Gaston v Sweet [2013] NTSC 84

PARTIES:	GASTON, Heather Anne
	v
	SWEET, Renee
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 12 of 2013 (21320587)
DELIVERED:	13 December 2013
HEARING DATES:	29 November 2013, 10 December 2013
JUDGMENT OF:	OLSSON AJ
APPEALED FROM:	D TRIGG SM

CATCHWORDS:

CRIMINAL LAW – Appeal – Appeal against sentence – Facts not before the Court.

APPEAL – Appeal against sentence – Facts not before the Court.

Criminal Code Act 1995 (Cth) s 135.2(1)

Laxton v Justice (1985) 38 SASR 376, applied.

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	J Johnston

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Commonwealth Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Ols1303
Number of Pages:	8

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Gaston v Sweet [2013] NTSC 84
JA 12 of 2013 (21320587)

BETWEEN:

HEATHER ANNE GASTON
Appellant

AND:

RENEE SWEET
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 13 December 2013)

[1] This is an appeal against a sentence imposed on the appellant in the Court of Summary Jurisdiction at Alice Springs.

[2] On 3 October 2013, the present appellant appeared before a stipendiary magistrate. She pleaded guilty to a charge on complaint that, between about 18 April 2011 and 30 April 2012 at Alice Springs, she engaged in conduct by intentionally providing information that she knew to be false to the Commonwealth in relation to her New Start Allowance, namely, information about her employment and income, and, as a result of that conduct, she obtained a financial advantage, namely payments of New Start Allowance for herself from the Commonwealth, knowing or believing that she was not

eligible to receive that financial advantage, in contravention of s 135.2(1) of the *Criminal Code Act*.

[3] The facts placed before the learned magistrate on 3 October 2013 were to the following effect:

(1) The appellant is a single woman aged twenty-eight. She has no prior record of convictions;

(2) She had, intermittently, been in receipt of Social Security benefits such as Youth Allowance, New Start Allowance and Sickness Allowance over a period extending from 13 November 2001 to 30 April 2012;

(3) Over a period of about thirteen months from 30 March 2011 to 30 April 2012 she had applied for and was in receipt of fortnightly payments of New Start Allowance. During that period she was required to report her income to Centrelink each fortnight by completing and lodging the appropriate form either physically or online;

(4) During the thirteen month period in issue, the appellant only declared earnings totalling $420, whereas she had been employed full-time for the whole period and in fact earned $33,677.32 gross;

(5) As a consequence, the appellant received a total of twenty-seven payments (totalling $13, 585.99), to which she was not entitled. That situation was detected as a result of data matching between Centrelink and the Australian Taxation Office;

(6) Throughout the thirteen month period the appellant had no dependents to look after, nor any family members to care for;

(7) The learned magistrate commented that she had no special or unusual circumstances in her case – the money was used partly for herself and her own purposes, although she did expend a significant portion of it for the benefit of family members and to help another person who was in difficulty. There was, however, no suggestion of any gambling or drug addiction. The learned magistrate concluded that it was not a case of need, but of greed; and

(8) He was informed by counsel for the appellant that she had been living in the Stuart Caravan Park for a number of years.

[4] Having heard submissions from counsel, the learned magistrate sentenced the appellant to imprisonment for four months, but directed that she be released on a recognisance release order after actually serving fourteen days.

[5] The notice of appeal to this Court is based upon two grounds, namely:

(1) That the learned magistrate sentenced on an erroneous factual basis, causing the sentencing discretion to miscarry; and

(2) That the learned magistrate erred in requiring the appellant to serve part of the term of imprisonment imposed.

[6] In essence the appellant now complains that the learned magistrate ought to have made an order for home detention, rather than requiring her to actually serve any portion of a custodial sentence.

[7] In the course of hearing an application for bail pending the hearing of this appeal, the learned magistrate indicated that he had not considered the possibility of home detention, because he had been told that the appellant was living in a caravan park and had been doing so for some years.

[8] He commented that, he was then being told for the first time at the bail hearing, that she was now living at 10 Underdown Street, Gillen with her sister. Had he been aware of that fact at the time of sentencing, he would have considered home detention as an option available to him.

[9] Counsel for the appellant conceded that he had not given the up-to-date residential information to the learned magistrate because he did not appreciate that home detention was an option available under the *Crimes Act*.

[10] It seems to me that, in the circumstances, no criticism can possibly be levelled at the learned magistrate. Had the appellant still been living in the caravan park, home detention would not have been a practical option – as the learned magistrate fairly appreciated. It simply would not have met the obvious requirements and intendment of the *Sentencing Act*.

[11] It now also emerges that the appellant had been the victim of sexual assault some years ago and was a deeply troubled person, suffering from depression. She also has other health issues for which she receives medical treatment. Those situations were also not known to her counsel, or made known to the learned magistrate.

[12] It is common ground that, because the sentencing process before the learned magistrate was based on an erroneous and incomplete understanding of the facts, the appeal should be allowed and the appellant re-sentenced.

[13] I have before me a series of character references relating to the appellant. These testify to her general good character and supportive nature, that she is held in high regard by her employer, and that she is a dedicated volunteer with the Alice Springs Volunteer Bush Fire Brigade.

[14] It is not disputed that, at all material times, the appellant was living in modest circumstances and had not engaged in extravagant self-indulgence.

[15] It is common ground that, for the reasons expressed by me in *Laxton v Justice*[1] and also in other relevant authorities, a case such as this almost inevitably attracts a custodial head sentence.

[16] The present parties do not dispute the appropriateness of the head sentence that was actually arrived at by the learned magistrate. Indeed, in my view, it

[1] (1985) 38 SASR 376.

was a merciful sentence and I am content to adopt it as proper for present purposes.

[17] The main issue is as to whether, given all of the facts now known to the court, the appellant ought to be required to actually serve some portion of the sentence and, if so, in what manner.

[18] Mr Goldflam submits that it would be open to me to suspend the whole of the sentence on a recognisance release order, given that the appellant, a person with no antecedent record, has already heard the slam of the prison door behind her and had the unpleasant and salutary experience of serving two days in custody prior to being granted bail.

[19] This is particularly so having regard to the depression suffered by her and the facts that she is gainfully employed and is a good candidate for full rehabilitation. It is most unlikely that she will ever reoffend.

[20] Whilst those contentions have force, the problem that exists in cases such as this is the imperative requirement to give due recognition to the factor of general deterrence.

[21] This was offending conduct that extended over a lengthy period of time and involved a substantial amount of public money. Moreover, the appellant well knew, from her earlier dealings with Centrelink, that she was under an obligation to disclose to it any earnings received by her.

[22] I have had the benefit of a report from Community Corrections, pursuant to s 45 of the *Sentencing Act*. It is apparent from the report that the present residence at which the appellant is residing is satisfactory. She has consented to the making of a home detention order.

[23] In the circumstances, I allow the present appeal and set aside the sentence appealed against.

[24] I substitute for that sentence a sentence of imprisonment for a period of four months, as to which the appellant is deemed to have already served two days. That sentence will be suspended on her entering into a home detention order for that period, conditions of which are that:

(1) She is to reside at unit 5/56 Bradshaw Drive Alice Springs for the duration of the order and not leave it except at the times and for the periods permitted by the Director of Correctional Services or a surveillance officer or for the purposes of a medical or dental emergency;

(2) If required by the Director, she is to wear or have attached an approved monitoring device in accordance with the directions of the Director and allow the placing, or installation in, and retrieval from, the premises specified in this order of such machine, equipment or device necessary for the efficient operation of the monitoring device;

(3) Upon discharge from court, she is to report immediately to the Community Corrections Courts Officer; and

(4) During the continuance of the order she is to obey the reasonable directions of the Director or a surveillance officer.

[25] I order that the reparation order made by the learned magistrate remain in full force and effect.

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