Latu v McPherson [2010] NTSC 14

PARTIES:	LONI LATU
	v
	CRAIG JOHN McPHERSON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	AP 9 of 2009 (20916100, 20829974)
DELIVERED:	23 April 2010
HEARING DATES:	8 April 2010
JUDGMENT OF:	MILDREN, SOUTHWOOD AND KELLY JJ
APPEAL FROM:	MARTIN CJ

CATCHWORDS:

Sentencing Act s 43, s 43(7)

Bukulaptji v The Queen (2009) NTCCA 7; Cranssen v The King [1936] HCA 42; (1936) 55 CLR 509; *Damaso* (2002) 130 A Crim R 206; *Hedgecock v The Queen* [2008] NTCCA 1; *Morse* (1979) 23 SASR 98

REPRESENTATION:

Counsel:

Appellant:	P Elliott
Respondent:	R Coates

Solicitors:

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

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

Latu v McPherson [2010] NTSC 14
No. AP 9 of 2009 (20916100, 20829974)

BETWEEN:

LONI LATU
Appellant

AND:

CRAIG JOHN McPHERSON
Respondent

CORAM: MILDREN, SOUTHWOOD & KELLY JJ

REASONS FOR JUDGMENT

(Delivered 23 April 2010)

Mildren J:

[1] I agree that the appeal should be dismissed for the reasons given by Kelly J.

Southwood J:

[2] I agree with the Reasons for Judgment of Kelly J.

Kelly J:

[3] On 3 November 2009 the appellant pleaded guilty in the Court of Summary Jurisdiction at Katherine to a charge of possessing a commercial quantity of kava, namely 270 kg, between 29 October 2008 and 1 November 2008. He was sentenced to nine months imprisonment suspended after he had served 7 days. The sentencing magistrate imposed an operative period of 18 months

from 1 November 2008 during which the appellant was to be of good behaviour if he was to avoid being dealt with under s 43 of the *Sentencing Act*. There were no other conditions of the suspended sentence.

[4] In breach of that suspended sentence, on 12 May 2009, just over six months into the 18 month operative period of his suspended sentence, the appellant committed another offence of possessing a commercial quantity of kava – this time 119 kg. On 10 July 2009, the appellant pleaded guilty to that offence and was sentenced in the Court of Summary Jurisdiction to a term of imprisonment for 5 months.

[5] At the same time, the appellant was dealt with for breach of his earlier suspended sentence, the breach being the commission of the offence on 12 May 2009. The learned sentencing magistrate ordered that the outstanding balance of the nine month sentence imposed for the offence committed in 2008 (a total of 8 months and 3 weeks) be restored and directed that the restored sentence and the sentence of 5 months imprisonment for the later offence be served concurrently. The practical effect of this order was that the appellant is not required to serve any additional period of imprisonment for the offence committed on 12 May 2009.

[6] The appellant appealed to the Supreme Court against the sentence of 5 months imprisonment for the offence committed on 12 May 2009 on the ground that it was manifestly excessive, and against the restoration of the

balance of the 9 month suspended sentence on the ground that full restoration of that sentence was unjust. That appeal was dismissed by Martin (BR) CJ on 10 December 2009.

[7] The appellant now appeals to this Court. For the reasons that follow, in my view the appeal should be dismissed.

[8] The facts of the offending on 12 May 2009, presented by the prosecution and agreed by the appellant, were as follows:

> "During the afternoon and evening of 12 May 2009, the [appellant] travelled to a destination south of Katherine with the co-offenders, Filiatu Fe 'Nua, Seminu Ha 'Villa and Levi Asile, where they retrieved a quantity of kava that had been hidden in bushland previously by persons other than the [appellant].
>
> About 1:55 am on Wednesday, 30 May 2009, the [appellant] and co-offenders returned and were travelling northbound on the Stuart Highway past the Katherine Council Chambers where they were stopped by police. Co-offender, Asile, who was driving, was subjected to a roadside breath test. Asile provided a negative result. After a brief conversation with the co-offenders it was revealed that there was a quantity of kava in the vehicle.
>
> A search of the vehicle revealed two large white feed bags in between the front and rear seats amongst the [appellant] and co-offenders containing kava. Several further large bags of kava were also located in the boot of the vehicle. The [appellant] and co-offenders were arrested and conveyed to the Katherine Police Station where they were lodged in cells until the rest of the investigations [could] take place. The kava was seized and weighed with a total approximate weight of 119 kilograms, 81 of which was divided into about 4000 individual 20 gram deal size bags.
>
> Later the same afternoon, the [appellant] participated in a record of interview during which he made admissions to travelling from Darwin knowing the intention was to pick up kava south of Katherine. The [appellant] further admitted to assisting the co-

> offender[s]. The [appellant] was later charged and refused bail to appear in court. The entire amount of kava seized was a commercial quantity as defined in the *Kava Management Act*. The [appellant] is not the holder of a kava licence to import, supply or possess kava."

[9] Counsel for the appellant gave an account of the appellant's personal circumstances and the circumstances of the offending which was not contested by the crown and was accepted by the sentencing magistrate. In relation to the circumstances of the offending, counsel told the court that the assistance which the appellant had admitted providing was to assist the co-offenders in loading the kava into the vehicle. He told the court that the appellant's trip to Darwin had nothing to do with kava. The appellant was in Darwin for the Arafura Games to meet with some Tongans who were competing in weight lifting. While in Darwin, he had met up with some Tongan boys and was invited by them to go for a trip down to Katherine. The appellant asked why they were going and was told they were going to get some kava, so he knew the purpose of the trip but his counsel said he had no idea of the amount they were getting, and that the appellant had no involvement in organising the operation, no involvement in financing it, and was to make no profit out of it. The explanation the appellant gave for becoming involved with the kava operation when he was on a suspended sentence for possessing a commercial quantity of kava was, "Well, I had nothing to do with it and it's rude for me not to go with them. They would've thought I didn't like them." His counsel told the court that the extent of the appellant's assistance was to load one bag of kava into the car.

[10] In relation to the appellant's personal circumstances, counsel for the appellant told the sentencing magistrate that the appellant was a married man with a very young child and pointed to the appellant's wife and young child in court. He informed the court that the appellant was the father of 10 children all of whom he had supported, and that he still supported those who required it. He tendered three references from apparently prominent members of the Tongan community in Sydney, where the appellant resides, which (as the sentencing magistrate accepted) spoke in glowing terms about the voluntary work done by the appellant in the community, his church work, and his admirable record as a parent.

[11] In sentencing, the learned magistrate accepted that the appellant's participation in the offending on 12 May 2009 "was limited to doing the polite thing and loading [the kava] into the vehicle" and that he would put the appellant's part in the possession of the kava in question "at a very low and minimally responsible level". However, he described the appellant's reason for not refusing to participate as "an abjectly inadequate excuse for getting yourself involved in this offending" particularly in light of the fact that he was on a suspended sentence for an offence of the same kind. In this the magistrate was self evidently correct – as pointed out by the Chief Justice in his reasons for decision on the appeal.

[12] In relation to the breach of suspended sentence, the sentencing magistrate determined that there was "no reason in justice" why he could do anything

but re-impose the suspended sentence given the commission of an identical offence within a short period of time.

Ground 3: that the learned magistrate placed insufficient weight on the appellant's guilty plea and the personal circumstances of the appellant

[13] This ground of appeal must fail. There is no reason at all to suppose that the learned magistrate did not place appropriate weight on the appellant's personal circumstances and plea of guilty. In the course of his reasons the learned magistrate referred to the appellant's circumstances and the references tendered on his behalf. He said:

> "I say all this, Mr Latu, because notwithstanding the extremely favourable stuff that's contained in these three references from apparently prominent citizens of the Tongan community in Sydney who speak in glowing terms about the voluntary work you've done in many ways over many years to assist other persons of Tongan origin to integrate into and settle happily in Australia and to assist them along the way and also your church work. And they also speak of your admirable record as a parent.
>
> Mr Latu, it seems to me there is just now [sic] reason of justice whatsoever why I could just do anything but re-impose the suspended sentence for that offence of last year given the proximity in time, the almost identical – well, the identical charge. And even though your part in the new offence is a relatively minor one, for a second offender in such a short time it's hard to see how anything but a sentence of imprisonment would be adequate to that as well."

[14] The magistrate also referred to the appellant's guilty plea in the introduction to his sentencing remarks. As the Chief Justice said in his reasons for decision on the appeal from the magistrate: "Although appellate courts have

encouraged the identification of a specific allowance in respect of a plea of guilty, a failure to do so is not an error of principle."

Ground 5: that the learned magistrate erred in either not considering or not placing sufficient weight on the sentence imposed on the co-offender Fanua

[15] The appellant committed the offence of 12 May 2009 to which he pleaded guilty in company with three co-offenders, each of whom was also charged with another offence or offences, some committed on another date. The appellant was sentenced to 5 months imprisonment. No part of that sentence was suspended, but it was made concurrent with the restored sentence for the 2008 offence, the practical upshot of which is that he is not required to serve any actual time in prison in respect of the 12 May offence over and above the time he is required to serve on the restored sentence.

[16] The sentences received by the co-offenders for the offending on 12 May 2009 were:

(a) Fanua 8 months imprisonment suspended after 7 weeks, with an operative period of 18 months

(b) Asaeli 6 months imprisonment suspended forthwith with an operational period of 3 years

(c) Kaufusi 12 months imprisonment with a non-parole period of 9 months

[17] Fanua and Asaeli had no prior criminal history. Kaufusi was not a first offender but had no relevant prior convictions – ie convictions of a like

kind. By contrast, the appellant not only had a recent prior conviction on an identical charge; the offending for which he was sentenced was a breach of a suspended sentence for that very charge.

[18] When all of the circumstances are considered, it is clear that the appellant received a significantly lighter sentence than any of his co-offenders and has no legitimate basis for any sense of grievance.

[19] In relation to ground 5, the appellant has submitted that a legitimate sense of grievance arises because Fanua received a total sentence that involved serving 7 weeks imprisonment, while the appellant received a sentence that involved serving 8 months and 3 weeks imprisonment though his role in the offending was accepted as minimal. This submission is based on a false premise, namely that the sentence of 8 months and 3 weeks was imposed in relation to the offending of 12 May 2009. That, of course, is not the case.

[20] As the Chief Justice correctly pointed out in his reasons for decision on the appeal from the magistrate:

> "… This submission is to misunderstand the sentencing scheme. The appellant was not being sentenced to nine months imprisonment for his role in May 2009. The sentence of nine months imprisonment was the appropriate sentence for the original offending in November 2008 and suspension of service of that sentence was intended to provide an inducement to reform. Having been given that opportunity, the appellant failed to reform with the consequence that he became liable to serve the sentence which the sentencing court regarded as the appropriate sentence for the offending. The fixing of that original sentence had nothing to do with the subsequent offending in May 2009."

[21] This ground of appeal must fail.

Ground 1: that the sentence of 5 months imprisonment for the offence committed on 12 May 2009 is manifestly excessive [Ground 4: "that the objective circumstances of the offending do not warrant a term of imprisonment" was not argued separately, but was subsumed within Ground 1.]

[22] In order to make out this ground, the appellant must show that the sentence was clearly and obviously and not just arguably excessive[1] in light of the maximum sentence prescribed by law for the crime, standards of sentencing, the relative seriousness of the criminal conduct on the scale of seriousness of crimes of that type, and the personal circumstances of the offender.[2]

[23] As the Chief Justice pointed out in his reasons for decision on the appeal from the magistrate, although the magistrate accepted that the appellant played a minimal role in the offence, he did so six months into a suspended sentence for a serious offence involving kava imposed by the court in the very town to which he had been invited to travel, knowing the purpose of the trip was to obtain kava. Given the 600 km round trip and his own experience with kava, the appellant must have realised that it was highly likely that a large quantity of kava was involved.

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1 *Cranssen v The King* [1936] HCA 42; (1936) 55 CLR 509 at 520

2 See *Hedgecock v The Queen* [2008] NTCCA 1 per Angel J at paragraph [9] citing *Morse* (1979) 23 SASR 98 at 99 per King CJ, White and Mohr JJ concurring; also *Damaso* (2002) 130 A Crim R 206, a decision of this court

[24] I do not consider in the circumstances that the sentence of 5 months imprisonment was manifestly excessive. It was within the range of sentencing discretion. It was also open to the magistrate to decline to suspend any part of the sentence, particularly in view of the fact that the offence was committed in breach of an existing suspended sentence. It must also be kept in mind that the magistrate made the 5 month sentence wholly concurrent with the restored sentence for the 2008 offending.

Ground 2: that the order to restore the whole of the suspended sentence is unjust

[25] S 43(7) of the *Sentencing Act* directs a court to restore a suspended sentence in the circumstances of this case "*unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence*".

[26] In *Bukulaptji v The Queen* (2009) NTCCA 7[3], 5 June 2009, the NT CCA considered the relevant principles involving the discretion to be exercised under s 43(7). The Court identified some of the factors for consideration to include:

(a) the nature and terms of the order suspending the sentence;

[3] (2009) NTCCA 7

(b) the nature and gravity of the breach and, particularly, whether the breach may be regarded as trivial;

(c) whether the breach evinces an intention to disregard the obligation to be of good behaviour or to abandon any intention to be of good behaviour;

(d) whether the breach demonstrates a continuing attitude of disobedience of the law;

(e) whether the breach amounted to the commission of another offence of the same nature as that which gave rise to the suspended sentence;

(f) the length of time during which the offender observed the conditions;

(g) the circumstances surrounding or leading to the breach;

(h) whether there is a gross disparity between the conduct constituting the breach and the sentence to be restored;

[27] The appellant submitted that the learned Magistrate placed excessive weight on the fact that the applicant had re-offended in relation to kava, and insufficient weight, in particular, on considerations (b) (c) (d) (g) and (h) above.

[28] I do not agree. Looking at each of the factors in turn:

(a) The sentence was for a term of imprisonment for 9 months, suspended after only 7 days. There were no conditions other than

to be of good behaviour for 18 months. The appellant was being given a chance.

(b) The breach cannot be regarded as trivial. It was not a matter of a relatively trivial breach of condition such as failure to report. The breach consisted of commission of a serious criminal offence of the same kind as the one for which the suspended sentence was imposed.

(c) The breach clearly demonstrated a continuing attitude of

& (d) disobedience to the law which *ipso facto* amounted to a disregard of the obligation to be of good behaviour.

(e) The breach amounted to the commission of another offence of the same kind as that which gave rise to the suspended sentence, even involving the same town – which was not the appellant's home town.

(f) The offence was committed only six months into the 18 month operative period.

(g) There were no mitigating circumstances surrounding the commission of the offence which would make it unjust to restore the sentence. As the sentencing magistrate found, the appellant's expressed reason for joining in the offence was "abjectly inadequate".

(h) I agree with the opinion expressed by the Chief Justice on the appeal from the magistrate that there was no gross disparity between the conduct constituting the breach and the sentence to be restored.

[29] Also in relation to this ground, the appellant quoted the following paragraphs from the reasons of the Chief Justice.

> *"Counsel submitted that there is a "gross disparity" between the conduct involved in breaching the suspended sentence and the sentence to be restored. At times, this submission verged on a proposition that the appellant was being required to serve almost nine months imprisonment for the minimal role he played in lifting one bag of kava into a car. This submission is to misunderstand the sentencing scheme. The appellant was not being sentenced to nine months imprisonment for his role in May 2009. The sentence of nine months imprisonment was the appropriate sentence for the original offending in November 2008 and suspension of service of that sentence was intended to provide an inducement to reform. Having been given that opportunity, the appellant failed to reform with the consequence that he became liable to serve the sentence which the sentencing court regarded as the appropriate sentence for the offending. The fixing of that original sentence had nothing to do with the subsequent offending in May 2009.*
>
> *In my opinion, there is no gross disparity between the conduct that amounted to the breach and the sentence of nine months to be restored. The circumstances under consideration are well removed from the circumstances in Bukulaptji where a breach of a condition of suspension would have resulted in service of two years and nine months imprisonment*[4]*."Bukulaptji* (2009) NTCCA 7

[30] The appellant submitted that the Chief Justice erred in those paragraphs and argued:

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[4] (Paras. 23-24)

> "The restoration of the suspended sentence could only be effected by virtue of the appellant's offending in May 2009. That offending, and the circumstances in which it was found to have occurred, was a critical and relevant consideration as to whether the full amount of the suspended sentence should be restored, and the touchstone as to whether there was a gross disparity between the conduct constituting the breach and the sentence to be restored."

[31] That is true as far as it goes, but it in no way contradicts anything said by the Chief Justice in the quoted paragraphs. While the offending in May 2009 was a relevant and very important consideration for the learned magistrate to take into account when determining whether it would be unjust to restore the suspended sentence, it is clear (as a matter of temporal logic alone) that "the fixing of that original sentence had nothing to do with the subsequent offending in May 2009". That sentence was the appropriate sentence for the offending in 2008 to which it related. In dealing with the appellant for breach of his suspended sentence by the present offending, the learned magistrate was limited to determining whether, in all of the circumstances, it was unjust to restore the sentence (or part thereof, and how much).

[32] It is also correct to say that the offending of May 2009 and the circumstances in which it was found to have occurred was "the touchstone as to whether there was a gross disparity between the conduct constituting the breach and the sentence to be restored". The Chief Justice was aware of that, and undoubtedly correct when he held that in this case there was no gross disparity between the conduct that amounted to the breach and the sentence of 9 months to be restored. The conduct constituting the breach

was the commission of an offence of the same nature in the same geographical area a mere 6 months into the suspended sentence.

[33] It was argued on behalf of the appellant that the learned sentencing magistrate accepted that, when the trip began, the appellant did not know how much kava was going to be involved and that this produced a gross disparity between his conduct and the restoration of the whole of the sentence. It was put, essentially, that he was sentenced to 8 months 3 weeks imprisonment for nothing more than lifting one bag into a car.

[34] However, as Mr Coates for the respondent pointed out, a submission that the appellant did not know how much kava would be involved is not the same as a submission that he did not know there was to be a commercial quantity – let alone that he believed there would not be a commercial quantity. The appellant became involved in a trip to collect kava, in circumstances where he must have been aware that, at the very least, there was a real risk that a serious criminal offence was to be committed and he did not enquire about the quantity of kava involved. Moreover, when they arrived at the scene and it became apparent that a serious criminal offence was in fact being committed, he participated, knowing it to be in breach of his suspended sentence. No matter how peripheral the involvement by the appellant, his excuse for becoming involved was (as found by the magistrate) abjectly inadequate. It was, moreover, conduct which independently warranted a sentence of 5 months imprisonment which the magistrate ordered to be served wholly concurrently with the restored sentence.

[35] This ground of appeal too must fail.

[36] There was no complaint made about the adequacy of the learned magistrate's reasons in connection with this ground of appeal, and s 43(7) of the *Sentencing Act* only requires reasons to be given where the court forms the opinion that it would be unjust to restore the balance of the suspended sentence upon a breach being admitted or proven. There is no legislative requirement to give reasons for restoring the whole (or part) of a suspended sentence. Nevertheless, a decision to restore a suspended sentence is an exercise of a judicial discretion and this Court is of the view that a court exercising that discretion ought to give sufficient reasons to enable the parties, and any appellate court, to be satisfied that the discretion has been exercised judicially, taking into account the relevant considerations and no others.