Supreme Court Notes

by Cameron Ford, Barrister at Law

Appeal - Justices' Appeal - Sentencing - Approach under Misuse of Drugs Act 1990 cf under Poisons and Dangerous Drugs Act 1987.

Fejo v Ilett; Wilton v Ilett (26/2/91) Asche CJ

The appellants pleaded guilty in the Court of Summary Jurisdiction for offences under the *Misuse of Drugs Act* 1990. Fejo was sentenced to 28 days imprisonment on each of four charges, the sentences on charges 1 and 2 to be cumulative, and concurrent with those on charges 3 and 4. Wilton was sentenced to 28 days imprisonment on each of three charges, to be served concurrently.

On appeal against the sentence, it was contended that regard should be had to sentences for comparable offences under the repealed *Poisons and Dangerous Drugs Act* 1987, and that the magistrate erred in having regard to his knowledge of community concern.

Held: (1) the *Misuse of Drugs Act* evidences a legislative intent to impose more serious terms for drug offences generally;

(2) When sentencing under the latter Act, regard should not be had to sentences imposed under the earlier Act;

(3) Where s37(2) of the later Act applies, ie a maximum penalty of seven or more years of imprisonment, or in circumstances of aggravation, the prima facie rule is imprisonment unless particular circumstances pertain;

(4) It is not necessarily wrong for an experienced magistrate, knowing the concerns of the community from his court work, to voice those concerns.

S Wells for the appellants.

S Nish for the respondents.

Solicitors: *NT Legal Aid Commission* for the appellants; *Director of Public Prosecutions* for the Respondent.

Sentencing - s154 Criminal Code - Black-out sex - Whether novelty of offence relevant - General deterrence and retribution.

Maurice v R, (2/4/92), CCA; Martin, Angel and Mildren JJ.

The applicant pleaded guilty to doing a dangerous act, namely the stopping of the breath of R, who subsequently died. Being an acute alcoholic and having drunk alcohol since 10am, the applicant and R engaged in black-out sex in which the applicant throttled R at the point of orgasm, thereby heightening her sensations. She died and the applicant notified the police, submitted to a taped record of interview and pleaded guilty at the first opportunity. On being sentenced to five years imprisonment with two years non-parole, he sought special leave to appeal.

Held (per Martin and Angel JJ, Mildren J dissenting), granting leave but dismissing the appeal: (1) While the prevalence of an offence may call for increased sentences, the fact that an offence is the first of its kind or is novel does not dispel consideration of general deterrence. The offence, not the mode of offending, is to be deterred.

(2) The fact that the applicant intended to do no harm and in fact give pleasure to R is not a relevant mitigating factor.

(3) The fact that the applicant did not appreciate the very dangerous nature of the offence due to his intoxication is not a mitigating factor.

(4) The fact that R voluntarily participated in the adventure is not a mitigating factor.

Per Mildren J: (5) A deliberate act pursued for good motives is less reprehensible than one pursued for selfish ones. In considering general deterrence, one must look at the facts of the individual offence. R's voluntary participation is a mitigating factor. Retribution was given undue emphasis in the sentence.

A Fitzgerald, for the appellant.

RJ Wallace, for the respondent.

Solicitors: *NT Legal Aid Commission*, for the appellant; *Director of Public Prosecutions*, for the respondent.

Mines - Terms of exploration agreement under Land Rights (Northern Territory) Act 1976 (Cth) contrary to that Act - Whether void.

Northern Territory of Australia v Northern Land Council & Ors (11/3/92) Kearney J.

The plaintiff sought a declaration that certain articles of a Deed of Exploration between a mining company, a land council and an Aboriginal association were void as being contrary to the *Land Rights Act*. The provisions sought to impose further conditions on the grant of mining rights to the mining company, other than those contained in the Act.

Held: (1) The regime for the granting of the exploration licences and mining rights in Part IV of the Act is fully comprehensive;

(2) It is necessary to adopt a purposive approach in interpreting Part IV. That purpose was to protect the right of traditional owners to prevent exploration and mining on their lands. But it was also to protect the interest of all Territorians in the minerals below the surface which are invested in the Territory;

(3) A "once-only" scheme of consent is established by Part IV and it is not competent for the traditional owners to impose further conditions on mining once they have consented to the granting of an exploration licence. Accordingly, the articles of the Deed purporting to do so were void as against the Act.

T I Pauling QC, Solicitor-General, and *G C McCarthy*, for the plaintiff.

P G Minogue, for the first defendant.

F X Costigan QC and *R G Blowes* for the second and third defendants.

D Morris for the fourth defendant.

Solicitors: *Solicitor for the NT*, for the plaintiff; *Australian Government Solicitor* for the first defendant; *Brett I Medina*, for the second and third defendants; *Ward Keller*, for the fourth defendant.

Practise - Amendment - Whether alteration in name or description of party - Whether step a "nullity."

Smart & Ors v Stuart (2/4/92), CA: Martin, Angel and Mildren JJ.

On 19 January 1988 the plaintiff commenced an action under the *Compensation (Fatal Injuries) Act* in respect of a death occurring on 1 February 1988. She intended to sue in a representative capacity but styled the action "as personal representative of the estate of [the deceased]." At that time she was not the personal representative of the estate. After the expiration of the limitation period, she sought and obtained leave to amend the title of the proceeding to delete the words quoted above (on 1 November 1987, the rule in *Weldon v Neal* was abrogated in the Territory). From this the appellants sought leave to appeal.

Held, per curiam, granting leave but dismissing the appeal: (1) r36.01 as to amendment should be given the widest interpretation its language will permit, to cover not only misnomers, clerical errors and misdescriptions, but also mistakes as to the name, but not the identity, of a party.

Bridge Shipping Pty Ltd v Grand Shipping SA (1991) 66 ALJR, 76, applied.

Per Angel J: (2) The deletion of the words did not change the name or identity of the party, simply her description, and does not expose the defendants to any new or different liability.

(3) The term "nullity" for proceedings or documents is to be avoided because of the connotation of the absolute void this induces.

Atco Industries (Aust) Pty Ltd v Ancla Maritima SA & Ors (1984) 35 SASR 408, referred to.

Per Mildren J: (4) Substitutions or additions of persons takes effect from the date of the order, not from the date of initiation of the proceedings as was once thought.

Bridge Shipping, supra, per Dawson J at 77, applied.

T Riley QC, for the appellants.

J Reeves, for the respondent.

Solicitors: *Ward Keller* for the appellant; *Cridlands* for the respondent.

provisional liquidator where order invalid and revoked and petition dismissed - Validity of acts done under defective orders.

Re Deisara Pty Ltd (In Liquidation); Ex Parte Commissioner of Taxation (15/5/92), Mildren J.

JHJ was appointed "liquidator" (which should have been "provisional liquidator") on 4 September 1990 and set about winding up the company. On 6 December 1990 the order appointing him was vacated and on 20 December 1990 the summons was dismissed. JHJ applied for ratification of his acts between 4 September and 6 December to enable him to claim his fees for that period.

Held: (1) The Court is empowered to fix the provisional liquidator's remuneration without ratification of his acts since the entitlement to remuneration comes not from the order appointing him but from the statute.

Re North Australian Properties Pty Ltd (1984) 2 ACLR 319, applied.

Nationwide News Pty Ltd v Samalot Enterprises (No 2) (1986) 5 NSWLR 227, followed.

Starr & Anor v Trafalgar Financial Corporation Ltd (No 2) (1983) 8 ACLR 367, not followed.

(2) An order made by a superior court of record is valid until set aside.

Re Boomerang Investments Pty Ltd (1979) 4 ACLR 361, applied.

(3) But as an unauthenticated interlocutory order, it was liable to be recalled, even by another judge.

Hutchinson v Nominal Defendant [1972] 1 NSWLR 443.

T Fong Lim, for the applicant. Ex parte. Solicitors: *Cridlands*, for the applicant. Ex parte.

Appeal - Justices' Appeal - Sentencing - Fresh evidence - Whether prior convictions require more severe sentence for subsequent offences - Whether totality principle applies where part of sentence for breach of recognizance - Proper order where sentencing for breach of recognizance.

Nabanardi v Minner (8/5/92) Mildren J.

The appellant pleaded guilty in the Court of Summary Jurisdiction to driving whilst disqualified. He had four prior convictions for each of which he had been disqualified from obtaining or holding a licence. At the time of the offence, he was under a good behaviour bond of four months, of which he had served one month before being released. He was convicted and sentenced to three months imprisonment for the breach of bond; six months imprisonment for driving whilst disqualified, cumulative upon the first sentence; and disqualified from holding or obtaining a licence for two years.

On appeal, it was contended that remissions earned on the bond should have been taken into account in sentencing; that the magistrate should not have considered the maximum penalty was appropriate simply because of the prior convictions; that the totality principle applied to these circumstances and the sentences were manifestly excessive.

Held: (1) Because the minister's determination on remissions was not before the court, it was not possible to determine what, if any, remissions had been earned on the bond. Nevertheless, the appropriate order when sentencing for breach of bond is not in terms of a fixed period but "so much of the balance thereof as he may still be required to serve."

R v Mulholland (unrep CCA NT 16/1/91), *R v Babui* (unrep CCA NT 19/12/91) applied.

(2) There is no principle that a convictions for a subsequent offence must of necessity result in a more severe sentence than had previously been imposed. The maximum is reserved for the worst category of case.

Veen v R (No 2) (1988) 164 CLR 465 at 477-8, applied.

(3) The totality principle does apply where one of the sentences is for breach of bond.

Gills (1986) 22 A Crim R 115; *Ros v Sears* (1988) 54 NTR 26 at 34, followed.

J Blokland, for the appellant.

R Davies, for the respondent.

Solicitors: *KRALAS* for the appellant, *Director of Public Prosecutions* for the respondent.