George v O'Neil [2009] NTSC 41

PARTIES:	GEORGE, PRESTON LEE
	v
	O'NEIL, WAYNE JEFFREY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 26 of 2009 (20910679)
DELIVERED:	5 August 2009
HEARING DATES:	17 July 2009
JUDGMENT OF:	THOMAS J
APPEAL FROM:	Court of Summary Jurisdiction

REPRESENTATION:

Counsel:

Appellant:	G Lewer
Respondent:	R Coates

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	tho200907
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

George v O'Neil [2009] NTSC 41
No. JA 26 of 2009 (20910679)

BETWEEN:

GEORGE, PRESTON LEE
Appellant

AND:

O'NEIL, WAYNE JEFFREY
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 5 August 2009)

Thomas J:

[1] This is an appeal from an order made by a stipendiary magistrate in the Court of Summary Jurisdiction on 25 May 2009 issuing a warrant of commitment that the appellant serve seven days imprisonment.

[2] On the application of Ms Lewer for the appellant, and with the consent of Mr Coates for the respondent, the Court granted leave to amend the existing ground of appeal by replacing it with the following three grounds:

1. The learned magistrate erred in finding that the warrant of commitment issued by the Court of Summary Jurisdiction on 27 March 2009 and executed on 25 May 2009 provided lawful

authority for the Appellant's imprisonment on 25 May 2009 or for any period thereafter.

2. The learned magistrate erred in finding he had power to make an order for a further warrant of commitment that the appellant served 7 days imprisonment.

3. In the alternative, if the learned magistrate did have power to make such an order, that the learned magistrate's discretion about whether he should make such order miscarried.

[3] At the commencement of the hearing of this appeal, Mr Coates on behalf of the respondent, conceded that the learned stipendiary magistrate had no power to make the order. Accordingly, the respondent conceded the appeal should be allowed and the order of the magistrate made on 25 May 2009 be quashed.

[4] I stated I would nevertheless provide written reasons for decision as the point is of significance.

[5] The background to this matter is set out in the written submissions of Ms Lewer for the appellant as follows:

> "**History**
>
> **Proceedings on 27 March 2009**
>
> On 27 March 2009 the Appellant appeared in the Darwin Court of Summary Jurisdiction and pleaded guilty to one count of breaching a Domestic Violence Order. The learned Magistrate convicted and sentenced the Appellant to 10 days imprisonment ordered to commence on 26 March 2009. This sentence was backdated by one

day to take account of the prior period in custody (when the Appellant was first arrested and taken into custody). Accordingly, the Appellant could have expected to be released on 5 April 2009 at the expiration of the 10 days.

Events between 27/09/09 and 25/05/09

The Appellant relies on the affidavit of O'Neil Joseph PADILLA affirmed 13 July 2009 as to what happened after the Appellant was sentenced on 27 March 2009.

Three orders relating to warrants of commitment are referred to in these submissions. A copy of the first warrant of commitment is annexed and marked 'A' in the affidavit of PADILLA ('the first warrant of commitment'). The first warrant of commitment specified that the Appellant be imprisoned for 10 days commencing on 26 March 2009 but then further ordered that he 'is to be released immediately'. As is apparent in the document, the first warrant contained a material error that did not reflect the actual order of the learned Magistrate made 27 March 2009. The next warrant of commitment which purported to correct the error in the first warrant is annexed and marked 'B' in the affidavit of PADILLA ('the second warrant of commitment'). Lastly on 25 May 2009 the learned Magistrate made an order for a further warrant of commitment for the imprisonment of the Appellant for a period of 7 days, this order is referred to in Paragraph 16 of the affidavit of PADILLA ('the third warrant of commitment').

The appellant was released from custody and at liberty from the evening of 27 March 2009. He was eventually apprehended and taken into custody at 12:26am on 25 May 2009, when police attended his residence and purported to execute the second warrant. Their purported authority to do so was the second warrant of commitment, Annexure 'B' in affidavit of PADILLA.

Proceedings on 25 May 2009

At the Court of Summary Jurisdiction on 25 May 2009 the Crown made no formal application or submissions other than to support an order for the Appellant to serve 'the days he hasn't already served' (page 23 of the transcript of 25 May 2009), that is a further seven days imprisonment. Neither the Crown nor the learned Magistrate identified any specific power, legislative or at common law to order a further warrant of commitment (for 7 days imprisonment).

At first instance, counsel for the Appellant submitted that:

1. The Appellant was not in lawful custody, relying on the case of *Vella v Gray* (1985) 9 FCR 81; 21 A Crim R 125; 61 ALR 210.

2. And that the court had no power to further deal with the Appellant . There were no current valid proceedings before the court. In effect, the court was now *functus officio*.

The learned Magistrate held that the second warrant of commitment provided the lawful basis for the Appellant's custody on 25 May 2009 (page 23 of the transcript of 25 May 2009). However, to remove any doubt he ordered a new warrant of commitment be issued for the Appellant to be imprisoned for seven days.

The Appellant filed a notice of appeal the same date and a recognizance to prosecute the appeal.

The learned Magistrate granted the Appellant bail pursuant to s.20(1)(b) of the Bail Act."

[6] Counsel for the appellant relied on the High Court authority of *Whan v McConaghy*.[1] This case is authority for the proposition that where a sentence to a term of imprisonment specifies a commencement date, the time of the sentence runs from that commencement date notwithstanding that a person may **not** be in custody. Their Honours Mason, Murphy, Wilson and Deane JJ stated at 636:

> "… A term of imprisonment expires with effluxion of time whether or not the prisoner is in custody serving that sentence for the whole of the term. Thus it has been held that a prisoner who escapes while serving a term of imprisonment cannot be detained in custody under the sentence once the term has expired, though he may be liable to arrest and prosecution for escaping …"

[7] This authority has been applied in a number of cases including *R v Hall*[2] and *R v Nunan*.[3]

[1] (1984) 153 CLR 631.
[2] (2004) NSWCCA 127.
[3] (1999) NSWCCA 117.

[8] In the short amount of time this matter occupied in the Court of Summary Jurisdiction, his Honour was not made aware of the High Court decision of *Whan v McConaghy*.[4]

[9] In all circumstances at common law, a sentence continues even when a person is not actually in prison. This principle applies whether the prisoner's release was the fault of the authorities or the fault of the offender.

[10] There is no statutory provision in the Northern Territory to cover the situation that exists in this matter. The appellant was sentenced to 10 days imprisonment to commence on 26 March 2009. He was released two days later because of an administrative error. The administrative error occurred within the office of the Criminal Registrar at the Darwin Court of Summary Jurisdiction when the following words were included on the first warrant of commitment "and it was further ordered that; The offender is to be released immediately". This did not accurately reflect the order of the Court which, on 27 March 2009, sentenced the appellant to 10 days imprisonment commencing 26 March 2009. If there had been no administrative error, he would have been released on 5 April 2009 at the expiration of the 10 days. The sentence continued to run while he was at liberty. The warrant of commitment expired on 5 April 2009. He could not, after 5 April 2009, be imprisoned again on that warrant of commitment. The Court was functus officio and there was no power to order a further warrant of commitment after 5 April 2009.

[4] (1984) 153 CLR 631.

[11] A magistrate is functus officio on passing conviction and sentence under the Justices Act – see also *Psaras v Littman*.[5]

[12] There is no objection to the actual sentence of 10 days imprisonment imposed by the magistrate on 27 March 2009 and backdated to 26 March 2009.

[13] The appeal is confined to the principle that two months later i.e. on 25 May 2009 the magistrate had no power to issue a new warrant of commitment. The 10 day sentence had passed irrespective of whether it had actually been served.

[14] There was no error in the sentence imposed rather the error was on the warrant. There is no power in the Justices Act to rectify that error once the 10 day sentence had passed on 5 April 2009.

[15] By 25 May 2009 the warrant had expired and there was no power under the Justices Act for the magistrate to issue a third warrant of commitment. To make an order for a third warrant at that time was to re-sentence the offender.

[16] A reading of the transcript of the proceedings before the Court of Summary Jurisdiction on 25 May 2009 indicates that Ms Lewer made submissions to the effect that the appellant should be released because there was no currently valid warrant to keep him in custody. His Honour referred to a

[5] (2006) 18 NTLR 189; 165 A Crim R 116 Martin CJ paragraph [3] to [29].

second warrant of commitment that issued but had not been executed within the period of 10 days from 26 March 2009. The second warrant of commitment was not executed until 25 May 2009, the date this matter came before the Court of Summary Jurisdiction.

[17] There was considerable discussion between the learned stipendiary magistrate and counsel for the defence as to the position that existed once the 10 days from 26 March had expired and the appellant had been released but had not actually served the time in prison. His Honour raised the possibility of adjourning the matter to the following morning so that full submissions could be made to him. He asked that authorities be provided by counsel for the defence in support of her argument that there was no power to hold the appellant on the second warrant of commitment because the 10 days had expired. The learned stipendiary magistrate considered remanding the appellant in custody overnight. Ms Lewer maintained her argument that to do so would mean her client was not lawfully in custody as he would effectively be re-sentenced. Ultimately, his Honour decided to issue a third warrant and made an order that a warrant of imprisonment issue requiring the defendant to undergo a period of imprisonment of seven days commencing on that date, being 25 May 2009.

[18] Ms Lewer immediately lodged an appeal from this order the same day i.e. 25 May 2009. There was an application for bail which was granted. The appellant has been on bail pending the decision on appeal.

[19] It is clear that this matter came before the Court of Summary Jurisdiction at short notice. The appellant had been arrested and brought before the Court the same day. Neither counsel had adequate time to prepare proper submissions. The learned stipendiary magistrate did not have the benefit of the detailed argument prepared by Ms Lewer on behalf of the appellant on this appeal. The learned stipendiary magistrate was not made aware of the relevant authorities in particular *Whan v McConaghy*[6] and the supporting authorities that were put before this Court on appeal.

[20] In her very careful and detailed written submissions to this Court on the appeal, Ms Lewer canvassed the various powers under the Justices Act, in particular, the powers under s 184, s 185 and s 187 of the Justices Act. None of these provisions provided for a power enabling the magistrate to issue a further warrant of commitment after the period of the sentence on the first warrant of commitment had expired. In this case that was 5 April 2009. The other possible source of power is contained in s 48B of the Interpretation Act and s 112 of the Sentencing Act but neither are applicable in this situation.

[21] The clerical staff at the Magistrates Court could have corrected the error that appeared on the first warrant of commitment which allowed for the appellant's release forthwith, although such a correction after the warrant had been executed may well have required judicial approval. However, the correction would have to be made on a second warrant of commitment and

[6] [1984] HCA 22

that could only be valid if executed within the 10 day period of the sentence. If such a warrant had been executed within that time then the appellant would only have been liable to serve the balance of the remainder of the 10 day sentence commencing on 26 March 2009. In the case before this Court this second warrant of commitment was not executed until 25 May 2009, long after the 10 day sentence had expired. By this time the second warrant of commitment was not valid for holding the appellant in lawful custody. Issuing a third warrant of commitment on 25 May 2009 well after the expiration of the 10 day sentence that commenced on 26 March 2009 could not cure the situation and was not a basis to lawfully hold the appellant in custody.

[22] The respondent on the appeal represented by Mr Coates, having read the very well prepared written submissions made by Ms Lewer, and taking into account in particular the High Court decision of *Whan v McConaghy*,[7] concedes the appeal must be allowed.

[23] I agree that this is a concession well made by the respondent.

[24] Accordingly, I find that the learned stipendiary magistrate had no power to make the order he did on 25 May 2009 to issue a further warrant.

[25] The appeal is allowed. The order of the learned stipendiary magistrate of 25 May 2009 is quashed. The defendant is discharged.

[7] (1984) 153 CLR 631.