Olsen v Sims [2010] NTSC 28

PARTIES:	JAMES OLSEN
	v
	ERICA ANN SIMS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 3 of 2010 (20632016)
DELIVERED:	28 May 2010
HEARING DATES:	24 May 2010
JUDGMENT OF:	RILEY J

CATCHWORDS:

CRIMINAL LAW AND PROCEDURE – Appellant convicted and sentenced under a repealed Act – contravention of a restraining order – restraining order – Domestic Violence Order – application of s 14 Criminal Code – statutory interpretation – appeal dismissed

Criminal Code s 14, s 14(1), s 336
Domestic and Family Violence Act s 120, s 121, s 135
Domestic Violence Act (1992) s 10
Interpretation Act s 12
Sentencing Act s 121, s 121(2)

Maher v Hamilton (1990) Tas R 199; *Nguyen v The Queen* (2003) 13 NTLR 62; *Siganto v R* (1997) 141 FLR 73, applied

R v Hallam (1998) 102 A Crim R 546; *R v Pham* [2009] QCA 242, cited

R v Bowen [2008] VSCA 33; *Commissioner of Taxation v Price* [2006] 2 Qd R 316; *R v Ronen* (2006) 161 A Crim R 300, considered

REPRESENTATION:

Counsel:

Appellant:	G Lewer
Respondent:	M Grant QC with S Brownhill

Solicitors:

Appellant:	NAAJA
Respondent:	Director of Public Prosecutions

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

Olsen v Sims [2010] NTSC 28
No. JA 3 of 2010 (20632016)

BETWEEN:

JAMES OLSEN
Appellant

AND:

ERICA ANN SIMS
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 28 May 2010)

[1] This appeal involves a consideration of the interaction between the *Domestic Violence Act (1992),* which has been repealed, and its successor the *Domestic and Family Violence Act ("DFVA").*

[2] On 9 February 2010, in the Court of Summary Jurisdiction sitting at Wadeye, the appellant was convicted of breaching a restraining order made under the repealed Act and sentenced to imprisonment for a period of seven days. He appeals against both conviction and sentence.

[3] There is no dispute that on 14 December 2006 the appellant engaged in conduct that contravened an order which restrained him from contacting his

partner, BG. The restraining order had been made under the repealed Act and was served on him on 16 March 2006. On 14 December 2006 he attended at the residence of BG in breach of the order. The breach was constituted by the appellant approaching BG. There was no suggestion of any harm being caused to BG.

[4] The appellant was charged on 22 December 2006. The matter suffered significant delays due to the failure of the appellant to appear in court on a number of occasions. The appellant eventually came before the Court of Summary Jurisdiction in relation to the matter on 11 November 2009 where he pleaded guilty to an offence under s 10 of the repealed Act and the matter was adjourned for legal argument. The appellant next came before the court in relation to the offending on 9 February 2010, at which time he again pleaded guilty and was convicted and sentenced.

[5] In 2006, at the time of the offending, s 10 of the subsequently repealed Act provided:

> (1) Subject to subsections (1D) and (3), a person is guilty of a regulatory offence if:
>
> (a) there is a restraining order in force against the person; and
>
> (b) the person has been served with a copy of the order; and
>
> (c) the person contravenes the order.
>
> (1A) Despite the *Sentencing Act*, where a person is found guilty of a second or subsequent offence against subsection (1),

the Court must sentence the person to imprisonment for not less than seven days but not more than six months.

[6] The appellant had one prior conviction for contravention of a restraining order, having been convicted on 17 March 2006 and fined a sum of $300. The learned sentencing magistrate proceeded to sentence on the basis that he was bound to apply the provisions of the repealed Act and to convict the appellant and sentence him to imprisonment for not less than seven days.

[7] The *Domestic and Family Violence Act* commenced on 1 July 2008 and repealed the *Domestic Violence Act*. The *DFVA* did not include any transitional provision applicable to the circumstances of this case.

[8] Section 120 of the *DFVA* is in the following terms:

Contravention of DVO by defendant

(1) A person commits an offence if:

(a) a DVO is in force against the person; and

(b) the person engages in conduct that results in a contravention of the DVO.

(2) Subsection (1) does not apply unless:

(a) the person has been given a copy of the DVO; or

(b) for a DVO that has been varied under Part 2.7 or 2.8 or confirmed with variations under Part 2.9 or 2.10:

(i) the person has been given a copy of the DVO as varied or confirmed; or

(ii) the person's conduct also constitutes a contravention of the DVO last given to the person.

(3) An offence against subsection (1) is an offence of strict liability.

[9] The *DFVA* included the following provision relating to penalty which, the appellant submits, should apply in his case rather than the strict mandatory provisions of the repealed Act which required the court to sentence an offender to imprisonment for not less than seven days for a second or subsequent offence:

121 Penalty for contravention of DVO – adult

(1) If an adult is found guilty of an offence against section 120(1), the person is liable to a penalty of 400 penalty units or imprisonment for 2 years.

(2) The court must record a conviction and sentence the person to imprisonment for at least 7 days if the person has previously been found guilty of a DVO contravention offence.

(3) Subsection (2) does not apply if:

(a) the offence does not result in harm being caused to a protected person; and

(b) the court is satisfied it is not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence.

The appeal against conviction

[10] The appellant argued that he could not be found guilty of a contravention of the repealed Act because, pursuant to s 14(1) of the *Criminal Code*, the conduct impugned did not constitute an offence at the time the appellant "was proceeded against".

[11] The appellant acknowledged that the *Interpretation Act* contains provision relating to the effect of the repeal of legislation. Indeed, s 135 of the *DFVA* provides that the transitional provisions of that Act do not limit Part III of the *Interpretation Act*. Section 12 of the *Interpretation Act* (which is in Part III) provides:

> Effect of repeal
>
> The repeal of an Act or part of an Act does not:
>
> …
>
> (c) affect a right, privilege, obligation or liability acquired, accrued or incurred under an Act or the part of the Act so repealed, or an investigation, legal proceeding or remedy in respect of that right, privilege, obligation or liability; or
>
> (d) affect a penalty, forfeiture or punishment incurred in respect of an offence against the Act or part of the Act so repealed, or an investigation, legal proceeding or remedy in respect of that penalty, forfeiture or punishment,
>
> and the investigation, legal proceeding or remedy may be instituted, continued or enforced, and a penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been made.

[12] In the present case, the conduct the subject of the complaint occurred during the currency of the repealed Act and the prosecution of the appellant commenced during the currency of the repealed Act. By virtue of s 336 of the *Criminal Code* a trial is deemed to begin when the accused person is called upon to plead to the indictment and to say whether he is guilty or not

guilty of the charge. An accused person is "proceeded against" at that time for the purposes of s 14.[1]

[13] It is apparent, as the appellant accepts, that by operation of s 12 of the *Interpretation Act* the prosecution of the appellant for breach of the restraining order made under the repealed Act could be instituted and continued after the repeal of the Act. Further, punishment may be imposed under the repealed Act as if the repealing Act had not been made.

[14] However, it was submitted on behalf of the appellant that the circumstances of this matter should be governed by s 14 of the *Criminal Code* which provides:

> 14 Effect of changes in law
>
> (1) A person cannot be found guilty of an offence unless the conduct impugned would have constituted an offence under the law in force when it occurred; nor unless that conduct also constitutes an offence under the law in force when he is proceeded against for that conduct.
>
> (2) 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 authorized by the former law or to any greater extent than is authorized by the latter law.

[15] It was submitted that, in the circumstances of the present case, s 12 of the *Interpretation Act* is in conflict with s 14 of the *Criminal Code* and that the *Criminal Code* provision should prevail being a statute of specific rather

[1] *Nguyen v The Queen* (2003) 13 NTLR 62 at [4].

than general operation.[2] Further, it was submitted that if the *Interpretation Act* provision prevailed then s 14 of the *Criminal Code* would have no meaning.

[16] As was submitted on behalf of the respondent, s 14(1) reflects a fundamental principle of the law that a change in societal values resulting in the decriminalisation of particular conduct must be applied to any person yet to be dealt with under the law at the time of that change. In considering the application of the section it is necessary to determine in a particular case whether "the conduct impugned would have constituted an offence under the law in force" both when it occurred and when the accused is proceeded against for that conduct.[3] The section has no application where the same offence is in place at both times.[4]

[17] In the present case the conduct complained of under s 10 of the repealed Act is the conduct which amounted to a contravention by the appellant of an order made in a domestic violence context restraining him from identified behaviour. The appellant submitted that the offence under s 10 of the repealed Act is to be contrasted with the offence created by s 120 of the *DFVA* which refers to "a contravention of the DVO". It was submitted that the offence of contravening a restraining order ceased to be an offence at the time the *Domestic Violence Act* was repealed and was not an offence under the law when the appellant was proceeded against.

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[2] *Nguyen v The Queen* (2003) 13 NTLR 62 at [10].
[3] *Nguyen v The Queen* (2003) 13 NTLR 62 at [5].
[4] *Siganto v R* (1997) 141 FLR 73 at 80.

[18] Whilst there has been a change from the terminology used in s 10 of the repealed Act to that found in s 120 of the *DFVA,* conduct of the nature complained of was not decriminalised by the *DFVA*. Conduct which constituted the offence under s 10 of the repealed Act would also constitute an offence had it occurred under s 120 of the *DFVA*. The focus of the offence under the legislation remains the conduct of a person in a domestic violence context in circumstances where he was the subject of an order restraining such conduct. The change in terminology does not alter the fact that the conduct impugned would have constituted an offence under the law in force when it occurred and also an offence under the law in force when the appellant was proceeded against for that conduct.

[19] It follows that s 14(1) of the *Criminal Code* does not have application to this case. The section does not displace the ordinary operation of s 12 of the *Interpretation Act*. For present purposes there is no inconsistency between the operation of s 12 of the *Interpretation Act* and s 14(1) of the *Criminal Code*. Whilst the offence created by the repealed Act may have been repealed, conduct performed in circumstances which would have constituted a contravention at the time when the offence existed continues to be able to be prosecuted and result in conviction and punishment by operation of s 12 of the *Interpretation Act*.

[20] The appeal against conviction is dismissed.

The appeal against sentence

[21] In the appeal against sentence the appellant argued that the learned magistrate erred in finding that he was bound to impose a term of imprisonment of at least seven days because of the operation of s 10(1A) of the repealed Act, rather than applying that part of s 121 of the *DFVA* which allowed a residual discretion.

[22] By reference to s 10 of the repealed Act and s 121 of the *DFVA* it can be seen that the penalty regime has been modified for the offence of contravening a Domestic Violence Order. Under the repealed Act the maximum penalty for the offence was a fine of $2000 or imprisonment for a period of six months. In relation to a person, such as the appellant, found guilty of a second or subsequent offence the court "must sentence a person to imprisonment for not less than seven days but not more than six months". The *DFVA* increased the maximum penalty to a fine of 400 penalty units or imprisonment for two years. It went on to provide that the court must record a conviction and sentence the person to imprisonment for at least seven days if the person has previously been found guilty of a contravention offence. In a departure from the provisions of the repealed Act the sentencing regime was modified to provide that the mandatory sentence of imprisonment does not apply if the offence does not result in harm being caused to the protected person and the court is satisfied it is not appropriate to record a conviction and sentence a person under the subsection in the particular circumstances of the offence.

[23] It was submitted on behalf of the appellant that s 14(2) of the *Criminal Code* has application in the circumstances. The subsection provides that, 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 authorized by the former law or to any greater extent than is authorized by the latter law".

[24] This subsection does not assist the appellant. There is no suggestion that the appellant has been punished to any greater extent than was authorised by the repealed Act and there is no suggestion that he has been punished to any greater extent than is authorised by the *DFVA*. The Court was authorised to impose a term of imprisonment of seven days under both Acts. The inclusion of the discretion to avoid that consequence under the *DFVA* does not mean that the sentence was not authorised.

[25] Further, the appellant is not assisted by reference to s 121 of the *Sentencing Act*. That section provides as follows:

> Effect of alterations in penalties
>
> (1) Where an Act, including this Act, or an instrument of a legislative or administrative character increases the penalty or the maximum or minimum penalty for an offence, the increase applies only to an offence committed after the commencement of the provision effecting the increase.
>
> (2) Where an Act, including this Act, or an instrument of a legislative or administrative character reduces the penalty or the maximum or minimum penalty for an offence, the reduction extends to an offence committed before the commencement of the provision

effecting the reduction for which no penalty had been imposed at that commencement.

[26] Section 121(2) of the *Sentencing Act* is directed to circumstances where the penalty or the maximum or minimum penalty for an offence is reduced and provides that any such reduction extends to an offence committed before the commencement of the relevant amending provision. Section 121 has application in circumstances where the penalty for a particular offence is increased or decreased while the underlying offence provision remains unchanged.

[27] Legislation of a kind similar to s 121 of the *Sentencing Act* has been considered in other jurisdictions. In the New South Wales case of *R v Ronen*[5] it was held by the Court of Criminal Appeal that "it is artificial … to describe the repeal of one offence and the enactment of a different offence as a reduction in the sentence for the repealed offence." Howie J (who delivered a judgment with which Spigelman CJ and Kirby J agreed) said:[6]

> Section 4F[7] is a general provision concerned not only with the reduction in penalty for an offence but also with the situation where the penalty for an offence is increased. In my opinion it is concerned with variations in penalties for existing offences and not with the creation of new offences, whether or not they happen to correspond in some general, unspecific way with offences that they replace."

[5] (2006) 161 A Crim R 300 at [31] - [35].
[6] At [35].
[7] Section 4F of the *Crimes Act 1914* (Cth) is the equivalent of s 121 of the *Sentencing Act* (NT).

[28] This view of the provision was adopted by the Victorian Court of Appeal in *R v Bowen*[8] and was endorsed by the Queensland Court of Appeal in *Commissioner of Taxation v Price*.[9]

[29] The *DFVA* repealed the *Domestic Violence Act* and substituted a new regime. It significantly expanded the range of people who could be protected under a Domestic Violence Order and expanded the range of people who could be subject to such an order. It defined the grounds upon which an order might be granted by reference to a set of behaviours not covered by the repealed Act. Further, the amending Act specifically preserved the operation of Part III of the *Interpretation Act* suggesting that it was the intention of the Legislature that the repealed provisions would continue to apply to offences committed before the amendment including those provisions relating to penalty. Section 121 of the *Sentencing Act* does not have application in the present case.

[30] A further submission presented on behalf of the appellant in relation to the interpretation of s 121(2) of the *Sentencing Act* should be addressed. The appellant observed that, with the passing of the *DFVA,* the maximum penalty for the offence of contravening a domestic violence order was increased. It is clear that the increase in penalty does not apply to the appellant because his offence was not committed after the commencement of the provision effecting the increase. However, it was argued that, for the purposes of

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[8] [2008] VSCA 33 at [11].
[9] [2006] 2 Qd R 316 at [73] - [83].

s 121(2) of the *Sentencing Act*, the passing of the *DFVA* also reduced the minimum penalty for the offence by the introduction of a discretion permitting the Court to impose a sentence which does not include the mandatory term of imprisonment previously required. In my opinion the incorporation of a discretion by which a mandatory minimum sentence may be avoided in certain circumstances does not constitute a reduction in penalty.

[31] A similar issue was addressed by the Full Court in *Siganto v The Queen*[10] where the Court dealt with an applicant found guilty, after trial, of rape. After the offences were committed, but before the trial commenced, the relevant legislation changed to require the sentencing Court to set a minimum non-parole period of 70 per cent of the head sentence for offences of the kind under consideration in that case. In addition, other legislation abolished remissions which had previously applied. The Court said:[11]

> The applicant does not derive any benefit from s 121. There was no Act or instrument of a legislative or administrative character which increased the penalty for rape between the time of the offence and the conviction. It remained imprisonment for life, subject to the powers of the court to impose a shorter term (s 120). The applicant is aggrieved that by the time he came to trial, and was convicted and sentenced, the law had been changed so that that he did not receive the prospect of benefit of the remission and the possibility of a lesser period being fixed prior to which he would not be eligible to be released upon parole. The word "penalty" is not defined in the *Sentencing Act* or in the *Interpretation Act* ... In common parlance a penalty is a punishment imposed for violation of the law and it is in that sense that it is used in section 121. The abolition or reduction of a possible benefit having the effect of reducing the term of

[10] (1997) 141 FLR 73.
[11] (1997) 141 FLR 73 at 80.

imprisonment imposed by way of a penalty does not amount to an increase in the penalty.[12]

[32] Similarly, in the present case, the subsequent inclusion of a discretion by which a mandatory minimum sentence may be avoided in certain circumstances did not constitute a reduction in penalty.[13] Overall the maximum penalties for offending of the kind were increased. The amendment providing for the discretion did not, in itself, change the penalty but rather provided a power to ameliorate the penalty.

[33] In my opinion s 121 of the *Sentencing Act* does not assist the appellant.

[34] The learned magistrate did not fall into error. The appeal must be dismissed.

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[12] See also *R v Pham* [2009] QCA 242 at [49] – [52] and *R v Hallam* (1998) 102 A Crim R 546 at 548.
[13] *Maher v Hamilton* (1990) Tas R 199 at 204.