The Queen v Leo [2013] NTSC 70

PARTIES:	The Queen
	v
	LEO, Priscilla
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING ORIGINAL JURISDICTION
FILE NO:	21321030
DELIVERED:	31 OCTOBER 2013
HEARING DATES:	27 SEPTEMBER; 15 OCTOBER 2013
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:

STATUTORY INTERPRETATION – Sentencing – Effect of amendments to Division 6A of Sentencing Act – First amendment does not clarify position as to previous convictions triggering aggravated minimum sentence – Second amending Act operates to clarify intention of the legislature – previous convictions are to be taken into account whenever committed – *Sentencing Act* ss 78DA, 78EA.

Trenerry v Bradley (1997) 115 NTR 1; *Fisher v Hebburn Ltd* (1960) 105 CLR 188; *Nafi v The Queen* (2012) 32 NTLR 124, cited

McMillan v Pryce (1997)(115) NTR 19, applied

Maxwell v Murphy (1957) 96 CLR 261; *McMillan v Pryce* (1997) (115) NTR 19; *Coco v R* (1994) 179 CLR 427, referred

REPRESENTATION:

Counsel:

Crown:	M Nathan
Accused:	R Roy

Solicitors:

Crown:	Office of the Director of Public Prosecutions
Accused:	North Australian Aboriginal Justice Agency

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

The Queen v Leo [2013] NTSC 70
No. 21321030

BETWEEN:

THE QUEEN

AND:

PRISCILLA LEO

CORAM: BLOKLAND J

RULING

(Delivered 31 October 2013)

Introduction

[1] On 4 September 2013 Priscilla Leo pleaded guilty to one count of unlawfully cause serious harm. Ms Leo has one previous conviction for aggravated assault recorded on 20 April 2001, (committed on 14 June 1998), and one previous conviction for assault recorded on 16 March 1995. Ms Leo committed the offence of unlawfully cause serious harm on 14 May 2013, that is, after the commencement on 1 May 2013 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act* 2013 ("the first amending Act").

[2] Pursuant to s 78CA of the first amending Act, the offence of unlawfully cause serious harm is designated a “level five offence”. It is common ground that Ms Leo has committed a level five offence for the purposes of Division 6A of the first amending Act. The issue is whether Ms Leo is subject to the three month mandatory minimum period established by s 78D (Level 5-first offence) or the 12 month mandatory minimum term established by s 78DA (Level 5-second or subsequent offence).

The Application of the First Amending Act

[3] On Ms Leo’s behalf it is argued that at the time of the impugned conduct, s 78EA of Division 6A operated in such a way as to preclude previous convictions from enlivening s 78DA, if those convictions were imposed prior to the commencement of the first amending Act. Section 78DA specifies an aggravated minimum term of 12 months, (compared with the three month minimum term set by s 78D). On this argument, the s 78DA penalty is activated only with respect to specified previous convictions imposed after 1 May 2013, (the date of the commencement of the first amending Act).

[4] At the time of the commission of the subject offence, s 78EA provided as follows:

78EA Division does not apply to offence committed before commencement

This Division does not apply in relation to an offence committed before the commencement of section 6 of the *Sentencing Amendment (Mandatory Minimum Sentences) Act* 2013.

[5] "This Division" in s 78EA refers to Division 6A, (the first amending Act). The first amending Act introduced new mandatory minimum terms of imprisonment for certain offences, prescribed particular offence classification levels and provided that previous convictions for a "violent offence" would increase the minimum term of imprisonment to be served. The term "violent offence" has a particular meaning in the first amending Act. Relevantly here, if s 78DA applies, the minimum term would be twelve months imprisonment.

[6] Counsel for the Crown does not agree with the approach apparently taken by the Court of Summary Jurisdiction,[1] nor with the construction urged in this Court on behalf of Ms Leo. As discussed later, although I do not agree with this particular argument advanced on behalf of Ms Leo, I have come to the same conclusion in relation to previous convictions and the first amending Act, albeit through different reasoning.

[7] On a plain reading, in the context of Division 6A, "an offence" in s 78EA should be read as being a reference to the subject offence; in Ms Leo's case, the offence of cause serious harm, committed on 14 May 2013. Section 78EA does not refer to a "previous conviction" or a "conviction" for a

[1] This Court was informed that with respect, a number of Magistrates had taken this approach.

"violent offence". Even applying the strict rules of construction of statutes of this kind, on a plain reading of Division 6A, the initial interpretation advanced on behalf of Ms Leo in my opinion cannot stand.

[8] Clearly the first amending Act increased the minimum penalty for the subject offence. The application of Division 6A was restricted to "offences" committed after 1 May 2013 by virtue of s 78EA; but it would be an impermissible extension of the same argument to include "previous violent offence" within the definition of "offence committed" as it appears in s 78EA. Such a construction is strained when viewed in the context of Division 6A as a whole.

[9] Division 6A refers to "offence" repeatedly and consistently throughout the Division in reference to the subject offence as opposed to previous convictions; References to previous violent offences are expressed as such; in particular, the expression used throughout Division 6A: "previously been convicted of a violent offence". To extend a different meaning to the term "an offence" solely for the purpose of including a previous violent offence within the exclusionary terms of s 78EA is not, in my opinion, open.

[10] Counsel for Ms Leo pointed out that the term "an offence" in s 78EA uses the indefinite article, rather than the definite article, tending to lend weight to the interpretation advanced in Ms Leo's case. I do not agree. Use of the indefinite article in s 78EA signifies that a range of offences may be the subject of Division 6A. It would be unusual for the definite article to be

used in legislation of this type that deals with sentencing over a range of offences.

[11] In as much as this submission maintains that the original s 78EA phrase "an offence committed" was capable of being read as including a previous conviction for a violent offence, I am unable to agree. Although I agree with the submission on behalf of the Crown on that particular point, the Crown position does not answer satisfactorily the question of whether the term "previously convicted of a violent offence", (as appears in s 78DA and elsewhere), includes convictions imposed prior to the commencement of the first amending Act.

[12] The problem of the potentially retrospective operation of parts of Division 6A bears an uncanny resemblance to the issues identified in *McMillan v Pryce*[2] which dealt with a previous mandatory sentencing regime, (now repealed) for property offences. Since hearing the original argument on the construction of s 78EA, I requested further submissions from counsel to address the particular issue arising from *McMillan v Pryce* and I am grateful to both counsel for their efforts to address this point.

[13] Employing similar reasoning as that utilized by the majority in *McMillan v Pryce,*[3] I have come to the conclusion that the first amending Act, does not by unmistakable and unambiguous language make it plain that convictions for offences imposed before its commencement are "previous convictions of

[2] (1997)(115) NTR 19
[3] Mildren J with whom Martin (BF) CJ agreed; Angel J dissented.

a violent offence" as specified in s 78DA for the purpose of aggravating the relevant minimum penalty.

[14] Although the legislature may legislate with retrospective effect, the presumption is that statutes apply prospectively, in the sense of not attaching new legal consequences to facts or events which occurred before its commencement,[4] unless the contrary is clearly and unambiguously expressed. A statute ought not, unless the intention appears with reasonable certainty, be understood as applying to facts or events that have already occurred in a way that affects rights and liabilities which the law had defined by reference to past events.[5]

[15] The Court of Appeal (NT) decisions of both *Trenerry v Bradley*[6] and *McMillan v Pryce*[7] apply the strict approach as expressed by the High Court in *Maxwell v Murphy*[8] and *Coco v R*[9] to the effect that courts should not impute to the legislature an intention to interfere with fundamental rights; such an intention must be clearly manifested by unmistakeable and unambiguous language; General words will rarely be sufficient for that purpose if they do not specially deal with the question.[10]

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[4] *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194.
[5] *Maxwell v Murphy* (1957) 96 CLR 261 at 267*; Nafi v The Queen* (2012) 32 NTLR 124, holding that amendments to the *Migration Act* (Cth) for a "repeat offence" had clearly been shown to operate with a degree of retrospectively relevant to the timing of prior 'proceedings'.
[6] (1997) 115 NTR 1
[7] (1997) 115 NTR 19
[8] (1957) 96 CLR 261
[9] (1994) 179 CLR 427
[10] See *Trenerry v Bradley* (cited above in note 3 at 15); *McMillan v Pryce*, adopting the reasoning of *Trenerry v Bradley*; these two judgments were delivered at the same time.

[16] As would be expected, applying the ordinary principles, Division s 6A operates prospectively; however, there remains an element of potential retrospectivity in its application to previous convictions.[11]

[17] The element of potential retrospective operation arises given the wording of s 78DA; the definition of "violent offence" and the schedule 2, "violent offences".

> **Section 78DA (provided at the material time):**
>
> (1) This section applies if:
>
> (a) A court finds an offender guilty of a level 5 offence; and
>
> (b) The offender has previously been convicted of a violent offence
>
> (2) The court must impose a minimum sentence of 12 months actual imprisonment.
>
> **Section 78C provides**:
>
> **Violent Offence** means
>
> (a) an offence against a provision of the Criminal Code listed in Schedule 2; or

[11] The general prospective operation of Division 6A is made clear by s 78EA in that it only applies to offences committed post amendment; indeed even without s 78EA, s 121(1) of the *Sentencing Act* applies so that only offences committed after the commencement of the first amending Act would be subject to Division 6A penalties in any event. Common law principles in the line of authority of *Maxwell v Murphy* (cited above) would have ensured the same result.

(b) an offence substantially corresponding to an offence mentioned in paragraph (a) against:

(i) a law that has been repealed; or

(ii) a law of another jurisdiction (including a jurisdiction outside Australia).

Schedule 2 Violent Offences includes:

s 188 Common Assault

[full Schedule 2 not reproduced here]

[18] Prior to the commencement of the first amending Act, no offences were designated "violent offences" by Schedule 2 of Division 6A; nor of course could they have been; The previous "Schedule 2-Violent Offences" covering the same offences, (minus some additional offences now included), provided for a different sentencing outcome. Consequently, at the time Ms Leo committed the subject offence, notwithstanding s 78D applied to her such that she was liable to a three month minimum term, she had not "previously been convicted of a violent offence" as that particular offence designation, (carrying with it the particular legal consequence of conviction), was not in force at that time. Although the Crown points out that the offences "aggravated assault" and "assault" were contained in the Schedule 2 of the *Sentencing Act* as relevant to a previous mandatory sentencing regime, the previous Schedule 2 was expressly 'repealed' by s 8 by Division 6A. It did not have the same legal consequences as the 'new' "Schedule 2" that were enacted by the first amending Act.

[19] The particular prior convictions continue to have consequences as a matter of general sentencing law including ss 5(2)(e), (n) and 6 of the *Sentencing Act*, but not the consequence of an aggravated minimum penalty; the only consequence in terms of a mandatory sentence was the imposition of an actual (non specified) term of imprisonment.[12]

[20] For similar reasons, s 78C(b) does not apply as in relation to s 78C(b)(i), the particular offences in the *Criminal Code* have not been repealed. Section 78C(b) refers to the offence provision of the *Criminal Code*, not whether the offence is listed in the *Sentencing Act* schedule. With respect to s 78C(b)(ii), the particular offences are not a law of another jurisdiction.

[21] The conclusion here would have been different had the first amending Act contained the additional phrase "whenever committed", or a similar phrase, that has now been included in the second amending Act, (discussed below).

[22] The Court was referred to the Honourable Attorney General's Second Reading speech in respect of the second amending Act. This will be discussed later in these reasons. It is apparent an interpretation of this kind was anticipated or assumed. This indication appears in the following extract from the Second Reading speech:

> Nonetheless, it is recognised that the current worded sections may be read down in favour of limiting the scope of the convictions. Precedent for this approach can be found in the authority of *McMillan v Pryce* [1997] Northern Territory Supreme Court Law Reports, in which the majority of the Criminal Court of Appeal of the

[12] Previous s 78BA(1)(b) *Sentencing Act*.

> Northern Territory read down the meaning of the prior conviction in respect to the mandatory sentencing for property offences so it could only include a prior conviction for the offence after the commencement date.

[23] In terms of the use of presumptions, the authors of the third edition of *Cross on Statutory Interpretation* indicate:

> "Statutes ... are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules ... Longstanding principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament. One function of the word "presumption" in the context of statutory interpretation is to state the result of this legislative reliance (real or assumed) on firmly established legal principles ... These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction and they may be described as "presumptions of general application". At the level of interpretation, their function is the promotion of brevity on the part of the drafter. Statutes make dreary enough reading as it is and it would be ridiculous to insist in each instance upon an enumeration of the general principles taken for granted.
>
> The presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text.[13]

I conclude that at the time of committing the offence, by virtue of the first amending Act, prior to the passing of the second amending Act Ms Leo was then liable to serve a three month minimum term rather than a 12 month minimum term.

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[13] J Bell & G Engle, *Cross on Statutory Interpretation* (3rd ed) 1995, 165-166; as reproduced in Spigelman CJAC, 'The Principles of Legality and Clear Statement', in "Statutory Interpretation", (Judicial Commission of New South Wales) Monograph 4

The Second Amending Act

[24] The legislative response to the interpretation discussed, (resulting in the exclusion of previous convictions that predate 1 May 2013), was the enactment of the *Sentencing Amendment Act* 2013 that commenced on 12 July 2013, "the second amending Act".

[25] The second amending Act added the words "whenever committed" to all of the provisions that include the words "second or subsequent offence". Relevantly, s 78DA(1)(b) was amended, to read (*amendments in italics*):

> "the offender has previously been convicted of a violent offence *whenever committed*"

[26] Further, s 78EA was amended to add "to the sentencing of an offender", to distinguish "an offence" from previous convictions to meet the arguments previously referred to.

[27] In my opinion, through the second amending Act the legislature has made its intention clear. Previous convictions for "violent offences" are to be taken into account whether they were committed before or after the commencement of the Division for the purposes of the aggravated minimum penalty. I agree with the submission on behalf of the Crown that those words are incapable of any other meaning. There is still a question of how the second amending Act applies given it did not commence until 12 July 2013.

[28] The Crown submits the second amending Act merely clarified previous apparent confusion. It is submitted the principle in s 121(1) of the *Sentencing Act* does not apply as the second amending Act is no more than a transitional provision intended to clarify the meaning of an existing piece of legislation. Further, the Crown contends the second amending Act does not introduce an increased penalty but simply seeks to define the meaning of "previous violent offence" by the introduction of the phrase "whenever committed".

[29] As I have been referred to the Honourable Attorney General's Second Reading speech in respect of the second amending Act, I will set out further relevant extracts:

> "Clauses 3 to 7 of the bill, therefore, make amendments to individual sections where the phrase, 'previously convicted of a violent offence', appears in Division 6A to include the words, 'whenever committed', to make clear that the court must consider all prior convictions for violent offences, no matter when they occurred – before or after the commencement of the division".
>
> "Clause 8 also makes clear that section 78EA only applies to sentencing of an offender for an offence committed prior to the commencement of that section, and is not intended to affect the word 'offence' whenever it appears in Division 6A".

[30] Notwithstanding the Crown characterises the second amending Act as transitional, if the conclusion above in relation to the first amending Act is correct, the second amending Act has significant substantive effect. On behalf of Ms Leo it is argued there is nothing in the second amending Act by way of transitional provisions; nor anything to indicate that the second

amending Act *itself* has retrospective effect. In my opinion to accept this argument would fail to give effect to the clear intention of the legislature utilizing the phrase "whenever committed". After quite some consideration I have concluded "whenever committed" is meant to refer to previous convictions, no matter when they were imposed; that phrase clearly permits retrospective operation in relation to previous convictions; notwithstanding that for some offenders, such as Ms Leo, the rules have changed during the course of her being dealt with for the subject offence.

[31] Section 121(1) of the *Sentencing Act* provides that where an Act, including the *Sentencing Act*, increases the maximum or the minimum penalty for an offence, the increase applies "only to an offence committed after the commencement of the provision effecting the increase". On behalf of Ms Leo it is argued that if the effect of the first amending Act as concluded above is correct, it is the second amending Act that has increased the minimum penalty and therefore the aggravated penalty can only apply to offences committed after 12 July 2013. The contrary argument is, however, in this instance to be preferred; the second amending Act did not increase the penalty, but sought to define the meaning of "previous violent offence" by the introduction of the phrase "whenever committed". The intention of the second amending Act was to 'correct' a previous interpretation.

[32] Section 14(2) of the *Criminal Code* preserves the lesser penalty in the light of changes to the law that may have the effect of increasing the punishment even if the increase is not expressly stated. Section 14(2) provides:

> If the law in force when the conduct impugned occurred differs from that in force at the time of the finding of guilt, the offender cannot be punished to any greater extent than was authorised by the former law or to any greater extent than is authorised by the latter law.

[33] In this case, the law in force when the impugned conduct occurred, does differ from that in force at the time of the finding of guilt. The second amending Act does not expressly repeal or amend s 14(2) of the *Criminal Code*. As far as I am aware there were no consequential amendments to the *Criminal Code*, however, once again I have concluded the words "whenever committed" expressly provide for a degree of retrospectivity and to that extent, being a later amendment on a particular subject, s 14(2) must give way to the later amendment.

[34] In my view the second amending Act is similar in nature to validating Acts, which given their subject matter must be allowed to operate retrospectively in order to give effect to the intent of the legislature.

[35] In my opinion persons who commit violent offences as specified under Division 6A both before and after the commencement of the second amending Act (12 July 2013) will be liable to have previous violent offences, whenever committed, taken into account for the purpose of the aggravated minimum penalty. I acknowledge there may be a sense of unfairness felt given the increase in minimum penalty, however, I am persuaded the legislature intended the previous convictions be taken into account retrospectively. "Whenever committed" cannot mean anything else.

[36] For these reasons, Ms Leo in my view is liable to the 12 month mandatory minimum. I will proceed to hear sentencing submissions on that basis.

Chronology of Relevant Events

Date	Event
16 March 1995	Conviction for assault, recorded against Ms Leo, Court of Summary Jurisdiction.
20 April 2001	Conviction for aggravated assault recorded against Ms Leo, Court of Summary Jurisdiction.
1 May 2013	*Sentencing Amendment (Mandatory Minimum Sentences) Act* 2013, "the first amending Act" commenced. [Contested views in relation to taking into account previous convictions for violent offences imposed prior to 1 May 2013 become apparent].
14 May 2013	The subject offence, (cause serious harm), committed by Ms Leo.
12 July 2013	*Sentencing Amendment Act*; (Act No. 21 of 2013), "the second amending Act," commences. Adds that previous convictions for violent offences "whenever committed" aggravate certain penalties.
7 August 2013	Indictment filed charging cause of serious harm.
4 September 2013	Plea of guilty entered in the Supreme Court and finding of guilt made.
27 September 2013;	
15 October 2013	Legal Argument on the application of the first and second amending Acts to Ms Leo.