Leigh v Heath [2016] NTSC 50

PARTIES:	LEIGH, Sean
	v
	HEATH, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 5 of 2016 (21610542)
DELIVERED:	30 September 2016
HEARING DATES:	14 September 2016
JUDGMENT OF:	HILEY J
APPEAL FROM:	LOCAL COURT

CATCHWORDS:

CRIMINAL LAW- Firearms – mandatory disqualification – additional to court ordered disqualification - *Firearms Act 1997* (NT) s 10(2A)(a), s 93A(2).

APPEALS – Sentencing – error - failure to take into account period of mandatory disqualification

Burrarrwanga v Rigby [2009] NTSC 57; 24 NTLR 234; *Director of Public Prosecutions (Vic) v Amcor Packaging Australia Pty Ltd* [2005] VSCA 219; (2005) 11 VR 557; *R v Tait* (1979) 46 FLR 386; *Trajkovski v The Queen* [2011] VSCA 170; (2011) 32 VR 587, referred to

Firearms Act 1997 (NT) s 10(2A)(a)(i), (ii) & (b), s 40(1), s 43(1)(b) s 46, s 46(1), s 93A(1) & (2).

REPRESENTATION:

Counsel:

Appellant:	D McConnel
Respondent:	CW Roberts

Solicitors:

Appellant:	HWL Ebsworth Lawyers
Respondent:	

Judgment category classification:	B
Judgment ID Number:	Hil1609
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Leigh v Heath [2016] NTSC 50
No. LCA 5 of 2016 (21610542)

BETWEEN:

SEAN LEIGH
Appellant

AND:

ANDREW HEATH
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 30 September 2016)

Introduction

[1] The appellant pleaded guilty to two firearms offences under s 46 of the *Firearms Act 1997* (NT) (***Firearms Act***). The offending involved his failure to properly secure his rifle and a box of ammunition in his motor-vehicle. He had left his bolt action Winchester .308 calibre rifle in a gun case on the dashboard of his vehicle, and a box of 20 rounds compatible with that rifle in the unlocked glove-box of the vehicle. The vehicle was locked and was parked inside a fenced yard. During the night an intruder climbed the fence, broke into the car by smashing a window and removed the rifle and ammunition.

[2] He was convicted and fined $2000 with a victim's levy of $300. He was also disqualified from holding or obtaining a licence, registration or permit under the *Firearms Act* for 12 months. He has appealed against the sentence.

Grounds of Appeal

[3] The notice of appeal contains the following grounds:

(a) that the sentence imposed was manifestly excessive in all of the circumstances of the case

(b) alternatively, that his Honour erred in:

(i) taking into account irrelevant considerations;

(ii) failing to take into account relevant considerations; and

(iii) having regard to facts not admitted or proven beyond reasonable doubt;

with the result that the appellant was sentenced on the wrong basis.

[4] Although the sentence expressed by his Honour included convictions, the aggregate fine of $2000 plus victims levy of $300 and the 12 months disqualification, the appellant contended that ss 10(2A) and 93A(2) of the *Firearms Act* operated to impose an additional

disqualification of two years. That was the main basis of Ground (a) and of Ground (b)(ii).

[5] The appellant also contended that his Honour erred in other respects. They included:

(a) characterising his offending as reckless, an important conclusion resulting in his decision to impose a disqualification;

(b) impermissibly speculating as to the possible uses to which the stolen rifle and ammunition might be put;

(c) failing to appreciate the degree of hardship likely to result from the disqualification; and

(d) failing to afford due weight to the appellant's own reporting of the theft.

General principles re appeals against sentence

[6] The principles that apply to an appeal against sentence are well known and are conveniently summarised by the Full Court of the Federal Court in *R v Tait*[1] at 388:

> An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in

[1] *R v Tait* (1979) 46 FLR 386. See too *House v The King* (1936) 55 CLR 499 and *AB v The Queen* (1999) 198 CLR 111 at 160 [130] per Hayne J, and 151-153 [104]-[107] per Kirby J.

> misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error.

[7] As a general rule there is a presumption that there is no error in a judge's exercise of his sentencing discretion.[2] In order to interfere with the sentencing judge's exercise of his discretion, the court must be satisfied not just that the sentence was excessive but that it was manifestly excessive.[3] To determine whether a sentence is excessive, it is necessary to review it in the perspective of the maximum sentence prescribed by law for the crime, the standards of sentencing customarily observed with respect to the crime, the place which the criminal conduct occupies in the scale of seriousness of crimes of that type and the personal circumstances of the offender.[4]

Relevant statutory provisions

[8] The maximum penalty for a breach of s 46 of the *Firearms Act* is 50 penalty units or imprisonment for 12 months.[5]

[9] In addition, the firearms licence held by the holder of a licence is automatically revoked upon the holder being found guilty of an offence

[2] *Salmon and Chute* (1994) 94 NTR 1 at 24 (Kearney J).
[3] *Hampton v The Queen* [2008] NTCCA 5 at [44].
[4] *R v Morse* (1979) 23 SASR 98 at 99.
[5] *Firearms Act* s 46(1).

against the *Firearms Act*.[6] In circumstances where s 10(2A)(a) applies, the offender is not to be granted a new licence for at least two years.

[10] Section 10 of the *Firearms Act* confers and regulates the power of the Commissioner to grant a licence, relevantly a shooters licence. Section 10(2A) provides:

> The Commissioner is not to grant a licence to a person who has been found guilty of an offence against this Act … unless:
>
> (a) in a case where, on the trial or hearing in relation to the offence:
>
> (i) an order under section 10 or 11 of the Sentencing Act or referred to in s 130(2) of that Act … has been made directing that the person be discharged on giving security in accordance with the section; or
>
> (ii) a pecuniary penalty *only* has been imposed;
>
> and not less than 2 years have elapsed since the person was found guilty of the offence; and
>
> (b) in the case where a custodial sentence was imposed - five years have elapsed since the applicant was found guilty of the offence or released from custody, whichever is the later.
>
> [emphasis in italics added by me]

[11] Section 93A(1) also permits the court to disqualify the person from holding a specified licence or permit for a period specified by the court and to order that the person is not to apply for a licence or permit for the period of the disqualification. This would be the provision under which the Local Court imposed the 12 months disqualification.

[6] *Firearms Act* s 40(1).

[12] Section 93A(2) provides that "the period for which a court may disqualify the person is in addition to any period of automatic disqualification under [the] Act."

Ground (a) and (b)(ii)

[13] Ground (b)(ii) in this appeal assumes, and the respondent agrees, that s 10(2A)(a) applied to this offending and would operate to impose an additional disqualification period of two years, effectively resulting in a total disqualification of three years because of s 93A(2). On 21 April 2016 a delegate of the Commissioner of Police issued the appellant with a notice under s 43(1)(b) informing him that he is ineligible to apply for a licence for two years from the date of his finding of guilt and that he will be eligible to apply for a licence from 19 April 2018 .[7] This notice fails to recognise that the effect of the 12 month disqualification period ordered by the court is that the appellant is disqualified for a period of three years, not two.

[14] The assumption that s 10(2A)(a) applies is based upon the fact that the Local Court imposed a pecuniary penalty of $2000 coupled with the victims levy. It seems to be assumed the precondition in s 10(2A)(a)(ii) that "a pecuniary penalty *only* has been imposed" was satisfied notwithstanding that in addition to the fine and victims levy convictions were entered and the period of disqualification ordered.

[7] Ex A1.

[15] Section 10(2A) was considered by this Court in *Burrarrwanga v Rigby,*[8] a case where the appellant had been convicted of breaching s 46 of the *Firearms Act* and placed on a good behaviour bond.

[16] Referring to s 10(2A)(a)(i), (ii) and (b) respectively as three parts of s 10(2A), Southwood J said:

> [10] … The parts are based on the three kinds of sentencing disposition that are referred to in the subsection namely, non-conviction discharge or bond, fine and custodial sentence. The length of the time for which a licence cannot be granted by the Commissioner following the revocation of a licence by the operation of s 40(1) of the Act varies in accordance with the severity of the three kinds of sentencing disposition referred to in the subsection.
>
> [11] In my opinion s 10(2A) of the *Firearms Act* provides for mandatory suspension of a firearms licence in two circumstances. First, if a person is found guilty of an offence against the *Firearms Act* and a pecuniary penalty is imposed, a person is prevented from obtaining a firearms licence for a period of two years from the date when the person was found guilty of the offence. Secondly, if a person is found guilty of an offence against the *Firearms Act* and a custodial sentence is imposed, a person is prevented from obtaining a firearms licence for a period of five years from the date when the offender was found guilty of the offence or the date when the person is released from custody, whichever is the latter.[9]

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[8] *Burrarrwanga v Rigby* [2009] NTSC 57; 24 NTLR 234.

[9] This interpretation of the subsection is consistent with what the Minister for Police, Fire and Emergency Services stated during the First Reading Speech of the *Firearms Amendment Bill* Serial 158. At 4086 of *Hansard* for 28 May 2003 he stated: "Further amendments to the *Firearms Act* contained in the Bill will facilitate the administration of the Act by amending a number of anomalies or strengthening current provisions. The current provisions relating to the period of disqualification for a person applying to register a firearm for an offence under the Act are confusing and ambiguous. The Bill will provide a new procedure, simplifying the regime into a three tier system as follows: where a person has been found guilty of an offence, and a court has imposed a pecuniary penalty, the person cannot apply to register a firearm for a period of two years. Where, however, the Court has imposed a period of imprisonment, the period will be five years."

> [12] If a person who is found guilty of committing an offence against the *Firearms Act* receives neither a pecuniary penalty nor a custodial sentence, the person may be re-granted a firearms licence forthwith by the Commissioner.

[17] Although that discussion did not and did not need to consider the meaning and effect of the word "only" in subparagraph (a)(ii) it might be thought that the additional imposition of a conviction and or a disqualification, for example under s 93A, would render that subparagraph, and thus s 10(2A), inapplicable. However, as I have said, both parties to this appeal, and the delegate of the Commissioner of Police, have proceeded on the assumption that s 10(2A)(a)(ii) applies.

[18] That being so, the Local Court should have considered the operation and effect of s 10(2A) before ordering an additional period of disqualification under s 93A. It is most unfortunate that counsel did not bring this, and s 93A(2), to his Honour's attention. There is no suggestion in the course of any of the submissions made by counsel or in his Honour's reasons that there was a provision in the Act, such as s 10(2A), that would give rise to any automatic disqualification of the appellant's licence. Indeed counsel for the appellant sought a finding of guilt without conviction, which finding may well have triggered the operation of s 10(2A)(a)(i) and thus the automatic two year disqualification.

[19] From his reasons it appears that his Honour considered that a total disqualification period of 12 months, not two or three years, was appropriate, in the circumstances where convictions were also entered and the fine and victims levy imposed. I consider that his Honour erred in failing to have regard to the automatic disqualification period. If he had had regard to s 10(2A), his Honour might have structured the appellant's sentence to avoid its operation, for example by convicting the appellant without imposing a pecuniary penalty or by not convicting him, but, in either case, imposing the 12 months disqualification under s 93A. Alternatively his Honour might have imposed the pecuniary penalty thereby exposing the appellant only to the two year disqualification stipulated in s 10(2A).

[20] Accordingly I consider that his Honour erred in failing to have regard to this important consideration. That failure resulted in the sentence being manifestly excessive in the circumstances.

Other grounds

[21] That conclusion renders it unnecessary for me to consider the other grounds of appeal. However, I shall proceed to consider them to cover the possibility that the assumption that s 10(2A) applied is wrong.

[22] I reject the contention that his Honour's reference to the appellant being "reckless" was said in the context of recklessness in the sense

used in the cases where recklessness is an element of a particular criminal offence. This was merely his Honour's way of describing the appellant's conduct in leaving the rifle and ammunition where he did leave them, particularly leaving the rifle on the dashboard, without which it may not have been seen and stolen and ended up in unknown hands.

[23] I also reject the contention that his Honour gave substantial weight to the potential consequences of the appellant's actions by speculating how the rifle and ammunition might be used. Although he referred to the possibility of the rifle being used for unlawful purposes, a possibility which I do not consider fanciful, his Honour expressly recognised that he could not convict and deal with the appellant "on the basis of what the firearm will be used for because I can't predict what it will be used for." He added that "it is inherently serious that there is now this firearm and ammunition out there. Leaving one on the dashboard is bad enough but you shouldn't have left ammunition with it as well."

[24] It is not uncommon for a court to identify and have regard to foreseeable potential consequences that might result from the breach of a statutory obligation. In *Director of Public Prosecutions (Vic) v*

Amcor Packaging Australia Pty Ltd[10] the Victorian Court of Appeal said:

> When determining the appropriate penalty in a case of the breach of a statutory duty imposed for the purpose of protecting the lives and well-being of those who may be affected by the breach, the foreseeable potential consequences must be taken into account as it is the avoidance of those consequences which, when considering the objective seriousness of the offence, constitutes the raison d'etre for the establishment of the legislated regime in the first place. To a substantial extent the seriousness of a breach must be assessed by reference to those potential consequences and the measure of evidenced disregard concerning the safety of employees in the circumstances.

[25] As Southwood J said in *Burrarrwanga v Rigby*, at [27]:

> The purpose of the firearm storage regulations is to preserve public safety. The failure to store a firearm in accordance with the regulations is not a trivial offence and can have very serious consequences.

[26] The appellant referred to *Trajkovski v The Queen*[11] where the Victorian Court of Appeal was critical of the trial judge imposing a higher sentence than should have been imposed after wrongly assuming that the appellant would have kept and used a handgun found in his possession for particular unlawful purposes. I do not consider that his Honour made an error of this kind.

[27] I also reject the appellant's contention that his Honour erred in not taking into account the fact that the appellant himself reported the theft

[10] [2005] VSCA 219; (2005) 11 VR 557 at [35].
[11] [2011] VSCA 170; (2011) 32 VR 587 at [95] – [97].

of the rifle and ammunition and thus exposed himself to prosecution for the offences. His Honour was clearly aware of this fact. Indeed he was critical of the appellant for not checking his vehicle when he went outside at 2am after hearing a disturbance. He could then have reported the loss earlier than he did and thus given the police better prospects of retrieving the stolen goods. Even if he had not reported the loss when he did it is likely that the police would have become aware of it sooner or later. In any event, it is reasonable to assume that his Honour took into account the appellant's cooperation and pleas of guilty in the usual way, without expressly saying so.

[28] I would however agree with both parties to this appeal that his Honour erred in assessing the degree of hardship likely to be suffered by the appellant as a result of the disqualification. The only discussion about disqualification occurred in the last two paragraphs of his Honour's sentencing remarks:

> I've thought about the question of disqualification but I think that it's just too inherently dangerous. I appreciate that you need your firearm licence in relation to your property but there will be other workers on the property who can use firearms if you can't for a period of time. I think that people who display this degree of recklessness should suffer some firearms penalty.
>
> Given the fact that you've got a previous good character and you use it for your work, on charges 1 and 2, you are disqualified from holding or obtaining a licence, registration or permit under the Firearms Act for 12 months. I would quite often give it a lot longer than that and sometimes I've given up to 5 years. But I only make it 12 months.

[29] Counsel for the appellant had submitted that his client required a firearms licence as part of his business of primary production and that firearms such as the rifle were part of his tools of trade since he started working at Hamilton Downs Station in 1980. He pointed out that property owners use high-powered rifles for a number of purposes including obtaining "killers", despatching injured beasts and other vermin such as dingoes and wild dogs. His Honour seems to have assumed that there would be other workers on the appellant's property who had and could use a firearm during the period of disqualification. As the respondent concedes, there was no material upon which his Honour could have made that assumption.

Disposition

[30] In light of my conclusions, the appeal must be allowed. Despite the preference expressed by counsel for the appellant that I resentence the appellant, I consider it preferable to remit the matter to the Local Court for resentence. This will enable the parties to provide the court with greater assistance particularly in relation to the hardship issue and in relation to appropriate sentencing dispositions having regard to s 10(2A) and the kind of sentences that are normally imposed by the Local Court for these kinds of offences.