*Richardson v Moore* [2005] NTSC 45

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| PARTIES: | RICHARDSON, Jeffrey James |
| | v |
| | MOORE, David Steven |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION |
| FILE NO: | JA 94 of 2004 (20408650) |
| DELIVERED: | 18 August 2005 |
| HEARING DATE: | 12 August 2005 |
| JUDGMENT OF: | RILEY J |

**CATCHWORDS:**

CRIMINAL LAW – APPEAL AGAINST SENTENCE

Appellant pleaded guilty to stealing a cheque and its proceeds, the property of his employer contrary to s 210 Criminal Code (NT) – whether conviction should be recorded – Sentencing Act (NT) – breach of trust a significant matter – sentencing discretion properly exercised.

Impact of delay on sentence – no explanation of the delay – no impact of delay on appellant – sentencing magistrate did not need to take delay into account.

*Criminal Code (NT)*, s 210
*Sentencing Act (NT)*, s 6, s 8

*R v Bird* (1998) 56 NTR 17 at 33, applied
*Toohey v Peach* (2004) 143 NTR 1 at 4, considered
*Cobiac v Liddy* (1969) 119 CLR 257 at 275, considered
*Hesseen v Burgoyne* [2003] NTSC 47 at par [20], considered
*The Queen v Raggett, Douglas and Miller* (1990) 50 A Crim R 41, applied
*R v Miceli* [1998] 4 VR 588 at 591, considered
*Mill v The Queen* (1988) 166 CLR 59 at 64, considered
*Todd* [1982] 2 NSWLR 517, considered
*Crawley v R* (1981) 36 ALR 241, considered

**REPRESENTATION:**

*Counsel:*

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| Appellant: | P. Elliott |
| Respondent: | J.W. Adams |

*Solicitors:*

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| Appellant: | P. Elliott |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | B |
| Judgment ID Number: | ril0520 |
| Number of pages: | 13 |

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

*Richardson v Moore* [2005] NTSC 45
No JA 94 of 2004 (20408650)

IN THE MATTER OF the *Justices Act*

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

BETWEEN:

**RICHARDSON, Jeffrey James**
Appellant

AND:

**MOORE, David Steven**
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 18 August 2005)

[1] On 7 December 2004 the appellant pleaded guilty to a single count of having stolen a cheque and its proceeds valued at $2972.90, the property of Tourism Holdings Pty Ltd, contrary to s 210 of the Criminal Code. On that day he was convicted but discharged without penalty. A victim's levy of

$40 was imposed. The appellant now appeals against the sentence on the following grounds:

> "1. The magistrate erred in recording a conviction.
>
> 2. The magistrate erred in placing too much weight on the fact the offence was committed by an employee.
>
> 3. The magistrate placed insufficient weight on the particular circumstances of this offence."

[2] In addition, at the hearing the appellant sought to add a ground of appeal being that "the learned magistrate either failed to give sufficient weight to the delay between the time of offending and the matter coming to court or, alternatively, misdirected himself as to how to consider the question of delay". With the consent of the respondent the additional ground was added to the notice of appeal.

[3] The circumstances of the offending as described to his Worship were unusual. At the time of the offending the appellant was employed as the branch manager of Tourism Holdings Pty Ltd, which company traded as Britz Rentals in Stuart Park. The appellant was employed by the company from April 2000 through to 21 February 2002. The offending took place on 26 October 2001 and related to the sale of used tyres from rental vehicles. The information placed before the court was that, on earlier occasions, when tyres were replaced upon vehicles this was done through a contract with Bridgestone Tyre Company. The tyres would be replaced and the appellant's employer would receive no money for the replaced tyres. At

some point Bridgestone delegated the performance of its obligations under the contract to a local tyre dealer, Tyrepower. Tyrepower determined that there was some value in the replaced tyres and raised a cheque for the sum of $2972.90 made payable to the appellant's employer. That cheque was provided to the appellant.

[4] The appellant claimed that the employer had strict budgets and, in his opinion, was not purchasing either the best or appropriate equipment for the maintenance of the vehicles. The appellant formed the view that if the monies received from Tyrepower were paid into the employer's account, then, consistent with the approach of the employer, it would be required to be applied to other needs. The appellant determined to use the funds to purchase materials for the business for the use of his staff. He therefore deposited the cheque into his own account but applied the proceeds of the cheque to purchase goods for the use of his staff, which goods became the property of his employer. The goods purchased included a circular saw, a cordless drill, a welder and some screwdriver sets and socket sets. In addition, a second-hand washing machine and dryer were purchased from the appellant for an amount of $700 and delivered to the employer. The transactions for the purchase of those items took place within a week of the receipt of the cheque. The uncontested information provided by the appellant to the court was that all of the funds received from the stolen cheque were applied in this way to the ultimate use of the staff of the employer.

[5] Submissions were made to the sentencing magistrate as to the circumstances of the appellant. His Worship accepted that the appellant was unlikely to re-offend and noted that he had an impressive background and a commendable record of community service. Those matters were observed by his Worship to be "significant" in determining the appropriate sentence.

[6] The submission put to the Court of Summary Jurisdiction on behalf of the appellant was that the learned magistrate should not record a conviction. In rejecting that submission his Worship referred to the position of trust occupied by the appellant. He went on to observe:

> "If, as you would have me accept, that you didn't really steal this but diverted the monies in a way which your employer would not have let you divert them, in effect you are making a decision which you were not entitled to make it would seem on the surface, or alternatively, a decision which you couldn't be bothered going through the correct channels to enable that decision to be made. In the event you were breaching a sense of trust that was placed upon you as the local manager … this was not the first such payment so Bridgestone (sic Britz) had obviously received such payments before and as a manager you have every obligation obviously to maximise the profitability of the person that you work for so that when an opportunity arises to make money as manager your duty would be to accept it and pass the benefits on to the company. So in those terms it seems to me that you were breaching your duty but that is not the charge that you are charged with and I am addressing this as a concept of culpability … ."

[7] The learned magistrate stated that the usual sentence for someone stealing from an employer is a period of imprisonment. He noted that the proposed disposition of no conviction and discharge without penalty was "a long way" removed from that position. He referred to the behaviour of the appellant as being "morally inappropriate" in that the appellant, as manager with a duty

to carry out instructions, chose to spend his employer's money in the way that he wished to spend it and contrary to the anticipated wishes of the employer. His Worship then referred to the creditable background of the appellant and went on to conclude:

> "Given that you used the money for the benefit of the company and its employees and not for yourself it is probably not a case where the issues of general deterrence play a great regard other than the fact that it is very necessary at all times for the courts to send a message that managers and staff must not take into their own hands what they think is the right thing to do with cash. Whilst I am very impressed with your background and your community service and those matters are a very significant player in my mind, I can't let the matter go totally unrecorded and for that reason the course that I am proposing to adopt is this: that you are found guilty, that you are convicted of the offence but you are discharged without penalty. There will be a victim's levy of $40; I am obliged to impose that."

[8] The observation of his Worship that offences involving breach of trust by employees usually lead to a term of actual imprisonment is supported by the decision of the Court of Criminal Appeal in *R v Bird* (1998) 56 NTR 17 at 33. In that case the court observed that in general, "unless the circumstances are very exceptional or the amount of money involved is small, a sentence of immediate imprisonment is the usual and expected punishment".

**Conviction or no conviction**

[9] In determining whether or not a conviction should be recorded, guidance is to be obtained from s 8 of the Sentencing Act which is in the following terms:

"(1) In deciding whether or not to record a conviction, a court shall have regard to the circumstances of the case including –

(a) the character, antecedents, age, health or mental condition of the offender;

(b) the extent, if any, to which the offence is of a trivial nature; or

(c) the extent, if any, to which the offence was committed under extenuating circumstances.

2. Except as otherwise provided by this or any other Act, a finding of guilt without the recording of a conviction shall not be taken to be a conviction for any purpose."

[10] In determining the character of an offender, by virtue of s 6 of the Act, the court may consider the following:

"(a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender;

(b) the general reputation of the offender; and

(c) any significant contributions made by the offender to the community."

[11] The application of these sections was considered by the Court of Appeal in *Toohey v Peach* (2004) 143 NTR 1 where the court said (at 4):

"[11] The primary focus of attention in considering whether or not to record a conviction is upon all the circumstances of the case, the enumerated factors being some of them: cf *Cobiac v Liddy* (1969) 119 CLR 257. The result of declining to record a conviction and dismissing a complaint is to free the offender of the immediate legal consequences of his having committed the offence: *Cobiac v Liddy* at 274 Windeyer J. Before considering the exercise of the discretion, there must be found some mitigating aspect arising from the

circumstances of the case, whether by reference to one or more of the factors enumerated in s 8(1) or otherwise. The opening words of s 12(2) of the Penalties and Sentences Act 1992 (Qld) are drafted in a similar way to s 8(1) of the Territory Act, albeit the enumerated matters are in a different form. In *R v Brown; Ex parte Attorney-General* [1994] 2 Qd R 182 Macrossan CJ held (at 185):

> Where the recording of a conviction is not compelled by the sentencing legislation, all relevant circumstances must be taken into account by the sentencing court. The opening words of s 12(2) of the Act say so and then there follow certain specified matters which are not exhaustive of all relevant circumstances. In my opinion nothing justifies granting a general predominance to one of those specified features rather than to another. They must be kept in balance and none of them overlooked, although in a particular case one, rather than another, may have claim to greater weight.

[12] With respect, we are of the opinion that the same approach applies to s 8(1) of the Sentencing Act."

[12] In *Cobiac v Liddy* (1969) 119 CLR 257 Windeyer J considered whether members of an appellate court should interfere with the exercise of discretion by a magistrate to decline to record a conviction. His Honour stressed that the question is not whether any members of the appellate court would have taken that course of action, he said (at 275):

> "The question is not what we would do, but what could he lawfully do. The discretion was his. He could exercise it as he thought expedient, provided that in the circumstances it was open to him to exercise it at all."

[13] Similar views were expressed by BF Martin CJ in *Hesseen v Burgoyne* [2003] NTSC 47 where his Honour was dealing with the application of s 8 of the Sentencing Act and said (at par [20]):

> "Judicial minds may well differ as to the significance to be placed upon any one or more of the enumerated factors in s 8 as well as the

> other circumstances of the case, and in ultimately deciding whether or not to record a conviction the sentencer is exercising a judicial discretion. An appellate court will only interfere if there is some reason for regarding that the discretion conferred upon the Magistrate was improperly exercised and the Magistrate fell into error (*Mason v Pryce* (1988) 34 A Crim R 1)."

**Principles to be applied**

[14] The general principles applicable to an appeal against sentence are well known. The presumption is that there is no error in the sentence and an appellant must demonstrate that error occurred in that the learned sentencing magistrate acted on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the facts: *The Queen v Raggett, Douglas and Miller* (1990) 50 A Crim R 41. The appellant referred to the identified grounds of appeal for that purpose.

**Grounds 1 to 3**

[15] Counsel for the appellant argued the first three grounds of appeal together. In relation to those grounds it was submitted that the learned sentencing magistrate placed too much weight on the decision in *R v Bird* (supra). It was said that the principles to be found in that case had little or no application to the sentencing of the appellant in the present proceedings. Whilst, in contrast to the present matter, it may be the case that *Bird* involved offending where a substantial amount of money was stolen from an employer over a period of time and used to finance a gambling habit, the principles addressed by the court apply generally. Those principles were

expressed by the court to apply to cases involving the misappropriation of monies by employees in breach of the trust reposed in them by their employers. This was just such a case. Although the learned sentencing magistrate did not refer to *Bird* by name he was correct in applying the principles to be found in that case in a manner suitably modified to allow for the different circumstances in the present case.

[16] The appellant further submitted that his Worship did not take into account all the relevant material and focused to an impermissible extent upon the breach of trust aspect of the case. A review of the sentencing remarks, brief though they were, makes it clear that his Worship did take into account such matters relevant to a determination of whether or not a conviction should be imposed as were placed before him. He referred to being impressed with the background of the appellant and with his community service. In so observing it is clear that his Worship had in mind the matters that had been placed before him by counsel for the appellant immediately before he proceeded to sentence. Insofar as information was placed before him relevant to the matters referred to in s 8 and s 6 of the Sentencing Act, those matters were taken into account.

[17] One submission made to his Worship was that this was "a case of someone who has made great contributions in various facets of his life, taking a shortcut not for his own benefit and he has technically infringed the criminal law". It would seem that this was a submission that the offence was of a trivial nature for the purposes of s 8(1)(b) of the Sentencing Act. In dealing

with that submission his Worship referred to the appellant making a decision which he was "not entitled to make" and which was "breaching a sense of trust" placed upon him as the local manager. His Worship referred to the appellant selling his own equipment to the company and retaining the money resulting from the sale. His Worship regarded the offending as at the lower end of the scale but did not consider the circumstances such that he could "let the matter go totally unrecorded". In my view his Worship did take into account the relevant material placed before him. Further, it was appropriate for his Worship to make reference to the breach of trust aspect of the case as being a significant matter in the context of the proceedings.

[18] A matter not referred to by his Worship was the fact that the offence involved a planned deception by the appellant. He took the cheque and paid the proceeds into his own account. He then undertook a series of transactions with those proceeds in purchasing the items to which I have referred. He adopted this approach in order to avoid the scrutiny of his employer. This was not a spur of the moment offence. Although short-lived, it was a planned deception.

[19] The complaints identified by the appellant in grounds 1 to 3 have not been made out.

**Ground 4 – delay**

[20] The offence in this case took place on 30 October 2001. The appellant was not spoken to by police until 31 March 2004 when he made admissions as to

having received the cheque in the sum of $2972.90 and having paid the proceeds into his own account. The delay in the matter coming to court was not explained to the learned sentencing magistrate. His Worship asked counsel to explain the delay. Counsel for the appellant said:

> "The prosecution might be able to explain that, there is no basis – although my client did leave the Northern Territory."

[21] When counsel for the prosecution addressed this issue she said:

> "All I can say is on the face of it the complaint was made, it was investigated and charges were laid and I can't assist you any more than that. It is that the offences did occur in 2001 and it is that the charges were not laid until 2004."

[22] His Worship responded by observing: "I don't suppose it either increases or decreases the criminality".

[23] The appellant complains that these observations reveal error on the part of his Worship in the sentencing process. It was submitted that the learned magistrate considered the issue of delay "either unimportant or irrelevant in sentencing". Reference was made to the decision in *R v Miceli* [1998] 4 VR 588 where it was said by Tadgell JA at 591:

> "Most particularly is the matter of delay between the commission of the offence and the imposition of a sentence to be taken into account when rehabilitation is a real prospect; and it is no less so when the person to be dealt with has been at large and has ordered his affairs during the period of the delay with a view to reorganising his life. That is what happened here.
>
> Prosecuting counsel before the judge made the point that here the delay had not been inordinate. There is, in my opinion, no

> requirement that a delay should be inordinate before it deserves to be taken into account in accordance with the principles adopted in the cases I have mentioned. The learned judge at page 63 of his sentencing remarks simply asseverated that there had not been any such delay as should bring about any diminution or lessening of an otherwise appropriate sentence. His Honour gave no explanation of that statement and attempted no investigation of the circumstances upon which the applicant had relied for the application of the relevant principles. That, in my opinion, reveals error."

[24] In *Mill v The Queen* (1988) 166 CLR 59 at 64 the High Court approved the observations of Street CJ in *Todd* [1982] 2 NSWLR 517 to the effect that:

> " … passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner."

[25] In the circumstances of this case there is no explanation of the delay. Whilst it must be acknowledged that investigations into white-collar crimes may be complex and lengthy, that has not been said to be the situation in this case. It is not clear when the offending was discovered and late discovery may explain the delay in the proceedings being commenced. It is not known whether the departure of the appellant from the Territory in any way contributed to the delay. There was no information placed before his Worship to permit any conclusion to be drawn as to the reason for the delay. The issue for determination in those circumstances is what impact the delay should have upon the sentence. There is no suggestion that the appellant used the period for the purposes of rehabilitation, nor that he spent the period between October 2001 and 31 March 2004 experiencing anxiety or

uncertainty as to his fate: *Todd* (supra). There is no evidence that the delay was due to deleteriousness or neglect requiring the court to express its disapproval by imposing a lower sentence: *Crawley v R* (1981) 36 ALR 241. The appellant was unable to identify any way in which the delay should have been taken into account by his Worship in order to lead to a different outcome.

[26] The ground of appeal is not made out.

**Conclusions**

[27] Whilst I might not have followed the path chosen by his Worship, that is not to the point. In this case no reason has been identified for regarding the sentencing discretion exercised by his Worship as having been improperly exercised. The appellant has failed to demonstrate that his Worship fell into error.

[28] The appeal is dismissed.

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