The Queen v Brancourt [2013] NTSC 56

PARTIES:	The Queen
	v
	Brancourt, Scott
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21249123
DELIVERED:	3 SEPTEMBER 2013
HEARING DATES:	22 AUGUST 2013
JUDGMENT OF:	KELLY J

CATCHWORDS:

CRIMINAL LAW—Sentencing—Mandatory sentencing provision repealed—Whether able to be sentenced under repealed provision— Whether defendant subject to a "liability" under repealed provision—Whether liability to a punishment incurred before repeal—Held that liability incurred at time offence committed —Held that liable for sentence under previous provision.
STATUTORY INTERPRETATION—Transitional provisions—Sentencing—Whether *Interpretation Act* preserved penalties under repealed sections—Held that liability to punishment occurs at time offence committed—Held that penalties under repealed section apply to defendant.

Criminal Code (NT) s 14
Interpretation Act (NT) s 12(c), s 12(d)
Sentencing Act (NT) s 78BA

Commissioner of Taxation v Price [2006] 2 Qd R 319; *R v White* [2006] NTSC 95, applied.

REPRESENTATION:

Counsel:

Plaintiff:	D Dalrymple
Defendant:	P Maley

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Maley & Burrows Barristers & Solicitors

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

The Queen v Brancourt [2013] NTSC 56
No. 21249123

BETWEEN:

THE QUEEN
Plaintiff

AND:

SCOTT BRANCOURT
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 3 September 2013)

[1] The defendant Scott Brancourt has pleaded guilty to a charge of aggravated assault against his wife, Bianca Brancourt, on 23 December 2012, contrary to s 188 of the *Criminal Code*.

[2] As at the date of commission of the offence the provisions of s 78BA of the *Sentencing Act* applied to a range of crimes of violence including the offence to which Mr Brancourt has pleaded guilty. It provided, in sub-section (2):

> (2) If a court finds an offender guilty of an offence to which this section applies, the court must record a conviction and must order that the offender serve:
>
> (a) a term of actual imprisonment; or

(b) a term of imprisonment that is partly, but not wholly, suspended.

[3] That provision of the *Sentencing Act* (indeed the whole of Part 3 Division 6A in which s 78BA was contained) was repealed by the *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* which introduced a new Part 3, Division 6A containing a complicated mandatory sentencing regime for certain violent offences, including the offence to which the defendant has pleaded guilty. The amending Act commenced on 1 May 2013: it also introduced into the *Sentencing Act* a new s 78EA which provides:

> This Division does not apply in relation to an offence committed before the commencement of s 6 of the *Amendment (Mandatory Minimum Sentences) Act 2013*. (ie 1 May 2013)

There are no other transitional provisions.

[4] As the offence to which the defendant has pleaded guilty was committed before 1 May 2013, the Crown argues that the old s 78BA applies. The Defence on the other hand contends that s 78EA creates a lacuna: s 78BA has been repealed and the new Division 6A is stated not to apply, therefore there are no mandatory sentencing provisions applicable to this offence.

[5] The Crown relies on s 12(c) and (d) of the *Interpretation Act* which provide:

> The repeal of an Act or part of an Act does not:
>
> …….

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under an Act or the part of the Act so repealed, or an investigation, legal proceeding or remedy in respect of that right, privilege, obligation or liability; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence against the Act or part of the Act so repealed, or an investigation, legal proceeding or remedy in respect of that penalty, forfeiture or punishment,

and the investigation, legal proceeding or remedy may be instituted, continued or enforced, and a penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been made.

[6] The Defence submits that neither s 12(c) nor s 12(d) has any operation in the circumstances and, instead, the principles in s 14 of the *Criminal Code* should be applied.

[7] The Defence contends that s 12(d) does not apply because, on its plain meaning, it applies only to "a penalty, forfeiture or punishment incurred in respect of an offence against the Act or part of the Act so repealed". The offence to which Mr Brancourt has pleaded guilty is not "an offence against the Act or part of the Act so repealed": it is an offence against s 188 of the *Criminal Code;* the Act which was (partly) repealed was the *Sentencing Act*. It seems to me that that is self evidently correct.

[8] The Defence contends that s 12(c) does not apply either because it is directed to civil proceedings, whereas s 12(d) is directed to criminal proceedings. The Defence contends that "imprisonment" is not a "right, privilege, obligation or liability" within the meaning of s 12(c) and that if

"liability" were to be construed as including a sentence of imprisonment, s 12(d) would have no work to do.

[9] The Defence contended further that, assuming a prison sentence could constitute a liability, that liability was not incurred under the Act or the part of the Act which has been repealed so as to attract the operation of s 12(c). The liability to punishment for committing the offence of aggravated assault is created by s 188 of the *Criminal Code*, not s 78BA of the *Sentencing Act*. That section simply operated to remove part of the judicial discretion in relation to the range of penalties the court may impose.

[10] Finally, it was submitted by the Defence that even if a sentence of imprisonment could be considered to be a "liability" within the meaning of s 12(c), no such liability (sentence) had been "incurred" as at 1 May 2013 because Mr Brancourt had not at that time been sentenced.

[11] These submissions, it seems to me, cannot succeed in light of the authorities, in particular the decision of the Queensland Court of Appeal in *Commissioner of Taxation v Price*[1] and the decision of this Court in *R v White*.[2]

[12] In *R v White* a young offender had been sentenced in the Supreme Court to a suspended sentence of imprisonment under the *Juvenile Justice Act*. That Act was repealed and replaced with the *Youth Justice Act* on 1 August 2006.

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1 [2006] 2 Qd R 316

2 [2006] NTSC 95

The *Youth Justice Act* contained a transitional provision which continued orders made by the Juvenile Court under the former Act and provided that those orders could be reviewed, varied and revoked under the new *Youth Justice Act* as if made under the new Act. There was no such transitional provision dealing with orders made by the Supreme Court. The defendant was brought before the court for breaching the suspended sentence.

[13] Mildren J applied s 12(c) of the *Interpretation Act* to hold that the breach could and should be dealt with under the provisions of the repealed *Juvenile Justice Act* as if that Act had not been repealed. In doing so he held that:

> (a) there is no doubt that the word "liability" is apt to embrace criminal responsibility as well as civil responsibility,[3] and
>
> (b) the making of an order, disobedience to which carried a penalty, was sufficient to create a "liability" within the meaning of s 12(c).

[14] In *Commissioner of Taxation v Price* Keane JA (as he then was) considered the application of the equivalent provision of the *Acts Interpretation Act* (Cwth). In relation to the equivalent to s 12(d) he said:[4]

> "In considering the language of s 8(d) and (e) of the *Acts Interpretation Act*, the authorities make it plain that, in a "proceeding" related to a "penalty", there is no requirement that a penalty must have already been **imposed** by a court or other authority in order for s 8(d) and (e) to operate: it is sufficient that a penalty has been **incurred**. In the case of a criminal or quasi-criminal offence, a penalty is incurred at the time at which the offence takes place." *(emphasis in original, footnotes omitted)*

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3 He referred to and relied on *Byrne v Garrison* [1965] VicRp 70; [1965] VR 523 at 528.

4 at para [58]

[15] It seems to me that, logically, the same reasoning should apply to the expression "a … liability … incurred under an Act or the part of the Act so repealed" in s 12(c). Given that (as held by Mildren J in *R v White*) a "liability" includes criminal responsibility, a liability to a punishment for the commission of a criminal offence is "incurred" not when sentence is passed, but when the offence is committed. Mr Brancourt therefore "incurred" a liability to punishment for the offence of aggravated assault on 23 December 2012, before the repeal of s 78BA.

[16] It remains to consider what that "liability" consisted of. Did it include the mandatory sentencing provisions of s 78BA? In my view it did.

[17] The Defence submitted that what had been "incurred" was simply the sentence prescribed by s 188 of the *Criminal Code*, but I do not think it can be so limited. Section 188 does no more than prescribe the maximum penalty available. A judge sentencing an offender for a breach of s 188 is bound to apply all relevant sentencing principles and other provisions (including mandatory sentencing provisions) in accordance with the general law and the applicable statutes. What Mr Brancourt became liable to on 23 December 2012, was a penalty for the offence of aggravated assault to be determined in accordance with the law as it stood at that date, including s 78BA of the *Sentencing Act*. By virtue of s 12(c) of the *Interpretation Act*, that liability was not affected by the repeal of s 78BA on 1 May 2013.

[18] The final submission of the Defence was that, should I hold that s 12 of the *Interpretation Act* does apply, it should nevertheless be read subject to s 14 of the *Criminal Code* which provides:

> **14. Effect of changes in law**
>
> (1) A person cannot be found guilty of an offence unless the conduct impugned would have constituted an offence under the law in force when it occurred; nor unless that conduct also constitutes an offence under the law in force when he is proceeded against for that conduct.
>
> (2) If the law when the conduct occurred differs from that in force at the time of the finding of guilt, the offender cannot be punished to any greater extent than was authorised by the former law or to any greater extent than is authorised by the latter law.

[19] The Defence contends that the law in force at the present time, when Mr Brancourt is being dealt with for this offence, provides for a lesser punishment than that which was authorised at the time of the offence. At the time of the offence, s 78BA applied to mandate a penalty of an actual sentence of imprisonment. However, that section was repealed on 1 May 2013 and s 78EA of the *Sentencing Act* provides that the new mandatory sentencing regime does not apply to offences which were committed before 1 May 2013.

[20] It seems to me that that reasoning is very much circular: it assumes what it purports to conclude, namely that there is a lacuna created by s 78EA. In my view there is no such lacuna because s 12(c) of the *Interpretation Act* applies to preserve the operation of the provisions of the *Sentencing Act*

(including s 78BA) for offences committed before the new provisions came into force. For the defendant's arguments in relation to s 14 of the *Criminal Code* to be valid, one would have to impute to the legislature an intention to repeal the mandatory sentencing provisions for offences committed before 1 May 2013. The second reading speech for the *Amendment (Mandatory Minimum Sentences) Bill* contains the following general statement of intent:

> "The purpose of this Bill is to insert new mandatory minimum sentences of imprisonment for assaults into the *Sentencing Act* and to remove the ability of the court to suspend the sentence for that minimum period of time. The mandatory periods apply to serious assaults and repeat offenders of aggravated assault. The bill does not intend to remove the current mandatory imprisonment provisions for violent offences in section 78BA of the *Sentencing Act*. It retains the effect of those provisions and supplements them with new mandatory minimum sentences for specified sentences."

[21] For these reasons, it seems to me that the now repealed s 78BA of the *Sentencing Act* continues to apply for the purposes of sentencing Mr Brancourt for the offence of aggravated assault committed in December 2012.