Townsend v Trenerry [1999] NTSC 32

PARTIES:	GEORGE DAVID TOWNSEND v ROBIN LAURENCE TRENERRY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from the COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction
FILE NO:	JA 1/99 9821881
DELIVERED:	9 April 1999
HEARING DATE:	22 March 1999
JUDGMENT OF:	THOMAS J

CATCHWORDS:

Appeal – justices – appeal against sentence – dangerous act, drive unlicensed, drive in dangerous manner, unlawfully damage property and possessing property suspected of having been stolen – *Justices Act* 1928 (NT).

Criminal law and procedure – sentencing – failure to comply with s 54(2) *Sentencing Act* 1995 (NT) – discretion of sentencing court to reopen proceedings – judicial error.

Statutes – Interpretation – *Sentencing Act* 1995 (NT), s 112.

Sentencing Act 1995 (NT), s 54(2) and s 112

R v Staats, No 9502330, unreported decision of Mildren J, delivered 18 November 1997, referred to.
R v Staats (1998) 123 NTR 16, followed.

REPRESENTATION:

Counsel:

Appellant:	J. Hunyor
Respondent:	A. Fraser

Solicitors:

Appellant:	NT Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

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

Townsend v Trenerry [1999] NTSC 32
No. JA 1/99 9821881

BETWEEN:

GEORGE DAVID TOWNSEND
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 9 April 1999)

[1] This is an appeal from a decision of a magistrate made on 10 December 1998 pursuant to s 112 of the *Sentencing Act*. The decision was to increase the period of non parole from seven months to eight months to comply with the provisions of s 54 of the *Sentencing Act*.

[2] The relevant provisions of s 54 of the *Sentencing Act* are as follows:

> "(1) Subject to this section, where a court sentences an offender to be imprisoned for 12 months or longer that is not suspended in whole or in part, the court shall fix a period under section 53(1) of not less than 50% of the period of imprisonment that the offender is to serve under the sentence.
>
> (1A) For the purposes of subsection (1), the period of imprisonment that an offender is to serve under a sentence imposed for a property offence is not to be taken to include the mandatory period of the sentence.

(2) Subsection (1) does not permit a court to fix a period under section 53(1) of less than 8 months.

(3) Subsection (1) does not apply where the court under section 53(1) considers the fixing of a non-parole period is inappropriate."

[3] The appellant has lodged the following grounds of appeal:

> "1. The Learned Magistrate erred in ruling that he did not have power under s.112 of the Sentencing Act to substitute the original sentence of 14 months imprisonment with a non-parole period of 7 months, with a sentence of 14 months suspended after serving 7 months.
>
> 2. The Learned Magistrate erred by failing to give consideration to imposing a substituted sentence of 7 months imprisonment.
>
> 3. It was oppressive, in all the circumstances to impose on the Appellant a greater sentence than had previously been imposed."

[4] At the hearing of the appeal, Mr Hunyor, counsel for the appellant, advised that Ground of Appeal 2 was withdrawn. For this reason I proceed only with Ground of Appeal 1 and 3.

[5] On 6 November 1998, the appellant entered pleas of guilty to a total of five charges of being in possession of property reasonably suspected of having been stolen or otherwise lawfully obtained, a charge of committing a dangerous act, driving in a manner dangerous, driving unlicensed and unlawfully damaging property.

[6] On 9 November 1998, the appellant was sentenced to a total of 14 months imprisonment. His Worship noted that the first 14 days, being a mandatory 14 days imprisonment, could not be taken into account for the purpose of

setting a non parole period. The learned stipendiary magistrate noted that the appellant had been in custody since 13 October 1998. Accordingly, the non parole period of seven months was to commence from 27 October 1998.

[7] The appellant makes no complaint about the sentence imposed on him on 9 November 1998.

[8] On 10 December 1998, police prosecutor Mr Hales on behalf of the Crown, brought the matter back before the learned stipendiary magistrate. Mr Hales advised the court that the sentence imposed on 9 November 1998 was not in accordance with s 54(2) of the *Sentencing Act*. The Crown sought that the learned stipendiary magistrate vary the parole order to comply with s 54(2) of the *Sentencing Act*.

[9] Mr Hunyor, who appeared for the appellant on this application, asked the learned stipendiary magistrate to make it a suspended sentence after seven months so that there would be no change to the amount of time that the appellant actually had to serve.

[10] His Worship declined to do this and stated (t/p 19):

> "HIS WORSHIP: Well, I'm no sure I can do that. You can report back before me to correct an error in sentence in accordance with the law. I don't think it can be brought before me to re-sentence and to do that would be effectively to re-sentence him. It would not be sentencing in accordance with the law it would be just simply changing and substituting a different sentence. It would be different to the one that I'd imposed."

[11] His Worship then altered the non parole period that he had imposed to eight months in lieu of seven months and noted that such non parole period was to commence from 27 October 1998 so as not to include the mandatory part of the sentence.

[12] At the hearing of the appeal, Mr Hunyor, on behalf of the appellant, submitted that he was in agreement with the Crown that the original sentence imposed by the learned stipendiary magistrate breached the prohibition contained in s 54(2) of the *Sentencing Act*, by fixing a period of less than eight months. He further agreed that the reopening of the proceedings under s 112 of the *Sentencing Act* for the correction of the error was entirely appropriate.

[13] It is relevant to set out the provisions of s 112 of the *Sentencing Act*:

> "(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 imposed 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."

[14] Mr Hunyor submitted that where proceedings are reopened, the court "may impose a sentence that is in accordance with the law." Mr Hunyor argues that this section is broad and gives the court a discretion beyond simply correcting the particular error in the original sentence. It is counsel for the appellant's submission that upon reopening the proceedings the court should still apply ordinary sentencing principles and impose what is in all the circumstances the appropriate sentence. Mr Hunyor submits that this view is supported by the provisions of s 112(2)(c) which he says by its terms

contemplates that a resentence may involve charging a number of elements of a sentence.

[15] Under Ground 3 of the appellant's notice of appeal, Mr Hunyor submits that it was oppressive and unjust to change the composition of the sentence in a way which significantly increases the amount of time the appellant can expect to serve in custody.

[16] It is the appellant's contention that the learned stipendiary magistrate erred in imposing a greater sentence than had previously been imposed.

[17] The submission put forward by Ms Fraser, counsel for the Crown, is that s 112(1)(b) of the *Sentencing Act* does not allow for a discretion. It is a provision which is limited to allowing a correction of sentence to comply with the law.

[18] Ms Fraser made submissions in some detail relating to the powers of the Court of Summary Jurisdiction. These submissions in summary are that the power of a magistrate is statute based. The Court of Summary Jurisdiction has no inherent power. Section 112 of the *Sentencing Act* has increased the power of a sentencing court. Instead of being functus officio the sentencing court now has the power to correct a sentence which does not comply with the law. This power does not extend to changing a discretionary order.

[19] I am satisfied that the decision whether to release a person on parole or to release following a suspended or partially suspended sentence is a discretionary matter.

[20] The effects of release on parole as distinct from release on a suspended sentence have significant differences which do not need to be enumerated here.

[21] At the time of imposing sentence on 9 November 1998, the learned stipendiary magistrate gave his reason for imposing a non parole period which were as follows (t/p 15 - 16):

> "I have also seriously considered the question of whether any sentence should be wholly or partly suspended, or whether I should simply impose a non-parole period in relation to it. I have also taken account that you have a stated aim to leave the Northern Territory as soon as you are released from these matters which, to some extent, militates against a suspended sentence, because any breach of it interstate would not be a breach here and, effectively, I mean, it would be no real penalty hanging over your head."

[22] In the matter of *R v Staats* No. 9502330 unreported decision of Mildren J delivered 18 November 1997, his Honour allowed a Crown application brought pursuant to s 112 of the *Sentencing Act* to reopen the proceeding to alter a non parole period so that the non parole period complied with the provisions of s 55(1) of the *Sentencing Act*. In that matter his Honour rejected an application by counsel for the defence to recast the whole sentence. His Honour restricted his order to increasing the non parole period to comply with the law.

[23] His Honour's sentence was the subject of an appeal to the Court of Criminal Appeal which dismissed the appeal and affirmed the sentence imposed by his Honour (*R v Staats* 123 NTR 16). In this matter Martin CJ said at p 24:

> "In my opinion s 112 is limited in its application to errors of law in relation to the imposition of the sentence. It does not extend to the correction of reasons or review of the exercise of a discretionary judgment."

[24] and Angel J at p 25 - 26:

> "I agree with the other members of the court that Mildren J did not err in adjusting the non-parole period pursuant to s 112 of the Sentencing Act. That section gives a sentencing judge the power to re-open proceedings where the court has "imposed a sentence that is not in accordance with the law" or has "failed to impose a sentence that it should legally have imposed". The section is somewhat akin to a slip rule. Its purpose appears to be to reduce the number of appeals against sentences. It should, in my opinion, be given a broad interpretation. The section does not employ the expression "error of law". The section does not empower the court to re-open a case merely because it has changed its mind as to the appropriate sentence. It is not necessary in the present case to decide the limit of a sentencing judge's jurisdiction to re-open the case. It at least includes errors of law. It may well include judicial oversight of a fact obviously material for sentencing purposes, ie in a case where the court makes clear findings of fact, plainly applies the correct law to those facts, but overlooks a further fact, which, had it been taken into account, would obviously have affected the result. I would wish to hear argument on the issue before reaching any concluded view on the limits of the section."

[25] While Angel J did not come to a conclusion as to the limits of s 112 he did not suggest that it extended to a review of a discretionary decision.

[26] I do not accept the submission by counsel for the appellant that s 112(2)(b) can be interpreted so broadly as to include reviewing that aspect of the sentence which was the exercise of discretion.

[27] I am in agreement with the magistrate's statement that to change the order from a period of non parole to an order for a suspended gaol sentence (which would include a partially suspended gaol sentence) would not be sentencing in accordance with law it would be changing and substituting a different sentence.

[28] I agree with the Crown submission that the learned stipendiary magistrate did not have the power under s 112 or under any other statutory provision to proceed to re-sentence the appellant in the manner suggested by the appellant's counsel.

[29] Accordingly, I would dismiss the appeal.

[30] Ground 3 – It was oppressive, in all the circumstances to impose on the Appellant a greater sentence than had previously been imposed.

[31] Because I have found that the learned stipendiary magistrate had no power to vary the sentence as sought by the appellant, it is not necessary to say anything further. However, for the benefit of the appellant, I will make a few brief comments in respect of this ground of appeal.

[32] The appellant was charged with a number of offences, the most serious being committing a dangerous act contrary to s 154(1) of the Criminal Code. The facts in support of this charge indicate it was a serious offence. The learned stipendiary magistrate considered every aspect of mitigation and

extended the appellant the appropriate leniency as demonstrated by his following comments (t/p 15):

> "I have given the matter some considerable thought since then. I have made every allowance I think I can possibly do for your youth and the fact that you have not been to gaol before, and that this has been your first time in prison.
>
> I have seriously considered the question of the totality principle, and what is an appropriate disposition. I have then substantially reduced the penalty down from what I considered to be an appropriate objective penalty, to take into account the fact that you are still young, that rehabilitation is not totally lost on you, and you have not been in prison before."

[33] The appellant did not complain in respect of the original sentence.

[34] Increasing the non parole period, as the learned stipendiary magistrate was required to do in law, does not make this sentence oppressive. Even if the magistrate had power to substitute a partially suspended gaol sentence for a non parole period, it would not, in my opinion, have been an appropriate sentence to impose. With respect, I agree with the reasons the learned stipendiary magistrate gave at the time of the original sentence when he made a decision to fix a non parole period rather than a partially suspended sentence.

[35] I am not persuaded that it was oppressive, in all the circumstances to increase the period of non parole from seven months to eight months.

[36] I would dismiss this ground of appeal.

[37] The order of the Court is that this appeal be dismissed.