*Wayne v Cornford* [2013] NTSC 01

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| PARTIES: | WAYNE, Malcolm<br><br>v<br><br>CORNFORD, Michael |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | 16 of 2012 (21113574) and<br>17 of 2012 (21241237) |
| DELIVERED: | 9 JANUARY 2013 |
| HEARING DATES: | 7 JANUARY 2013 |
| JUDGMENT OF: | KELLY J |
| APPEAL FROM: | J NEILL SM |

**CATCHWORDS:**

JUSTICES APPEAL – CRIMINAL LAW – Appeal against sentence – denial of procedural fairness – submissions that appellant had capacity to pay a fine rejected by the sentencing magistrate – failure to provide an opportunity to the appellant to call evidence in relation to the appellant's capacity to pay fines – a real possibility that the assumption made by the learned magistrate contributed to the conclusion not to impose a fine – appeal allowed

*Justices Act* s 177(2)
*Sentencing Act*

*Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Development Consent Authority v Phelps* [2010] NTCA 3; *R v Tait* (1979) 24 ALR 473; *Van Toorenburg v Westphal* [2011] NTSC 31; followed

*Shannon v Cassidy* [2012] NTSC 27; referred to

**REPRESENTATION:**

*Counsel:*

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| Appellant: | T Collins |
| Respondent: | N Kumar |

*Solicitors:*

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| Appellant: | Central Australian Aboriginal Legal Aid Service |
| Respondent: | Office of Director of Public Prosecutions |

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| Judgment category classification: | B |
| Judgment ID Number: | KEL 13001 |
| Number of pages: | 13 |

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

*Wayne v Cornford* [2013] NTSC 01
No. 16 of 2012 (21113574) and
No. 17 of 2012 (21241237)

BETWEEN:

**MALCOLM WAYNE**
Appellant

AND:

**MICHAEL CORNFORD**
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 9 January 2013)

[1] On 5 November 2012 the appellant Malcolm Wayne pleaded guilty to a number of offences:

1. driving with a high range blood alcohol content (0.182);

2. driving a vehicle that did not have a current compensation contribution;

3. driving an unregistered vehicle;

4. driving without holding a licence;

5. driving a vehicle contrary to the terms of a defect notice; and

6. breach of his bail.

[2] On counts 1, 4 and 5 (namely driving with a high range blood alcohol content, driving unlicensed, and driving a vehicle contrary to the terms of a defect notice) Mr Wayne was sentenced to a term of five weeks imprisonment. In addition, on count 1 he was disqualified from holding a driver's licence for 18 months. On counts 2 and 3 (driving an unregistered vehicle which did not have a current compensation contribution) he was fined $1,500.00. On the charge of breaching his bail, Mr Wayne was sentenced to a term of imprisonment for seven days cumulative upon the five week sentence for the other offences.

[3] Mr Wayne has appealed against his sentence on a number of grounds.

[4] First he appeals on the grounds that the sentence of five weeks and the sentence of seven days were both manifestly excessive.

[5] Secondly it is contended that the learned magistrate erred in not considering dispositions other than immediate imprisonment in relation to both the traffic offences and the breach of bail.

[6] Thirdly, the appellant contends that the learned magistrate erred in not affording his counsel the opportunity to call evidence in relation to his capacity to pay a fine before determining that a sentence of imprisonment should be imposed.

**Alleged failure to consider dispositions other than immediate imprisonment**

[7] This ground of appeal must be dismissed. So much was conceded by counsel for the appellant on the hearing of the appeal. The learned magistrate clearly did consider other sentencing dispositions. In sentencing Mr Wayne his Honour said, "Notwithstanding that there are other sentencing options available to me, I have determined in this case that the most effective and the most appropriate is a sentence of actual imprisonment".[1]

**Sentencing allegedly manifestly excessive**

**(a) The breach of bail**

[8] The principles governing appeals against sentence are well known. A court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge or magistrate was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence.[2] The sentence is presumed to be correct.[3]

[9] In written submissions, counsel for the appellant referred to the recent decision of Riley CJ in *Shannon v Cassidy*.[4] In dismissing an appeal against a sentence of seven days imprisonment for breach of bail Riley CJ said:

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1 Transcript of sentencing remarks, Monday 5 November 2012 p 3.

2 *R v Tait* (1979) 24 ALR 473 at 476.

3 *Van Toorenburg v Westphal* [2011] NTSC 31 at [3].

4 [2012] NTSC 27.

> "[29] In sentencing for this offence the magistrate determined that it was not a trivial matter. His Honour noted that the consumption of alcohol was a contributing factor to the criminal history of the appellant. The breach of the term of the grant of bail requiring the appellant to abstain from consumption of alcohol was significant in that the appellant was found in a public street with a blood alcohol reading of 0.124%. His Honour concluded that the consumption of alcohol went "to the heart of the whole bail process" in relation to the appellant. It reflected an intention on the part of the appellant to disregard his conditions of bail. It was also noted that the appellant had prior convictions for breach of bail. In my opinion it cannot be said that the sentence of imprisonment for seven days was manifestly excessive in all the circumstances of the offending and of the offender. I dismiss this ground of appeal."

[10] Counsel for the appellant contended that the current case could be distinguished from *Shannon v Cassidy* on the basis that Mr Wayne has no prior convictions for breaching bail and that "the breach arose from the client's non-attendance at court as opposed to an intrinsic condition pertaining to his substantive alleged criminal offending". In support of this submission she sought to rely also on research undertaken by an officer of the Central Australian Aboriginal Legal Aid Service Inc into breach of bail sentences and sentencing ranges throughout Australia.

[11] In my view Mr Wayne's case can be distinguished from *Shannon v Cassidy* in that it is more not less serious. The whole purpose of bail is to ensure the attendance of the bailed individual before the court at the nominated time. If anything goes "to the heart of the whole bail process" it is non-appearance in answer to that bail.

[12] This is illustrated by the research referred to by the appellant and summarised in the appellant's written submissions. I am not convinced that a consideration of sentences handed down for breach of bail in other jurisdictions with different legislative provisions is necessarily particularly helpful. Nevertheless, the table of such sentences set out in the appellant's submissions illustrates that in other jurisdictions breach of bail by failure to appear generally attracts a far higher sentence than breach of a condition of bail such as a condition to refrain from drinking alcohol. The table included a few cases which attracted only a fine or in which no penalty was imposed, but in each case referred to in which a sentence of imprisonment was imposed for failure to appear, the sentence was greater than the 7 days imposed by the magistrate in this case. The most common sentences for failure to answer bail were in the 3 to 6 month range; the lowest was 16 days. By contrast, the cases cited by the appellant in the table show that failure to comply with the condition of bail has attracted lower penalties than failure to answer bail, namely sentences in the range of 7 to 14 days.[5]

[13] Ms Collins for the appellant contended that in the published interstate judgments a penalty of immediate imprisonment for breach of bail was generally only imposed if the accused had a history of prior convictions for breach of bail (or perhaps disobedience to other court orders), or a history of very serious offending, or there was something else, particular to the circumstances of the breach, which warranted a more serious penalty. She

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5 Three were demonstratively higher; one was ten months for 17 breaches of bail dealt with together and two were 12 months to be served concurrently with the substantive sentence.

placed particular emphasis on the importance of a history of prior convictions for breach of bail as a factor in whether a sentence of immediate imprisonment would be imposed by courts in other jurisdictions.

[14] However, the table of cases set out in the written submissions does not support this contention. In the table of interstate cases of sentences for breach of bail by failure to answer bail, there were 14 cases in which the penalty imposed was a sentence of imprisonment (one of 9 months (suspended), four of 6 months, two of 4 months, three of 3 months, one of 2 months, two of 1 month and one of 16 days) and only 7 in which there was an alternative disposition. Of the 14 cases in which imprisonment was imposed, 8 of the defendants had one or more prior convictions for breach of bail, 2 had no prior convictions for breach of bail (those sentences being for 2 months and 1 month) and in the remaining 4 cases it was not stated whether or not there had been any such prior convictions. The 7 cases in which a sentence of imprisonment was not imposed were not markedly different: 2 of the defendants had no prior convictions for breach of bail, 2 did have prior convictions for breach of bail and in 3 cases it was not stated whether or not there had been prior convictions for breach of bail. (The table contained no information about the other matters which the appellant contended were determinative of whether a sentence of imprisonment would be imposed.)

[15] Counsel for the appellant attempted to distil from the interstate cases a set of principles for sentencing in breach of bail cases which included reference

to the circumstances of the offending, the offender's history and personal circumstances, the offender's understanding of the bail condition, and whether the offender had displayed an obvious disregard of the bail process, which, it was contended, would generally warrant a more severe penalty. I do not think it is particularly helpful to try to formulate separate principles for breach of bail matters. The same principles apply in sentencing for this offence as for any other, including, of course, the guidelines and factors set out in the *Sentencing Act*.

[16] In relation to the sentencing of Mr Wayne, Ms Collins pointed out, correctly, that Mr Wayne had no prior convictions for breach of bail. However, although he was only charged with one count of breaching his bail, Mr Wayne in fact failed to appear in answer to his bail on these traffic offences twice, as a result of which he was at large for one and a half years before being dealt with for these offences. It seems to me that in this Mr Wayne displayed an obvious disregard for the bail process. In the circumstances I do not consider the sentence of 7 days imprisonment cumulative upon the 5 weeks for the traffic offences to be manifestly excessive. This ground of appeal must fail.

**(b) The traffic offences**

[17] Similarly, in my view the sentence of 5 weeks imprisonment for the traffic offences, cumulative upon the 7 days for breach of bail was not manifestly excessive. As the learned magistrate pointed out, Mr Wayne had been convicted on five previous occasions for similar offences. All five included

convictions for driving unlicensed as Mr Wayne has never held a driver's licence. Three of them were for driving uninsured and unregistered vehicles. One was for driving an unsafe motor vehicle and on the last three occasions he was also convicted of drink driving. In these circumstances it seems to me that the learned magistrate's view that Mr Wayne's behaviour falls into a serious category was inescapable. He has shown a continuing disregard for the law over a significant period and his offending has escalated from simply driving unlicensed to driving with a mid range blood alcohol content, to driving with a high range blood alcohol content. This same attitude of disregard for the law is reflected in his twice failing to answer bail on these latest offences.

[18] The appellant contends that the magistrate appears to have disregarded the significant gap in the appellant's offending. I do not think that this can be said to be the case. In his sentencing remarks, the learned magistrate set out clearly the dates of each offence committed, the first being in July 1997, the second being on 28 August 2002 which his Honour noted was five years after the first offence, the third on 3 December 2003, the fourth on 28 November 2006 and the fifth on 9 January 2007.

**Failure to afford the appellant the opportunity to call evidence in relation to the appellant's capacity to pay fines**

[19] In his sentencing remarks, the learned magistrate said:

> "It's all very well to say you have the capacity to pay fines but I'm not very convinced of that because with the second or subsequent

> conviction for driving uninsured I have to impose a minimum financial penalty of ten penalty units.
>
> ... It's just ridiculous I'd end up imposing a total of fines on you in excess of $2000 and you'd have no real prospects of doing anything useful about it. ..."

[20] The appellant contends that in this portion of his sentencing remarks the learned magistrate erred by rejecting the contention of counsel for the appellant that the appellant had the capacity to pay fines without affording the appellant the opportunity of calling evidence to that effect.

[21] It seems to me that the learned magistrate did err in this respect. As appears from the sentencing remarks, Mr Wayne's counsel had submitted from the bar table that Mr Wayne had the capacity to pay a fine: his Honour ought not to have rejected that contention without giving notice to defence counsel that he intended to do so, and affording the appellant the opportunity to adduce evidence in support of the disputed contention. It was a denial of procedural fairness to simply assume that the appellant did not have the financial capacity to pay the minimum financial penalty (or other financial penalty his Honour may have been considering imposing) without affording the appellant the opportunity to give evidence in relation to that matter once counsel had submitted that the appellant did have the capacity to pay.

[22] The question then is whether this appeal should be allowed because of the failure to provide an opportunity to call evidence of financial capacity. A decision does not "involve" an error of law unless the error contributes to

the decision.[6] The question I need to ask is whether, examining the learned magistrate's sentencing remarks, there was a real possibility (but not mere or slight possibility) that the error could (but not necessarily would) have affected his Honour's decision.[7]

[23] The error was to assume that the appellant had no capacity without affording the appellant the opportunity to call evidence in relation to that matter. Had he been afforded that opportunity the appellant may or may not have taken advantage of it. Had he given evidence that evidence may or may not have established that he had the capacity to pay a fine in the amount that was likely to have been levied. It is not for this Court to make any assumptions about what the outcome of affording that opportunity to the appellant would have been, anymore than it was for the learned magistrate to do so. The question is whether there was a real possibility that that assumption contributed to the learned magistrate's conclusion that, notwithstanding that there were other sentencing options available, the most effective and the most appropriate option was a sentence of actual imprisonment.

[24] I cannot conclude from the sentencing remarks that that assumption did not contribute to the decision to reject the option of a fine. It seems to me that there is a real possibility that that assumption affected that decision, and counsel for the respondent, Mr Kumar, properly conceded as much. In particular the learned magistrate used the words "the <u>most effective</u> and the

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6 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 per Mason CJ at 353

7 *Development Consent Authority v Phelps* (2010) 27 NTLR 174; [2010] NTCA 3 at para [23]

most appropriate" option immediately after saying, "It's just ridiculous I'd end up imposing a total of fines on you in excess of $2000 and you'd have no real prospects of doing anything useful about it".

[25] In the circumstances the appeal must be allowed.

[26] Under the *Justices Act* s 177(2), this Court may quash the order appealed from or substitute any order which ought to have been made in the first instance,[8] remit the case for the further hearing before the Court of Summary Jurisdiction,[9] or notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage for justice has actually occurred.[10]

[27] Given the nature of the error and the findings in relation to the other grounds of appeal, it seems to me that the most appropriate course of action in this case would be to remit the matter to the learned magistrate for re-sentencing after affording the appellant the opportunity to call evidence in relation to his capacity to pay a fine and taking into account the evidence adduced (if any) in determining the most appropriate sentence.[11]

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8 Section 177(2)(c).

9 Section 177(2)(d).

10 Section 177(2)(f).

11 On the hearing of the appeal, counsel for the appellant stated that, if the defendant had been afforded the opportunity of adducing evidence in relation to his capacity to pay a fine, the defendant would have been called to give such evidence (or an adjournment would have been sought for that purpose). Had she indicated that the defendant would not have adduced evidence if given the

[28] A question arose as to whether the sentences for both the traffic matters and the breach of bail should be remitted to the learned magistrate, or only the sentence for the traffic matters. My initial view was that it was only the traffic matters that should be remitted. However, counsel for the appellant contended that, given that his Honour had already made the assumption that the defendant had no capacity to pay a fine when he turned to sentence the appellant for breach of bail, there was a real possibility that that assumption contributed to his Honour's decision to impose a sentence of imprisonment for the breach of bail. Given the tenor of his Honour's remarks in sentencing the appellant for the breach of bail, I suspect that this assumption did not contribute to that decision. However, given that both counsel were agreed that there was "a real possibility" that it did, I consider it appropriate to remit both matters to the learned magistrate for re-sentencing.

ORDERS:

1. The appeal is allowed.

2. The sentence imposed by the learned magistrate is set aside.

3. Both matters [ie file nos 16 of 2012 (21113574) & 17 of 2012 (21241237)] are remitted to the learned magistrate for re-sentencing after affording the defendant the opportunity to adduce evidence in relation to his capacity to

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opportunity, I would have considered the most appropriate disposition of the appeal would have been to dismiss the appeal on the ground that there had been no substantial miscarriage of justice.

pay a fine or fines and taking into account any such evidence that may be adduced.