifting offence.

[10] The magistrate was informed that the appellant had previously been in a relationship, which ended in 2011, but which had then resumed in November 2013. She was the mother of three children, who were living with an aunt in Melbourne. Alcohol-related difficulties had led to the appellant's 2011 separation but, after reconciling with her partner, she was living at the Acacia Larrakeyah Community, a dry community. The appellant's counsel informed the magistrate that the appellant no longer consumed alcohol. Counsel submitted that alcohol was a catalyst for the appellant's offending, but that she had taken steps to deal with that problem. She was also being

medicated for a bipolar disorder and schizophrenia, for which she received fortnightly injections.

[11] The magistrate was informed that the shoplifting offence was a breach of the suspended sentence imposed in file 21213350 in respect of the earlier stealing offence committed on 6 April 2012.

[12] His Honour determined that he should fully restore the 14 days of the suspended sentence. He gave the appellant credit for two days spent in custody but required that she serve the remaining 12 days in prison. His Honour also sentenced the appellant to 7 days' imprisonment for the shoplifting offence but directed that the seven days be served wholly concurrently with the restored sentence.

[13] Under subsections 43(5)(c) and 43(7) *Sentencing Act*, the magistrate was required to restore the sentence held in suspense, and order the appellant offender to serve it, unless he were of the opinion that it would be unjust to do so in view of all the circumstances which had arisen since the suspended sentence was imposed, including the facts of any subsequent offence.

[14] Counsel for the appellant sought to emphasise two matters of significance relevant to both the sentence for the fresh offending and the discretion to restore the earlier suspended sentence: (1) that the appellant, by giving up drinking alcohol, had "taken a significant factor, that was linked to her offending, out of the equation", and (2) that she had reunited with her partner in a constructive and supportive relationship.

[15] The magistrate accepted that the appellant was living in an alcohol-free community and that she was in a supportive relationship.

[16] In his sentencing remarks, the magistrate referred to the opportunities and warnings given to the appellant by courts in the past for offences of stealing, and to the appellant's breach of the conditions of her suspended sentence. The magistrate also referred to the appellant's medical condition, although he noted that it was being treated and that the medical condition had not been a contributing factor to the shoplifting offence.

[17] The magistrate went on to make the following remarks:

> " … But in any event, you are stealing again. The court is in a very difficult position and clearly there are some quite powerful personal circumstances which make this balancing exercise one of the more difficult matters. But in the circumstances, I have indicated to your counsel there is no compelling reason why the warnings and the sentence that was imposed on you by another magistrate, on file 21213350, that is that suspended sentence, should not be enlivened and you are required to serve the balance of that term."

Issues on appeal

[18] The appellant argues that the sentence of seven days imposed for the fresh offending was manifestly excessive, and breached both the principle that imprisonment is a sentence of last resort and the principle of proportionality.[4]

[19] In my view, however, none of those three grounds has been made out.

[4] Amended notice of appeal, grounds 1, 2 and 3.

[20] The offence of stealing was charged contrary to s 210 of the *Criminal Code* (NT) and carried a maximum sentence of imprisonment of seven years. The offence could be dealt with summarily by a magistrate in the Court of Summary Jurisdiction,[5] in which case the maximum penalty was a sentence of imprisonment of five years or a fine of 250 penalty units.[6] The sentence of seven days imprisonment was neither excessive (and certainly not manifestly excessive) nor disproportionate. The offender was before the court on her fifth stealing offence. An aggravating feature was that the offence had been committed during the operational period of a suspended sentence imposed for stealing. There were no extenuating circumstances in relation to the offending; the offender simply wished to celebrate her birthday by getting drunk. The matters submitted in mitigation, referred to in [14] above, which were relevant to the sentencing objective of rehabilitation, were not such as to render the sentence of seven days manifestly excessive or in breach the other two principles referred to.

[21] Moreover, the appellant's attack on the imposition of a seven-day sentence overlooks the considerable leniency which the magistrate showed to the appellant by directing that the seven-day sentence should be served wholly concurrently with the restored sentence. Whether His Honour's direction as to concurrency represented leniency in respect of the fresh offending only,

---

5 *Justices Act*, s 120(1), the value of the property not exceeding $5,000.
6 *Sentencing Act*, s 122.

or was the result of the application of the principle of totality to the combination of the sentence for the fresh offending and the restored sentence, does not matter for present purposes. The fact is that the appellant was not required to serve further time in prison on account of her fresh offending, and was not, for example, left to pay off a substantial fine on release from prison after serving the restored sentence.

[22] Grounds 1, 2 and 3 have not been made out, and should be dismissed.

[23] I turn to consider Ground 4. The question I have to decide is whether the appellant has established that the magistrate, in fully restoring the appellant's suspended sentence, erred in the exercise of the discretion vested in him by s 43(7) of the *Sentencing Act*.

[24] Counsel for the appellant argues that the magistrate did not exercise his discretion in accordance with the requirements of the statute. The magistrate did not specifically refer to the words of s 43(7) and state: "I have considered the following circumstances which have arisen since the suspended sentence was imposed …" and then state all the circumstances considered by him. The magistrate did not then state, as a conclusion: "I am of the opinion that it would not be unjust to restore the suspended sentence", or similar words to that effect, before proceeding in accordance with s 43(5)(c) *Sentencing Act*. Further, the magistrate used the expression "compelling reason", words not contained in s 43(7). He said: "… unless there is some compelling reason, she is required to receive the 14 days at

least for the breach of a suspended sentence for stealing, that's a starting point".[7] A short time later he said to the appellant: "... there is no compelling reason why the warnings and the sentence that was imposed on you by another magistrate, ... that suspended sentence, should not be enlivened and you are required to serve the balance of that term."[8]

[25] Notwithstanding the suggested deficiencies, it is clear from the magistrate's sentencing remarks that he considered all of the circumstances put to him by the appellant's counsel. The matters referred to in [14] must have been at the forefront of his mind; his Honour specifically referred to the court being "in a very difficult position" and to the existence of "some quite powerful personal circumstances". He also referred specifically to the appellant's mental health problems. At the same time, his Honour was required to take into account the facts of the subsequent offending, to which he had also referred in his sentencing remarks. When his Honour used the expression "no compelling reason", I understand that he meant that there was no compelling reason, in the nature of a potential injustice as referred to in s 43(7), to depart from the court's statutory obligation under s 43(5)(c) to restore the sentence held in suspense and order the appellant to serve it.

[26] In my judgment, and notwithstanding that his Honour did not use the words of the statute referred to in [24], it can be properly inferred from his remarks that he did not consider that it would be unjust to proceed under s 43(5)(c)

---

7 Transcript 09/01/2014, page 6.4.
8 Transcript 09/01/2014, page 8.8.

and restore the suspended sentence. I am satisfied that the magistrate carefully examined the overall justice of the appellant's situation before making the order which he could not have made if he had been of the opinion that it would be unjust to do so.

[27] I refer to the factors for consideration by a court on proof of breach of a suspended sentence stated by the Court of Criminal Appeal in *Bukulaptji v The Queen*.[9] The present appellant was guilty of fresh offending, and not of a breach of conditions. Although more than 12 months had passed since the suspended sentence was imposed, the fresh offending was an offence of the same nature as that which gave rise to the suspended sentence. The fresh offending evinced an intention to disregard the obligation to be of good behaviour and demonstrated a continuing attitude of disobedience of the law. The appellant had been warned of the consequences of re-offending. There was no material disparity between the fresh offending and the sentence to be restored, and certainly no gross disparity.

[28] The appellant has not established that the magistrate erred in the exercise of his discretion. It was clearly open to the magistrate to reach the conclusion that it would not be unjust to restore in full the suspended sentence. Ground 4 of the appeal has not been made out and must be dismissed.

---

[9] [2009] NTCCA 7 at [35].

[29] If, contrary to my finding, the magistrate made a technical error of law in the exercise of his discretion under s 43(7),[10] I would nonetheless dismiss the appeal pursuant to s 177(2)(f) *Justices Act* because I consider that no substantial miscarriage of justice has actually occurred. In this respect, I refer to my consideration of the *Bukulaptji* factors in [27].

Additional matter

[30] One of the appellant's arguments was unusual and merits specific comment. The appellant referred to *The Queen v Davey*[11] for the proposition that sentences of actual imprisonment are "not necessarily the most effective mechanism" for an offender's reform. The appellant's counsel then argued that the appellant's personal circumstances and efforts to reform herself during the months between the commission of the offence in June 2013 and her sentencing in January 2014 "demonstrated that remaining in the community was likely to greatly enhance the chances of further reform", whereas "any sentence of imprisonment was likely to significantly undermine the progress she had made."

[31] The appellant's argument does not clearly explain how a short period of imprisonment was likely to "significantly undermine" whatever progress the appellant had made. A possible explanation was contained in the submission[12] that "restoring the two weeks imprisonment risked a sentence

[10] For example, by reason of the matters summarized in [24].
[11] (1980) 50 FLR 57 at 65, per Muirhead J. The case was a Crown appeal against sentence.
[12] Summary of submissions for the appellant, 7 March 2013, par 50.

which was unjust because it was ineffective and undermined the Rule of Law."

[32] The appellant's counsel then cited research and referred to recidivism rates in the Northern Territory being "slightly less than 50%". Counsel submitted that incarceration is therefore "demonstrably counter-productive as an instrument of reform and rehabilitation." The submission continued as follows: to restore a sentence of two weeks imprisonment meant that, statistically, there was an almost 50% chance that the appellant would "revisit the prison in the future". The submission concluded that it was therefore unjust to order restoration of the sentence of two weeks' imprisonment; that allowing the appellant to remain in the community in a positive, alcohol-free relationship would have been a far more effective mechanism of reform and rehabilitation.

[33] I have rejected the appellant's submission set out in [30] to [32] for several reasons.

[34] On this appeal against the exercise of a discretion, the appellant must show that the discretion miscarried: that the magistrate acted upon a wrong principle, allowed extraneous or irrelevant matters to guide or affect him, did not take into account some material matter, or was mistaken in relation to material facts.[13] The implication of the submission is that the magistrate, who was not engaged in a primary sentencing exercise but was determining

[13] *House v The King* (1936) 55 CLR 499 at 504.

whether or not it would be unjust to restore a suspended sentence imposed by another magistrate, should have taken into account recidivism rates for incarcerated offenders.

[35] I doubt whether the magistrate could legitimately have taken recidivism rates into account as a circumstance of possible injustice, even in combination with other matters, when determining under s 43(7) whether or not it would be unjust to restore the suspended sentence. Determining what is unjust in the case of an individual offender requires consideration of the objective facts of the offending and re-offending, and the circumstances of the offender. To assume or find, based on statistics, that a person is likely to re-offend or not re-offend on release from prison would seem to be a departure from the sentencing principle of individualized justice referred to by the High Court, albeit in a different context, in *Bugmy v The Queen*.[14]

[36] My remarks in [35] are obiter because I do not have to decide the matter there discussed. In relation to the question I have to decide, however, it is clear that the magistrate had no obligation to take into account recidivism rates, and that his discretion did not miscarry because he did not do so. Further, recidivism rates were not mentioned in the Court of Summary Jurisdiction, and in particular were not submitted as matters which the magistrate should take into account.

[14] (2013) 87 ALJR 1022 at [36].

[37] Finally, although it is not the function of the Court on this appeal to determine the factual and logical merits of the appellant's argument, which may be legally flawed, as explained in [35], I point out that, if recidivism rates for incarcerated prisoners in the Northern Territory are slightly less than 50%, as the appellant submits, then that means that slightly more than 50% of incarcerated prisoners will not re-offend, or will not re-offend within a given time period. If there is any logic underlying the appellant's submission, then the same logic would suggest that restoring the sentence would have given the appellant a better than 50% chance of not re-offending. Contrary to the appellant's submission, therefore, the statistics might well support full restoration given the apparent lack of success of the previous non-custodial dispositions in favour of the appellant referred to in [3] and [4] above.

Conclusion

[38] The appeal should be dismissed.
