CITATION: *Bradley v Raymond* [2011] NTMC 004

PARTIES:	Sandi-Lee Bradley
	V
	Daley Raymond
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Northern Territory
FILE NO(s):	21022099
DELIVERED ON:	24 February 2011
DELIVERED AT:	Darwin
HEARING DATE(s):	9 February 2011
JUDGMENT OF:	Morris SM

CATCHWORDS:

CRIMINAL LAW -- SENTENCING -- APPLICATION BY CROWN TO RE-OPEN SENTENCE -- S112(1)(b) SENTENCING ACT -- FAILURE TO GIVE PROMISED EVIDENCE

Application to Magistrate to re-open sentence to correct sentencing errors – failure to impose a sentence that legally should have imposed

Sentencing Act (NT) s112(1)(a) and (b)

R v J (1992) 59 SASR 145
R v Stanley (1998) 7 Tas R 357
Dixon v R [2006] NTSC 11
R v Staats (1998) 123 NTR 16
R v Woodford (1996) 89 A Crim R 146, considered

REPRESENTATION:

Counsel:

Applicant:	Mr Ledek
Defendant:	Mr Burrows

Solicitors:

Applicant:	ODPP
Defendant:	Maleys

Judgment category classification:	B
Judgment ID number:	[2011] NTMC 004
Number of paragraphs:	23

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21022099

BETWEEN:

Sandi-Lee Bradley
Applicant

AND:

Daley Raymond
Defendant

REASONS FOR DECISION

(Delivered 24 February 2011)

Ms MORRIS SM:

1. The Crown has made an application to the Court under section 112 of the Sentencing Act that Mr Daley Raymond be re-sentenced in light of an alleged failure to honour an undertaking with regard to the giving of evidence in the prosecution of co-offenders.

2. Mr Raymond's sentence on 2 November 2010 gave consideration to this intention.

> "so in relation to that 14 month sentence of imprisonment, I have reduced that sentence, because of your plea of guilty and your preparation to give evidence to eight months imprisonment".[1] And "In considering all of those matters, and in particular, considering the decision you have made that you are

[1] Transcript Police v Raymond 2 November 2010 p22

prepared to give evidence and have taken steps to do so, I have determined that there are, in this case to my mind, the exceptional circumstances which I would required in order to suspend a sentence upon the rising of the court and I will do so today."[2]

3. Section 112 provides

> **112 Court may reopen proceeding to correct sentencing errors**
>
> (1) Where a court has in, or in connection with, criminal proceedings (including a proceeding on appeal):
>
> (a) imposed a sentence that is not in accordance with the law; or
>
> (b) failed to impose a sentence that the court legally should have imposed,
>
> the court (whether or not differently constituted) may reopen the proceedings unless it considers the matter should more appropriately be dealt with by a proceeding on appeal.
>
> (2) Where a court reopens proceedings, it:
>
> (a) shall give the parties an opportunity to be heard;
>
> (b) may impose a sentence that is in accordance with the law; and
>
> (c) may amend any relevant conviction or order to the extent necessary to take into account the sentence imposed under paragraph (b).
>
> (3) A court may reopen proceedings:
>
> (a) on its own initiative at any time; or
>
> (b) on the application of a party to the proceedings made not later than:
>
> (i) 28 days after the day the sentence was imposed; or

[2] Ibid p 23

(ii) such further time as the court allows.

(4) An application for leave to make an application under subsection (3)(b)(ii) may be made at any time.

(5) Subject to subsection (6), this section does not affect any right of appeal.

(6) For the purposes of an appeal under any Act against a sentence imposed under subsection (3)(b), the time within which the appeal must be made starts from the day the sentence is imposed under subsection (2)(b).

(7) This section applies to a sentence imposed, or required to be imposed, whether before or after the commencement of this section.

4. In most jurisdictions in Australia there is specific legislative provision to deal with offenders against whom it is alleged there is a failure to fulfil an undertaking to assist law enforcement or give evidence in other proceedings. The provisions provide for either an appeal mechanism where a sentence is reduced because of promised cooperation with law enforcement agencies, and such cooperation is not forthcoming[3] or provide for reopening of the sentence by the original court in similar circumstances[4].

5. Case law also supports that these circumstances can form grounds for appeal. King CJ in *R v J* (1992) 59 SASR 145 at 147 states;

> I agree that this Court has power to receive evidence of events occurring subsequent to sentence which have the effect of falsifying the basis upon which sentence has been imposed. It is a power to be exercised sparingly and with great circumspection. Ordinarily the Court of Criminal Appeal is concerned only with the question whether the sentence was correct on the information before the sentencing judge.

[3] *Crimes Act* (Cwlth) 21E), *Criminal Appeal Act* (NSW) s 5DA, *Criminal Procedure Act* (Vic) s 260, *Crimes (Sentencing) Act* (ACT) s 137
[4] *Penalties and Sentencing Act* (Qld) s188, *Sentencing Act* (WA) s 37A

It may nevertheless in exceptional circumstances vary a sentence in the light of events subsequently occurring.

The question of re-opening a sentence by reason of a failure of an offender to carry out his undertaking to give evidence against co-offenders, is a delicate one. The purpose of sentencing an offender before he is called upon to give such evidence is to remove any incentive to implicate others falsely in order to obtain leniency for himself. If the offender gives evidence in the shadow of the fear that the prosecution may appeal, that purpose is to some extent frustrated.

On the other hand, it is most important for the integrity of the sentencing process that an offender should not be permitted to obtain leniency by reason of an undertaking which he does not carry out. To allow that to occur would provide encouragement to mislead the sentencing court by means of false undertakings.

Restraint is necessary in connection with appeals on this ground. The mere fact that the offender's evidence has not measured up to prosecution expectations or statements which he has previously given, in all respects, would not be a sufficient basis for allowing an appeal. Where, however, the offender refuses to give evidence, or gives evidence exonerating rather than implicating the alleged co- offenders in contradiction of his undertaking or stated intention to give evidence against them the situation calls for re-examination of the sentence which has been imposed on a basis which has been falsified by the event.

It must be kept in mind that the basis of principle for the review of the sentence is not the punishment of the offender for departing from his undertaking or stated intention, but that the sentence was imposed on a wrong basis. Leniency has been granted on a ground which has proved to be baseless.

6. These remarks were supported in *R v Stanley* (1998) 7 Tas R 357.

7. The Northern Territory has no specific legislative provision to deal with the situation before the Court. Rather than appeal, the Crown have chosen to make application under s112 of the Sentencing Act.

8. It is conceded by the Crown that the sentence imposed on Mr Raymond was in accordance with the law. The Crown relies on the second limb of s112 being that the court "failed to impose a sentence that the court legally should have imposed".

9. His Honour Justice Riley in *Dixon v R* [2006] NTSC 11 explores the application of s112(1)(b). In that case the Court had been under the belief of an erroneous fact, being the age of the offender. A sentence had been constructed around release prior to attaining adulthood. The age relied on was later found to be incorrect and his Honour allowed an application pursuant to s112(1)(b) in order to restructure the sentence to comply with his original intention. His Honour stated:

> "In my view the application of s112(1)(b) is sufficiently wide to enable me to deal with the problem that has arisen in this case. In sentencing Mr Dixon I formed, and expressed, a view as to the sentence that the Court should legally have imposed. In so doing I relied upon information provided to me by counsel which subsequently turned out to be incorrect. This is not a case of permitting a 'general rehearing of sentencing proceedings on the merits' but, rather, is 'the correction of arguable mistakes in sentencing': *Ho v DPP* (NSW) (supra). The error occurred at the time of imposing the sentence and it is clear that, but for the misinformation provided, the sentence would have been differently constructed."

10. The Northern Territory Court of Criminal Appeal considered the limitations of s112 in *R v Staats* (1998) 123 NTR 16. Martin CJ states "In my opinion s112 is limited in its application to errors of law in relation to the imposition of the sentence. It does not extend to the correction of reasons or review of the exercise of a discretionary judgment."[5]

11. Angel J proffers a wider interpretation in the same case. "It (s112) should in my opinion, be given a broad interpretation. The section does not employ the expression "error of law". The section does not empower the Court to re-open a case merely because it has changed its mind as to the appropriate sentence. It is not necessary in the present case to decide the limit of a sentencing judge's discretion to reopen the case. It as least includes errors of law. It may well include judicial oversight of a fact obviously material for sentencing purposes, ie, in a case where the court makes clear findings of fact, plainly applied the correct law to those facts, but overlooks a further fact which, had it been taken into account would obviously have affected the result."[6]

12. The Queensland case of *R v Woodford* (1996) 89 A Crim R 146 considers legislation of similar nature to s112. The Queensland Court of Appeal held that the relevant section did not give power to reopen a completed sentencing process on the ground of a factual error.

13. In my view, even with a broad interpretation, s112 (1)(b) does not encompass the circumstances of the current application.

14. S112 does not permit a general rehearing on the merits of a case. Should the court be misinformed or overlook (as per Angel J) a fact that forms part of the merits, then s112 may well have some use, such

[5] *R v Staats* (1998) 123 NTR 16 at 24
[6] Ibid at 26

as the age of an offender, as per the decision in R v Dixon. But s112 does not extend to the review of the exercise of a discretionary judgment.

15. In sentencing Mr Raymond the Court relied upon certain factors in mitigation, that is, that he had assisted in the prosecution of co-offenders and would continue to do so by giving evidence in their trial. There is no submission in this application that reliance on that factor, which existed on the day of sentence, resulted in a failure to impose a sentence that legally should have been imposed on that particular day.

16. The Crown's submission is that the defendant's undertaking to provide evidence formed a circumstance in mitigation for sentencing purposes when it should not have done, given that 'fact' did not materialise at a later date, as a direct result of the defendant's conduct, therefore rendering that consideration erroneous.

17. S112 does not encompass a change of circumstances post-sentence nor does it envisage a retrospective rendering of the facts. It does not permit a court to "vary a sentence in the light of events subsequently occurring."[7]

18. The decision in *R v Dixon* can be distinguished in that the offender's age was always as it was, even if the court was misinformed at the time of sentencing. In an application as is currently before the Court new evidence would need to be called, evidence, neither in existence nor capable of being known at the time of the sentence. Consideration of this evidence would require a reconsideration of the merits of the case and the balancing of the relevant provisions of the Sentencing Act.

[7] *R v J* (1992) 59 SASR 145 at 147

19. There is a necessity for the finality of the sentencing process, pending, of course, the appellate jurisdiction. I do not accept the Crown's proposition that "where a sentencing exercise is not complete because of a position held out by one or both of the parties, it is the prosecutions submission that the 'merits' have not been decided until that position is resolved."

20. I note that the current Queensland legislation (s188 of the *Penalties and Sentences Act* 1992) allows the reopening of a proceeding in certain circumstances, including the same grounds as s112 of the NT Sentencing Act, but further goes on to specifically legislate for reopening for failure to provide promised cooperation with law enforcement agencies as well as on a clear factual error of substance.

21. In the absence of clear legislative intent I have no power to reopen the sentence in these circumstances, however desirable it may be to do so in order to preserve the 'integrity of the sentencing process'.

22. Given that, I decline to reopen the sentence and make no finding as to whether Mr Raymond fulfilled his intention to give evidence in the prosecution of the alleged co-offenders.

23. The application is dismissed.

Dated this 24th day of February 2011

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Elizabeth Morris
STIPENDIARY MAGISTRATE