Muhamad v Australian Fisheries Management Authority [2007] NTSC 4

PARTIES:	MUHAMAD, Hasan Alimudin v AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	RILEY J

CATCHWORDS:

APPEAL – JUSTICES – Appeal against sentence – totality – interpretation and application of the Crimes Act and Sentencing Act to default orders – concurrency or cumulation on default periods of imprisonment for unpaid fines – not manifestly excessive – appeal dismissed

Crimes Act 1914 (Cth)
Sentencing Act
Fines and Penalties (Recovery) Act

Yusup v The Queen [2005] NTCCA 19	followed
Aruli v Mitchell (1999) WASCA 1042	applied
Veen [No.2] (1998) 164 CLR at 477	referred
Fakie v Shelverton (2000) 115 A Crim R 381	referred
Liddy v R [2005] NTCCA 4 at [12]	referred
Darter v Diden [2006] SASC 152	referred

REPRESENTATION:

Counsel:

Appellant:	M Johnson
Respondent:	P Usher

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Commonwealth Director of Public Prosecutions

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

Muhamad v Australian Fisheries Management Authority [2007] NTSC 4
No JA 54 of 2006 (20625993)

IN THE MATTER OF the *Fisheries Management Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

MUHAMAD, Hasan Alimudin
Appellant

AND:

AUSTRALIAN FISHERIES MANAGEMENT AUTHORITY
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 31 January 2007)

[1] On 23 October 2006 the appellant was sentenced in relation to two offences under the Fisheries Management Act 1991 (Cth). Both occurred on 29 August 2006 and arose out of the same set of circumstances. The first offence was that the appellant used a foreign boat, namely the Bahagia IV, for commercial fishing contrary to s 100(2) of the Act and the second was

that he had in his charge a foreign vessel, namely the Bahagia IV, equipped with traps or other equipment for fishing contrary to s 101(2) of the Act.

[2] The facts placed before the learned sentencing magistrate revealed that the Bahagia IV was a shark boat approximately 14 metres in length. At the time of apprehension the vessel was approximately 230 nautical miles within the Australian Fishing Zone and was equipped with basic fishing gear. There were six people on board and the appellant was identified as the captain. The appellant acknowledged that he was aware that it was illegal to fish in the Australian Fishing Zone and he also "admitted that he had been apprehended for fishing in Australian waters eight times over a 13 year period".

[3] The maximum penalty for each of the offences is a fine not exceeding $275,000. In this case, by consent, the appellant was dealt with in the Court of Summary Jurisdiction where the limit of the jurisdiction in relation to each such offence is a penalty of $27,500. The learned sentencing magistrate recorded convictions and imposed a fine of $10,000 in relation to each offence. The total fine amounted to $20,000 which his Honour considered "reflects the totality of the offending". His Honour directed that if the fines were not paid within 28 days the appellant would be imprisoned for a period of three months on each count, giving a total of six months imprisonment in default. He observed that he could see "no good reason to make the periods concurrent".

[4] The circumstances of the appellant were unusual in that he had offended in this way on other occasions. His Honour observed:

> "The defendant does have a prior record of offending and the defendant has been before the Broome Magistrates Court in relation to relevant priors and indeed, also before that court in relation to other Commonwealth offences. The defendant also has a relevant Northern Territory record in relation to similar offences back in 2002 and on that occasion was fined a total of $5000 and as I understand it is presently undergoing imprisonment for those unpaid fines and in relation to those warrants the defendant is to serve 50 days."

[5] The situation was more serious than those observations revealed. As was acknowledged in the agreed facts, the appellant had been apprehended in Australian waters on eight occasions. His criminal history, which was placed before his Honour, showed that he had not been prosecuted on all of those occasions. In January 1994, in the Darwin Court of Summary Jurisdiction, the appellant was convicted of offences under the Quarantine Act and the Migration Act and was sentenced to imprisonment for a period of 16 weeks. In 1999 the appellant was dealt with in the Broome Magistrates Court when he was fined $18,000 for offences against s 100(2) and s 101(2) of the Fisheries Management Act and when he was also imprisoned for contempt of court. It was noted that he "insulted a Justice in proceedings". He served a total sentence of imprisonment of 16 months. In October 2002, in the Darwin Court of Summary Jurisdiction, he was convicted of further offences under the Fisheries Management Act and fined a total of $5000 with 50 days imprisonment in default. Upon his apprehension in respect of the matters now before the Court he was

committed to gaol for non-payment of those fines and served the 50 days imprisonment. In October 2005, in the Court of Petty Sessions in Perth, he was convicted of further offences under the Fisheries Management Act and fined a total of $7000. On that occasion he served 34 days in a Perth prison in default.

[6] Following sentence in the present case the appellant was repatriated to Indonesia on 13 January 2007.

[7] The appellant originally appealed against the sentence imposed upon him on the following three grounds:

(1) The learned sentencing magistrate erred in that he failed to give sufficient weight to the principle of totality.

(2) The learned sentencing magistrate erred in that he failed to apply subsections 15A(3) and (4) of the Crimes Act (Cth) and instead applied the provisions of subsection 26(6) of the Sentencing Act to the issue of concurrency or cumulation of default periods of imprisonment for unpaid fines.

(3) The overall sentence imposed by the learned sentencing magistrate was manifestly excessive.

[8] At the hearing the appellant was granted leave to add two further grounds of appeal, namely:

(4) That the learned magistrate erred in making default orders under s 26(2) of the Sentencing Act.

(5) That the learned magistrate erred in making a default order totalling imprisonment for six months as this order is ultra vires.

[9] It is convenient to deal with grounds 1 and 3 together and grounds 2, 4 and 5 together.

Grounds 2, 4 and 5

[10] In these grounds of appeal the appellant complains that the learned sentencing magistrate incorrectly applied s 26 of the Sentencing Act (NT) and failed to apply s 15A(3) and (4) of the Crimes Act 1914 (Cth).

[11] The first submission made was that s 26(6) of the Sentencing Act is inconsistent with s 15A(3) and (4) of the Crimes Act 1914 (Cth) and, in accordance with s 15A(1) of the Crimes Act, the Commonwealth legislation must prevail. Section 15A(1) relevantly provides that a law of a State or Territory relating to enforcement or recovery of a fine imposed on an offender for an offence against a law of the Commonwealth will apply so far as it is not inconsistent with a law of the Commonwealth.

[12] Section 26 of the Sentencing Act deals with the powers of the court when there is default in payment of a fine. Section 26(2) provides that a court may order that if a fine is not paid within 28 days the offender is to be imprisoned until his or her liability to pay the fine is discharged. By operation of s 26(6), unless the court otherwise orders, any period of imprisonment that an offender has to serve as a result of an order under s 26(2) is to be served cumulatively on any incomplete sentence or sentences of imprisonment imposed on the offender for the default of a payment of a fine.

[13] The application of this provision in circumstances similar to this matter was considered in *Yusup v The Queen* [2005] NTCCA 19 where it was said:

> "The learned sentencing judge imposed cumulative fines and directed that the periods to be served in custody for default of payment were to be served cumulatively in respect of the two fines he imposed. As is acknowledged by the respondent, s 15A(3) and (4) of the Crimes Act (Cth) provide that periods to be served in custody in such circumstances are to be served concurrently unless the court determines that there are circumstances that warrant that any periods to be served in custody should be cumulative. The starting point is one of concurrency. In this case the attention of the learned sentencing judge was not drawn to those provisions and he did not advert to those requirements of the Crimes Act (Cth) but, rather, referred to s 26(6) of the Sentencing Act (NT). Under that section there is an assumption of cumulation unless the court orders otherwise. To that extent the provision is inconsistent with the provision of the Crimes Act and the Crimes Act provision should have applied."

[14] In the present case the learned sentencing magistrate was aware of the decision of the Court of Criminal Appeal in *Yusup v The Queen* and he specifically referred to that case immediately before proceeding to impose sentence upon the appellant. However the attention of his Honour was not drawn to the provisions of s 15A(3) and (4) of the Crimes Act (Cth). Upon reading the whole of the transcript it is clear that his Honour regarded the situation as being governed by s 26(6) of the Sentencing Act (NT) with the starting point for the exercise being that the periods of imprisonment in default should be served cumulatively unless he otherwise ordered. As *Yusup v The Queen* determines, the starting point is, instead, one of concurrency.

[15] The respondent conceded that his Honour failed to apply s 15A(3) and (4) and mistakenly applied s 26(6) of the Sentencing Act. However it was submitted that the incorrect starting point had no effect upon the conclusion reached by the learned sentencing magistrate. Both the Northern Territory provision and the Commonwealth provision leave a discretion to the sentencer to direct any default term of imprisonment be served either cumulatively or concurrently. In this case his Honour considered the matter and, in the exercise of his discretion, chose to make the default terms cumulative. In so doing he proceeded consistently with the provisions of s 15A(4) of the Crimes Act (Cth). He gave reasons for reaching his conclusions and his reasoning process is not now challenged.

[16] Accepting that his Honour failed to expressly apply s 15A(3) and (4) of the Crimes Act (Cth) and mistakenly applied the provisions of s 26(6) of the Sentencing Act (NT), a consideration of his reasons leads to the conclusion that had he applied the provisions of the Crimes Act he would have reached the same result. His Honour noted the appellant had previously offended in the same way and that there was a need for both personal and general deterrence. He went on to say:

> "In this case I see no good reason to make the periods concurrent. There is a need for both specific and general deterrence and even taking into account the time that he has been in custody and detention I don't believe that a total of six months would be excessive, if anything, the offending warrants a longer period of six months but the Sentencing Act says that the period can't be any longer than three months so I am bound by that."

[17] I see no error in the conclusion reached by the learned sentencing magistrate.

[18] The learned sentencing magistrate imposed a fine of $10,000 in respect of each offence. It was submitted on behalf of the appellant that a "global sentence" should have been imposed covering both offences. However to do so where, as here, the offences were commenced by information but were not against the same provision of the law of the Commonwealth, would not comply with the terms of s 4K(3) and (4) of the Crimes Act (Cth): *Fakie v Shelverton* (2000) 115 A Crim R 381. His Honour was correct in proceeding as he did.

[19] It was further submitted that the learned sentencing magistrate should not have made orders under s 26(2) of the Sentencing Act because to do so was to "subvert" the clear intention of the recovery procedure provided for in the Fines and Penalties (Recovery) Act (NT). The offences under the Fisheries Management Act 1991 (Cth) were punishable only by way of a fine and not by way of imprisonment. Counsel for the appellant noted that s 26(1) of the Sentencing Act provided that if a court imposes a fine, the fine may be enforced under the Fines and Penalties (Recovery) Act "unless the court orders commitment in default under subsection (2)". By proceeding as he did it was argued that his Honour "effectively subverted" the alternative recovery procedures introduced by the Fines and Penalties (Recovery) Act. It is difficult to see how such a submission can be sustained given that the legislation provided for alternative approaches and his Honour has, for

reasons he has identified, chosen one of the available approaches. I see no error on the part of the learned sentencing magistrate.

[20] Whilst the Fines and Penalties (Recovery) Act (NT) established a Fine Recovery Unit and was intended to reduce the numbers of persons being committed to prison for non-payment of fines by allowing enforcement through suspension of licences and/or vehicle registration, garnishee orders, the placing of statutory charges on land and community work orders, those approaches are not appropriate in all cases. The legislature has provided (in s 26(2) of the Sentencing Act) the option that a court may order a period of imprisonment in the event that a fine is not paid. It may bypass the enforcement options provided in the Fines and Penalties (Recovery) Act. In a case such as the present where the offender is an impecunious unlawful non-citizen who is to be repatriated to Indonesia upon completion of the proceedings the other enforcement provisions contemplated under s 26(1) of the Act will not be effective. In order to ensure that the sentencing regime is not undermined the imposition of a default period of imprisonment was called for.

[21] In *Aruli v Mitchell* (1999) WASCA 1042 a challenge was mounted to the validity of imposing default periods of imprisonment under West Australian law for Commonwealth Fisheries Act offences. In finding there was no relevant inconsistency between the West Australian Sentencing Act and the Commonwealth regime, and in upholding the validity of default periods of imprisonment, Murray J said:

> "To apply it (a State law with respect to the enforcement and recovery of fines) is not to provide a penalty which includes imprisonment. The penalty is the monetary penalty. The enforcement of its payment may be avoided by paying the penalty. In that way it is demonstrated that any imprisonment suffered is not by way of the imposition of a penalty but by way of the ordinary process of providing sanctions to enforce compliance with the law. In my view there is no relevant inconsistency with the terms of the Crimes Act s 15A(1)."

I agree.

[22] Finally under these grounds it was submitted that the order of his Honour providing for a total period of imprisonment of six months was ultra vires. It was submitted that s 26(3)(c) of the Sentencing Act provided for a period of imprisonment as part of a default order that does not exceed three months. The subsection is in the following terms:

> "If a court makes an order under subsection (2) and the fine is not paid within 28 days, the court may issue a warrant of commitment in respect of the offender specifying the period of imprisonment calculated on the basis of the amount of the fine as follows:
>
> (a) the period is to be one day for each amount (or part of that amount) prescribed for the purposes of section 88 of the *Fines and Penalties (Recovery) Act* that comprises the fine;
>
> (b) the period is not to be less than one day;
>
> (c) the period is not to exceed 3 months."

[23] The appellant went on to contend that the purpose of s 26(3)(c) of the Sentencing Act is to require that the maximum period of imprisonment that could be imposed upon an offender "on any one occasion for default of fine payment would be three months". It was submitted that the learned

sentencing magistrate erred in imposing a default period totalling imprisonment for six months and that as such an order was "ultra vires".

[24] The first point to be made is, for the reasons set out above, the learned sentencing magistrate should have proceeded under s 15A(3) and (4) of the Crimes Act (Cth) rather than s 26 of the Sentencing Act (NT). However s 26 still has application to the extent that it is not inconsistent with s 15A of the Crimes Act (Cth).

[25] Section 26(2) of the Sentencing Act does not have the effect contended for by the appellant. It provides that where "a fine" is not paid the offender may be imprisoned until liability to pay "the fine" is discharged. Section 26(3) of the Act then provides that where "the fine" is not paid the period of imprisonment "is not to exceed 3 months". The reference in each case is to the "fine" in the singular. The imposition of a period of imprisonment is related to each fine imposed by a court. The maximum default period of 3 months is not to be exceeded in respect of the particular fine, not all fines, imposed on the offender. This approach to the section is consistent with the approach reflected in the provision of a starting point of cumulation found in s 26(6)(a) of the Sentencing Act.

[26] It was further submitted that, whilst the legislative scheme did not provide the sentencing court with an option of imposing a gaol sentence, the learned magistrate in this case "resorted to the imposition of default provisions under s 26(2) of the Sentencing Act" and in so doing "made it clear that it

was his intention that the appellant should serve a sentence of six months imprisonment".

[27] In fact what the learned sentencing magistrate did was to acknowledge that the failure to pay fines as ordered would result in the appellant serving:

> "… a total of six months imprisonment unless I am minded to order that the periods of imprisonment be served at the same time and if that were the case then it would be reduced to three months. In this case I see no good reason to make the periods concurrent. There is a need for both specific and general deterrence and even taking into account the time that he has been in detention and custody I don't believe that a total period of six months imprisonment would be excessive, if anything the offending warrants a longer period than six months but the Sentencing Act says that the period can't be any longer than three months, so I am bound by that. I also take into account that he has to do 50 days on those previous warrants and I can't see any reason why the six months for this should not be served on top of that 50 days".

[28] The effect of what his Honour had to say was not that he was imposing a period of imprisonment of six months but, rather, he was acknowledging that, in the event the appellant did not pay the fine imposed, a default sentence of imprisonment for six months would result. I see no error in his Honour considering that fact and determining that such a penalty would not be excessive in all the circumstances.

[29] The learned sentencing magistrate did not err in making default orders of imprisonment on each fine imposed to the statutory maximum of three months or in directing that in the event of default on both fines those default periods be served cumulatively.

Grounds 1 and 3

[30] The principal ground of appeal under this heading was that the sentence was manifestly excessive. In support of that ground the appellant submitted that there was a good deal of overlap between the elements of an offence against s 100(2) and the elements of an offence under s 101(2) of the Fisheries Management Act 1991 (Cth). It was submitted that there should be no doubling-up of the penalty in respect of those elements which are common to both sections. Whilst the respondent acknowledged that there were elements which were common to both offences, it was submitted that the gravamen of the offences was different. The offence under s 100 of the Act involves conduct relating to the use of a foreign vessel for commercial fishing whilst the offence under s 101 of the Act is concerned with a person being in charge of a foreign vessel equipped with nets, traps and other equipment for fishing in the Australian Fishing Zone. The offences are distinct.

[31] Similar submissions were made in relation to s 100A and s 101A of the same Act in *Yusup v The Queen* (supra). In that case it was held that there was an overlap between the two provisions and that a person charged under both provisions was therefore exposed to liability under one which to some extent was in relation to the same conduct which exposed him to liability under the other. It was said that "whilst two discrete offences are created by those sections, in the circumstances of this matter there is a significant commonality and that commonality should have been considered in

determining the appropriate sentence". The appellant relies upon those observations.

[32] In the present case it was submitted that there was a significant commonality between the offences and this was identified by reference to the offending occurring at the one place, involving the use of the one foreign boat and also by virtue of the fact that the foreign boat was used for commercial fishing. The learned sentencing magistrate expressly took those matters into account. He said:

> "I take into account that there is an overlap between the two charges and I am going to impose fines in relation to both charges, but I will be careful to ensure that I do not punish the defendant twice in relation to those charges. I am looking at the totality of his offending."

It appears on the face of the sentencing remarks that his Honour specifically and appropriately addressed the issue now raised by the appellant. He took the commonality between the provisions into account. He expressly referred to the principle of totality. The ground of appeal has not been made out.

[33] The nature of an appeal alleging that a sentence was manifestly excessive is well settled. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in

misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive: *Liddy v R* [2005] NTCCA 4 at [12].

[34] The submission made on behalf of the appellant was that the enterprise in which he was engaged was at the low end of the scale as indicated by the type of boat in which the offending took place and the limited fishing equipment on board. It was noted that the appellant had been detained in various forms of detention for a period of 56 days as at the date of sentence. That of course was a matter to be taken into account in determining an appropriate sentence: *Yusup v The Queen* (supra); *Darter v Diden* [2006] SASC 152. The appellant went on to submit that the learned magistrate failed to take into account the various subjective factors relevant to s 16A(2) of the Crimes Act (Cth). The ultimate submission was that the sentence was manifestly excessive.

[35] In imposing sentence the learned sentencing magistrate took into account the circumstances of the offending and the circumstances of the appellant. The personal circumstances of the appellant were before him. There is nothing to suggest they were not taken into account. The learned sentencing magistrate emphasised the need to provide a penalty which reflected a

deterrent effect both of a general and a specific nature. He made reference to the antecedents of the appellant, including his history of offending. He took into account that the appellant had spent time in detention and also that he spent time in custody in default of the payment of earlier fines. He regarded the offending as serious because of the extent to which the vessel had intruded into the Australian Fishing Zone and because of the fact that there were small amounts of fresh fish located on the deck.

[36] In the circumstances of this case the criminal history of the appellant was a relevant and significant factor. It served to demonstrate that the offence was not an uncharacteristic aberration and it revealed on the part of the appellant a continuing attitude of disobedience of the law: *Veen [No 2]* (1998) 164 CLR at 477.

[37] In relation to this ground the respondent placed before this Court a schedule of 176 offences under the same provisions dealt with in the Darwin Court of Summary Jurisdiction. A review of the facts related to those matters and the penalties imposed confirms that the penalties, the subject of challenge in this case, were comfortably within the available range.

[38] In my view it has not been demonstrated that the sentence imposed upon the appellant was manifestly excessive.

[39] The appeal must be dismissed.

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