Isles v Lyons [2016] NTSC 11

PARTIES:	ISLES, Brett v LYONS, Richard Mark
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA/AS 1 of 2016 (21562335)
DELIVERED:	26 February 2016
HEARING DATES:	10 February 2016
JUDGMENT OF:	MILDREN AJ
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW – APPEAL AGAINST CONVICTION – *Justices Act* (NT) s 171(2) – where appeal out of time – appellant argued Christmas period shutdown stipulated by rule 3.04(1) of *Supreme Court Rules* applied – Rule 3.04(1) applies only to time fixed by Supreme Court Rules or judgments or orders fixing, extending or bridging time – does not apply to timing of appeals – leave to appeal not granted.

CRIMINAL LAW – APPEAL AGAINST CONVICTION – *Justices Act* (NT) s 165 – where appellant seeks exemption from need to comply with stipulated time limits in Act where reasonable attempt to comply has been made – appellant applied for legal aid immediately after sentence – failure to lodge appeal in time

due to error of appellant's solicitor – no fault of appellant – discretion to allow appeal in favour of applicant – leave to appeal granted.

STATUTORY INTERPRETATION – *Child Protection (Offender Registration Reporting Obligations) Act (NT)* s 8(b) – whether appellant a corresponding reportable offender – appellant previously convicted of indecent assault in Tasmania – where *Community Protection (Offender Reporting) Act 2005* (Tas) is a corresponding Act – where s 3 defines corresponding foreign offender reporting order as order made under a corresponding Act that falls within a class of orders described by the regulations as a corresponding reporting order – yet no provision within Regulations regarding that class of orders – appellant cannot be a corresponding reportable offender.

STATUTORY INTERPRETATION – *Child Protection (Offender Registration Reporting Obligations) Act (NT)* s 9(a) – whether appellant a foreign reportable offender – defined as someone who has been sentenced for an offence that is *not* reportable under the Act – difficulty in interpreting meaning of section – where *Interpretation Act* s 62A requires Court to prefer construction promoting purpose of act being protection of children – narrow interpretation deprives section of meaning – section defined to mean persons required to report to registrar in foreign jurisdiction regardless of whether offending was against children – appellant required to report under the Act.

CRIMINAL LAW – APPEAL AGAINST SENTENCE – appellant claimed Magistrate erred in characterising offending as contemptuous – where Magistrate fairly assessed appellant as not treating reporting obligations seriously – where description of offending as contemptuous was excessive in circumstances – sentence was manifestly excessive – appeal upheld.
Justices Act (NT) s 165, s 171(2).

Child Protection (Offender Registration Reporting Obligations) Act (NT) s 8, s 9

Interpretation Act s 62A

Community Protection (Offender Reporting) Act 2005 (Tas)

Pushenjack v Owens [1972] 20FLR 190; *Nottle v Trenerry* [1993] 3NTLR 68; *Swann v Mosel* [2014] NTSC 43; *Schugman v Menz* [1970] SASR381; cited.

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	G Dooley

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Mil16539
Number of pages:	17

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Iles v Lyons [2015] NTSC 11
No. JA/AS 1 of 2016 (21562335)

BETWEEN:

BRETT ILES
Appellant

AND:

RICHARD MARK LYONS
Respondent

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 26 February 2016)

MILDREN AJ:

Introduction

[1] The appellant Brett Iles was charged with that he did fail without reasonable excuse, to comply with his reporting obligation, namely, failed to report to police in accordance with his obligation as directed contrary to s 48 of the *Child Protection (Offender Reporting and Registration) Act (NT)* ('The Act'). The learned Magistrate imposed a sentence of imprisonment for three months. The appellant lodged a Notice of Appeal against sentence on 1 February 2016. The conviction and sentence was recorded by the learned Magistrate on 22 December

2015. The *Justices Act* s 171(2) requires that an appeal should be instituted within one month from the time of the conviction order or adjudication appealed against. The appeal was therefore out of time Counsel for the appellant sought to rely upon Rule 3.04(1) of the Supreme Court Rules which provides "that in calculating the time fixed by these rules or by a judgement or order fixing, extending or bridging time, the period from 24 December to 9 January next following shall be excluded, unless the court otherwise orders."

[2] The argument based on this rule clearly has no foundation. The time to appeal is not fixed by the Supreme Court Rules nor was it fixed by any judgment or order fixing, extending or bridging time. The period in which to appeal is fixed by s 171(2) of the *Justices Act* (NT).

[3] The appellant's alternative submission was to seek a relief pursuant to s 165 of the *Justices Act* which enables this Court to dispense with compliance of any condition precedent to the right of appeal if in the Court's opinion the appellant has done whatever is reasonably practicable to comply with this Act. The facts are that the appellant applied for legal aid in order to appeal on the date upon which he was sentenced. Legal Aid was granted on 24 December 2015. A solicitor from the Northern Territory Legal Aid Commission assumed conduct of the matter on 19 January 2016 and confirmed the appellant's instructions that he wished to appeal. The appellant's solicitor was

under the impression that the vacation period did not count for the purposes of counting the period of one month. He was plainly wrong. It is well established that where the appellant is in custody and can do little more than trust an apparently competent solicitor to do that which was necessary to put his appeal on foot, and where the instructions to appeal were given in ample time for the solicitor to comply with the provisions of the Act, the appellant has done all that is reasonably practicable by him to comply with the provisions of the Act and accordingly it is appropriate to make an order pursuant to s 165 dispensing with compliance with the condition precedent imposed by s 171(2) that the appeal should be instituted within 28 days.[1] The court therefore has a discretion whether or not to dispense with the non-compliance.[2] In the circumstances of the present case the discretion should be exercised in favour of the appellant unless the appellant's case is plainly unarguable. At the time of the hearing I ruled that the appeal was not plainly unarguable and made an order in the appellant's favour. Counsel for the respondent did not argue otherwise.

[4] On the hearing of the appeal I allowed the appeal and quashed the sentence on the ground that the sentence imposed is manifestly excessive and substituted a sentence of imprisonment for one month

[1] *Pushenjack v Owens* [1972] 20FLR 190; *Nottle v Trenerry* [1993] 3NTLR 68 at 69; *Swann v Mosel* [2014] NTSC 43 at [18 to 20].
[2] *Schugman v Menz* [1970] SASR381 at 386 per Bray CJ; *Pushenjack v Owens* [1972] 20 FLR 190 at 196; *Swann v Mosel* [2014] NTSC 43 at [24].

which I backdated to the date of his arrest on 19 December 2015. I said that I would provide my reasons later. These are my reasons.

The Facts

[5] The facts that were accepted before the learned Magistrate were that on 9 June 2007 at the Supreme Court of Tasmania, the defendant was convicted of serious violent offences and indecent assaults. As a result of the conviction the appellant was deemed to be a reportable offender pursuant to the Community Protection Offender Register and was required to comply with the reporting obligations under the *Community Protection (Offender Reporting) Act 2005* (Tas) for a period of 10 years.

[6] The appellant was located by Northern Territory police in 2012 when he was registered in the Northern Territory on 6 August 2012 as a "corresponding reportable offender" pursuant to s 8 of the *Child Protection (Offender Registration Reporting Obligations) Act (NT)* (the Act). At the time of being registered as corresponding reportable offender the appellant was also served with a "Notification of Reporting Obligations" pursuant to s 52 of the Act.

[7] On 17 April 2013 the appellant left the Northern Territory and resided for a period of time in Western Australia. On 9 November 2015 the appellant arrived back in the Northern Territory and was residing at

Dingo Lodge, 88 Mitchell Street, Darwin. On 12 November 2015 the appellant came to police attention and was charged with assault. That matter was to be mentioned in the Court of Summary Jurisdiction in Darwin and on 18 December 2015 was adjourned until 16 February 2016. The appellant was spoken to by police on 12 November 2015 and he advised that he was departing the Northern Territory with his intention to return to Victoria, where he was then residing. As a result he was served a "Reminder Of Reporting Obligations" notice pursuant to s 56 of the Act. At 1:00 am on Saturday 19 December the appellant was found to be in the Northern Territory. It was alleged that as such he was in breach of his reporting obligations pursuant to s 22(2) of the Act in that the appellant failed to advise police of his travel plans or where he intended to stay. The appellant had been spoken to by police at a roadhouse near Tennant Creek as the police believed that he was behaving suspiciously.

[8] The appellant was arrested and conveyed to the Tennant Creek watch house and was later charged. He was subsequently remanded in custody to appear in the Alice Springs Magistrates Court on Monday 21 December 2015.

The Plea

[9] The plea was that sometime in November 2015 the appellant who was at that stage residing in Victoria, travelled to Darwin on 9 November 2015 for a job interview. On 12 November the appellant was arrested for the assault matter and was required to attend court on 18 December 2015. Consequently the appellant told the police that he was departing Northern Territory to return to Victoria. He returned to the Northern Territory to attend court on 18 December and thereafter was driving south when he was arrested on 19 December. At the time he was intending to drive back to Victoria.

[10] It is not very clear on the material put before the learned Magistrate as to exactly what circumstances gave rise to the breach for reasons I will discuss in a moment. Suffice is to say that counsel for the appellant conceded before the learned Magistrate that the appellant had failed to comply with s 22(2) of the Act because he had failed to report to the police his circumstances when he returned to the Northern Territory for the job interview because he stayed in the Northern Territory on that occasion for longer than 14 days.

[11] However the material which was before the learned Magistrate was very scant and I considered that there was a real chance that the appellant had been wrongly convicted. At my invitation counsel for

the appellant was granted leave to add the following further ground of appeal namely that the conviction be quashed on the basis that there was no evidence of an element of the offence, namely that the appellant was a reportable offender.

The Legislation

[12] In order to understand the circumstances of the offence it is necessary to consider the Act in some detail.

[13] The offence with which he was charged was a breach of s 48(1) of the Act which provides:

> A reportable offender who, without reasonable excuse, fails to comply with any of his or her reporting obligations commits an offence.

[14] Section 6 of the Act defines a "reportable offender" as, amongst other things, "a corresponding reportable offender" or a "foreign reportable offender".

[15] A corresponding reportable offender is defined by s 8 of the Act as follows:

> A corresponding reportable offender is a person:
>
> (a) whom a court outside the Territory has, at any time before, on or after the commencement date, sentenced for an offence that is a reportable offence for this Act; or

(b) who has been made the subject of a corresponding offender reporting order in a foreign jurisdiction; and

as a result was, is or would be required to report to the corresponding registrar in that jurisdiction.

[16] The purposes of the Act are set out in the preamble as "an Act to require certain offenders who commit sexual or certain other serious offences against children to keep police informed of their whereabouts and other personal details for a period of time in order to reduce the likelihood that they will reoffend and in order to facilitate investigation and prosecution of any future offences they may commit, to prohibit certain offenders from working in child related employment, to enable courts to make orders prohibiting certain offenders from engaging in specified conduct, and for related purposes." All of the offences which are reportable offences in the Northern Territory are set out in s 12 of the Act. Without going into details the classes of offences which are reportable offences under the Act all involve in one way or another offences against children.

[17] The offences for which the appellant was convicted in Tasmania requiring him to be a reportable offender in that state were of indecent assault. It was not alleged that those charges involved assaults against children and there was no evidence that they did. The appellant was therefore not a corresponding reportable offender within paragraph (a)

of the definition because an offence of indecent assault is by itself not a reportable offence for the purposes of the Act.

[18] As to paragraph (b) of the definition, which deals with a person who has been made the subject of a corresponding offender reporting order in a foreign jurisdiction, the expression "corresponding offender reporting order" is defined by s 3 to mean an order made under a corresponding Act that falls within a class of orders described by the regulations as a corresponding reporting order for this Act.

[19] The words "corresponding Act" are defined by s 3 as follows:

> Corresponding Act means a law of a foreign jurisdiction:
>
> (a) that provides for people who have committed specified offences to report in that jurisdiction information about themselves and to keep that information current for a specified period; and
>
> (b) that the Regulations state as a corresponding Act for this Act.

[20] Regulation 5 of the Child Protection (Offender Reporting and Registration) Regulations provides that the *Community Protection (Offender Reporting) Act 2005* (Tas) is a corresponding Act. However assuming that the order made by the Supreme Court of Tasmania was an order made under that Act, the second limb of the definition of "corresponding offender reporting order" requires proof that the order fell within a class of orders prescribed by the Regulations as a

corresponding offender reporting order for the purposes of the Act. The difficulty is that the regulations do not provide for any such class of orders. It therefore follows that the appellant was not a corresponding reportable offender.

[21] However it was put that the appellant was a foreign reportable offender. Section 9 of the Act provides that:

> A foreign reportable offender is a person:
>
> (a) whom a court outside the Territory has, at any time before, on or after the commencement date, sentenced for an offence that is not a reportable offence for this Act; or
>
> (b) who has been made the subject of a corresponding offending reporting order in a foreign jurisdiction;
>
> and as a result was, is or would be required to report to the corresponding registrar in that jurisdiction.

[22] Clearly s 9(b) does not apply for the same reason as it did not apply to section 8(b). It was submitted however that the appellant was caught by s 9(a).

[23] There is no definition of an offence "that is not a reportable offence for this Act" although s 11 deals with persons who "are not reportable offenders". Counsel for the respondent Mr Dooley relied upon s 9(a) in its ordinary meaning. The problem with that is that the words "an offence that is not a reportable offence for this Act" would mean

effectively any offence at all given that a court outside the Northern Territory has no jurisdiction to sentence a person for an offence of any kind which is an offence in the Northern Territory. It is difficult to see what the words "that is not a reportable offence for this Act" actually mean and what work they are required to do. If Mr Dooley's construction is correct then those words "that is not a reportable offence for this Act" are superfluous. It is a general rule of construction of statutes that the court should endeavour to give a meaning to every part of an Act. Legislatures are assumed to pass laws that make sense and that are not nonsense. I think that where the legislature has used the expression "that is a reportable offence for this Act" in s 8(a) and the corresponding expression in s 9(a) "that is not a reportable offence for this Act", the intent is that the offence must be of a kind which in the foreign jurisdiction is equivalent to, or not equivalent to, as the case may be, an offence which is a reportable offence for the purposes of the Act or not a reportable offence for the purposes of the Act.

[24] However that does not by itself resolve the problem of the redundancy of the words "that is not a reportable offence for this Act" in s 9(a).

[25] One possibility is that the legislature had in mind only those offences which were of a kind which involved offences against children, but if so, there does not appear to be any purpose to s 9 at all. Section 62A

of the *Interpretation Act* requires the Court when interpreting the provisions of an Act to prefer a construction that promotes the purpose or object underlying the Act. As I have noted before, the purposes underlying the Act when read as whole seem to be those purposes set out in the preamble to the Act: in other words the Act is primarily concerned with offences committed by offenders against children.

[26] If I were to take a narrow construction of s 9 the effect would be that s 9 would have no work to do. Plainly that would not be a proper outcome. I think therefore that, notwithstanding the infelicitous language of s 9(a), what was intended was that irrespective of whether or not the kind of offence for which the person was sentenced related to offences against children, if the person was required to report to the corresponding registrar of a foreign jurisdiction, the matter would be caught by s 9(a). The definition of corresponding registrar is "the person whose duties and functions under a corresponding Act most closely respond to the duties and functions of the Commissioner under this Act."[3] The order made by the Supreme Court of Tasmania was that the offender was placed on the Community Protection Offender Register and required to comply with the reporting obligations under the *Community Protection (Offender Reporting) Act 2005* (Tas) for 10 years.

[3] Fn 5.3

[27] It is not in contest that the appellant was required to report to the corresponding registrar in Tasmania.

[28] That leaves the question of what exactly the appellant failed to do that he was required to do under the Act. The agreed facts were that he was in breach of his reporting obligations pursuant to s 22(2) of the Act in that he failed to advise the police of his travel plans or where he intended to stay. Section 22(2) provides:

> If the reportable offender left the Territory, he or she must report his or her return to the Territory to the Commissioner within 14 non-custodial days after entering the Territory unless he or she leaves the Territory before the end of that period.

[29] On the facts which were not in dispute, the appellant left the Northern Territory sometime in November 2015 and returned to the Territory sometime in December 2015 in order to answer his summons. It is not clear when he returned to the Northern Territory. There were no facts put before the learned Magistrate as to when that occurred, nor did counsel for the appellant advise the learned Magistrate as to when he returned. The inference in the light of the plea is that he must have returned at least 14 days before the 18 December 2015.

[30] In those circumstances I consider that the offence had been made out, that the appellant was rightly convicted, and there was no miscarriage of justice.

Appeal against sentence

[31] The two grounds as to the appeal against sentence are as follows:

(1) Ground 1- the learned Magistrate erred by characterising the offending as showing a contempt by the appellant for his obligations, and by sentencing the appellant accordingly.

(2) Ground 2 – the sentence is manifestly excessive having regard to the circumstances of the offender and the offence.

[32] The appellant has prior convictions for failure to comply with his reporting conditions. On 8 October 2012 he was convicted by the Alice Springs Court of Summary Jurisdiction of two counts of failing to comply with reporting conditions but the offence dates are both the same, namely 6 August 2012. In relation to those offences there was an aggregate fine of $700 with a victims levy of $80. In Western Australia, he was convicted by the Geraldton Magistrates Court on 2 May 2013 in relation to the same offence, the offence having been committed on 1 May 2013, and fined $500. Further on 22 August 2013 he was convicted again of this offence by the Geraldton Magistrates Court, the offence date being 20 August 2013.

[33] So far as the offences on 8 October 2012 it was put to the court that the appellant had come to the Northern Territory and in the course of obtaining a drivers licence he was breached for failing to report a car registered in his name which is one of the personal details required to be reported under s 16(1)(h) and that he had also failed to report the name of his employer as required by s 16(1)(f)(ii). The facts in relation to the Western Australian matters were that on 7 April 2013 the appellant left the Northern Territory and resided for a period of time in Western Australia. He did not report to the police in Western Australia in time, which led to the conviction on 2 May 2013. The second conviction related to failing to notify a change of his address in time. It was put on his behalf that he went to Western Australia to find work but he was unable to find a stable place to live which resulted in his failing to advise his address in a timely manner.

[34] The requirement to report for a period of 10 years as required by the original order made by the Supreme Court of Tasmania on 9 June 2007 probably commenced operating when he was released from prison. It is difficult to know exactly when the 10 year period began to run because the appellant received a term of imprisonment for four years backdated to 21 March 2006 with a non-parole period of two years and six months. He would therefore not have been released from prison earlier than 20 September 2008. The offence with which the court was

dealing in this matter occurred in December 2015 which means that it is possible that seven years of the 10 year period had already lapsed by then.

[35] After considering the facts, the learned Magistrate observed:

"This is the fifth breach of this condition of your reporting and obviously, too, you have been dealt with those other matters and it comes to me to sentence you with this further breach. You, in my view, are showing contempt for your obligations and now (sic) treating as serious, what is expected of you. In dealing with these sorts of matters, specific deterrence is obviously a relevant factor. Because of the fact that you are on a disability pension, I am not satisfied that you are a person that has a capacity to pay a fine. Again, this further breach as I have tried to explain to you, is in my view, a contempt by you, of your obligation. The offending is sufficiently serious to warrant a period of imprisonment. In fixing that I do take into account your very early plea of guilty and what I've been told about your personal background, including your age and the other matters mentioned by your legal representative."

[36] I think it was reasonably open for the learned Magistrate to form the view that the appellant, because of his previous breaches, was not treating his reporting obligations seriously. However I do not think it

was a fair summary of the entire circumstances to say that he had reached the stage where he was showing a contemptuous attitude to his obligations. On the facts of the current offending the most that can be said about it is that he was a day late in failing to report.

[37] In those circumstances it seemed to me that sentence imposed was manifestly excessive.
