

CITATION: *KERRY RIGBY V REEVES DIXON [2020] NTLC008*

PARTIES: RIGBY, KERRY LEANNE

V

DIXON, REEVES

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMINAL

FILE NO: 21922611

DELIVERED ON: 17 JUNE 2020

DELIVERED AT: DARWIN

HEARING DATE: 5 FEBRUARY 2020, 18 MAY 2020

DECISION OF: JUDGE ELISABETH ARMITAGE

**CATCHWORDS:**

*Functus officio*, power to order imprisonment in lieu of unpaid fines

*Sentencing Act 1995* ss 7, 19, 24, 26, 112

*Crimes (Victims Assistance) Act* s 25B(7)

*Fines and Penalties (Recovery) Act 2001* s 6(1)

*Victims of Crimes Assistance Act* s 61

*Walker v Meredith* [2008] NTSC 23 distinguished

*DPP v Hofschuster* (1995) 125 FLR 239 applied

*Psaras v Littman* [2006] NTSC 75; *George v O'Neil* (2009) 24 NTLR 228 followed

*Jovanovic v R* (1999) 106 A Crim R 548; *Bailey v Marinoff* (1971) 125 CLR 529  
cited

**REPRESENTATION:**

Counsel:

Prosecution: Ms Laura Payne

Defendant: Ms Harriet Murphy

Solicitors:

Complainant: Office of the Director of  
Public Prosecutions

Defendant: Northern Territory Legal Aid  
Commission

Judgment category classification: A

Judgment ID number: 008

Number of paragraphs: 21

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

No. 21922611

BETWEEN

RIGBY, Kerry Leanne

Complainant

AND

DIXON, Reeves

Defendant

REASONS FOR DECISION

(Delivered 17 June 2020)

JUDGE ARMITAGE

1. On 25 June 2019 the defendant, Mr Reeves Dixon, pleaded guilty to four driving charges on file 21922611 (the driving file). The defendant was convicted on each charge, fined an aggregate fine of \$1000, was disqualified from driving and victims' levies of \$600 were imposed. The court ordered that the fine was to be paid within 28 days. No order was made under section 26(2) of the *Sentencing Act 1995*, accordingly the defendant was not subject to a warrant of commitment for imprisonment if he failed to pay the fine within the stipulated 28 days.
2. On 5 February 2020, on application by Counsel for the defendant, the driving file was re-listed before me. Defence Counsel made the following submissions,
  - “1. Counsel for the defendant seeks an order in the Darwin Local Court under section 26(2) of the *Sentencing Act* in relation to [the driving file].
  2. If the court made such an order, the defendant would be subject to a warrant of commitment and imprisonment if he did not pay the fines originally ordered within 28 days.

3. The defendant is currently serving a term of imprisonment imposed by the Local Court on 31 October 2019 in relation to [another] file 21939346. The total effective sentence is 15 months imprisonment, backdated to 25 October 2019. The sentence is suspended after the defendant has served 7 months, with the remaining 8 months suspended for an operative period of 12 months. The defendant will be released on the suspended sentence on or around 24 June 2020.

4. The file on which the section 26(2) order is sought was finalised by a judge in the Darwin Local Court and was imposed on a different date prior to the defendant being remanded in custody on file 21939346. The defendant's total court imposed fines is \$1681."

3. Defence Counsel submitted that even though almost 8 months had passed since the sentence was imposed on the driving file the court still had a power to make an order under section 26(2) of the *Sentencing Act 1995* because,

"A plain reading of the power under section 26(2) does not require that the order be made at the time of sentencing; and

In making an order under section 26(2), the court is not being asked to review, rehear, vary or set aside a sentencing disposition previously ordered by a court, and is therefore not functus officio."

4. Defence Counsel relied on the decision of *Walker v Meredith* [2008] NTSC 23 submitting that that case "implicitly recognises that the court has power under section 26(2) to make an order retrospectively". In *Walker v Meredith*, when sentencing a defendant to a term of imprisonment on one criminal file, the sentencing Magistrate also dealt with a breach of a recognizance on an earlier file (the recognizance file) and was asked to make orders under section 26(2) of the *Sentencing Act 1995* in respect of the forfeited recognizance and the victim's levy on the recognizance file. The Magistrate was also asked to make section 26(2) orders in respect of outstanding fines and levies earlier imposed on a third file (the fine file)<sup>1</sup>. The Magistrate made section 26(2) orders for the fines but declined to do so for the levies or the forfeited recognizance. The appellant appealed the decision of the Magistrate not to make orders under section 26(2) of the *Sentencing Act 1995* in relation to the levies and the forfeited recognizance. Mildren J upheld the appeal in respect of the levies, but dismissed the appeal in respect of the forfeited recognizance. Mildren J held that under the applicable legislation<sup>2</sup> the levies were deemed to be fines and so an order under section 26(2) of the *Sentencing Act 1995* was available. A forfeited recognizance was not a fine (nor deemed to be a fine) and so an order under section 26(2) of the *Sentencing Act 1995* was not available for the forfeited recognizance. However, the question of whether the court was functus

---

<sup>1</sup> See written submissions of the defence dated 5 February 2020 at [14]

<sup>2</sup> *Crimes (Victims Assistance) Act 2005* s 25B (7)

officio in respect of the fine file was neither raised nor considered by the Magistrate or on the appeal.

5. In response to the application, the Prosecutor submitted that the court could not make an order under section 26(2) of the *Sentencing Act 1995* as the court was functus officio.
6. On 18 May 2020 I declined to make orders under section 26(2) of the *Sentencing Act 1995* and said I would publish my reasons at a later time. I now do so.
7. There is a general rule that, except by way of appeal, a court has no power to review, rehear, vary or set aside any judgement or order once it is formally recorded<sup>3</sup>. When a court has made a final determination on a matter it is functus officio. The court has exercised its power under the law and cannot reopen a case. The rule rests on the principles that it is desirable that there be an end to litigation and that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing<sup>4</sup>.
8. The Supreme Court of the Northern Territory has considered when a court is functus. In *DPP v Hofschuster* (1995) 125 FLR 239 an offender pleaded guilty to engaging in an aggravated dangerous act with a shotgun and was sentenced. Some nine months later the Crown made an application for forfeiture of the firearm. In respect of that application Thomas J considered the authorities and held,

“I adopt with respect the principle expressed in *Director of Public Prosecutions v Helps* (unreported, Supreme Court, NT, Martin CJ, No 122 of 1993, 18 April 1994) Martin CJ (at 20):

“Whatever may be the nature of proceedings seeking a forfeiture order, and the consequences flowing therefrom, there is no doubt that such an order is penal in character and thus the Act is to be strictly construed.”

I note that the *Crimes (Forfeiture of Proceeds) Act 1988 (NT)*, s 5 which was the applicable legislation in the decision referred to above makes specific provision for the application for forfeiture to be dealt with up to six months after conviction. There is no such provision in the *Firearms Act*.

I agree with the submission by counsel for the accused that in relation to this matter I should apply the principle as expressed by D A Thomas, *Principles of Sentencing*, 2<sup>nd</sup> ed (1979) at 336: “Where the power to order confiscation arises, the sentencer should consider the

---

<sup>3</sup> *Jovanovic v R* (1999)106 A Crim R 548 at 551

<sup>4</sup> *Bailey v Marinoff* (1971) 125 CLR 529 per Gibbs J at 539

order in relation to the whole of the sentence and as part of the sentence.”

This principle finds support in the decision of *Cheatley v The Queen* (1972) 127 CLR 291 per Barwick CJ (at 299): “The penalty of forfeiture of the boat is, in my opinion, part of the penalty for the offence.”

In the decision of *Fang Chinn Fa v Puffett* (1978) 22 ALR 149, Gallop J held that forfeiture was part of the penalty and if there were mitigating circumstances in relation to the offence or the offender these could be taken into account in determining whether to impose forfeiture or the extent of forfeiture.

I agree with the submission by counsel for the accused that the application for forfeiture should have been made at the time of the Crown submission on sentence and that this Court having proceeded to sentence Mr Hofschuster on 6 December 1994 is now *functus officio*.

I consider it an important principle in the administration of the criminal law that an offender, when sentenced by the Court, is entitled to finality of the proceedings in respect of that particular charge, unless there is a specific legislative provision to the contrary as contained in the *Crimes (Forfeiture of Proceeds) Act*.”

9. In *Psaras v Littman* [2006] NTSC 75 Martin (BR) CJ held that a Magistrate was *functus officio* when he or she had heard and determined a charge in a summary matter and passed sentence. However, on the facts in *Psaras*, as the Magistrate had not passed sentence the Magistrate was not *functus officio* (and ought to have considered an application to reopen the hearing on fresh evidence).
10. In *George v O’Neil* (2009) 24 NTLR 228 a prisoner had been released from gaol before he had served his full sentence of imprisonment (due to an administrative error on his commitment warrant). It was conceded by the Director of Public Prosecutions and held by Thomas J that once the warrant of commitment had expired the offender could not be imprisoned again on the warrant and the Magistrate, having convicted and sentenced, was *functus officio* and had no power to issue a new warrant.
11. I consider that the application of Defence Counsel seemingly proceeded on the basis that section 26(2) of the *Sentencing Act 1995* was overlooked at the time the sentence was imposed, and so any consideration of section 26(2) on this application would not involve a review, rehearing or variation of an earlier sentencing decision. I consider this premise of Defence Counsel to be erroneous. The court’s power to order imprisonment in lieu of timely payment of a fine is discretionary, with

imprisonment to be used as a last resort<sup>5</sup>. In this case there was no application at the time of sentencing by either Defence Counsel or the Prosecutor for an order under section 26(2) of the *Sentencing Act 1995*, nor were there submissions enlivening a positive exercise of the discretion. The fine imposed on the defendant reflected his likely limited financial capacity. Noting that an order of imprisonment in default of payment is more punitive than the recovery options available to the Fines Recovery Unit, there was nothing about the factual circumstances of the matter or the personal circumstances of the offender which appeared to warrant the making of a section 26(2) order. In those circumstances, I consider that it can properly be assumed that when the court sentenced the defendant it exercised its discretion under section 26(2) of the *Sentencing Act 1995* by choosing not to make the more punitive order. Having chosen not to make orders under section 26(2) of the *Sentencing Act 1995* when the sentence was imposed, the court is now functus in respect of the exercise of that power.

12. As noted by Thomas J in *Hofschuster*, the general rule of functus officio is subject to statute and the *Sentencing Act 1995* confers a statutory power to reopen sentencing proceedings in limited circumstances as follows,

**s 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) must give the parties an opportunity to be heard; and
- (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).

---

<sup>5</sup> *Sentencing Act 1995* s 7; *Walker v Meredith* [2008] NTSC 23 per Mildren J at [11] and [14]

- (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
    - (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.

13. I note that there was no application to reopen proceedings pursuant to section 112 of the *Sentencing Act 1995* nor did Defence Counsel submit that there was any error with the sentence that was imposed.

14. The sentence imposed on the driving file was one which was available under the *Sentencing Act 1995*. The *Sentencing Act 1995* relevantly provides,

**s 7 Sentencing and other orders**

Where a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence and this Part, make one or more of the following sentencing orders:

...

- (e) with or without recording a conviction, order the offender to pay a fine;

...

- (k) impose any sentence or make any order authorised by this or any other Act.



....

**s 19 Time for payment of fine**

A fine imposed by a court is to be paid within 28 days after it is imposed.

**s 24 Application of fine etc.**

...

**s 26 Court may order commitment in default**

(1) If a court imposes a fine on an offender under section 16(1), the fine may be enforced under the *Fines and Penalties (Recovery) Act 2001* unless the court orders commitment in default under subsection (2).

(2) A court may order that if a fine is not paid within 28 days the offender is to be imprisoned until his or her liability to pay the fine is discharged.

(3) If a court makes an order under subsection (2) and the fine is not paid within 28 days, the court may issue a warrant of commitment in respect of the offender specifying the period of imprisonment calculated on the basis of the amount of the fine as follows:

- (a) the period is to be one day for each amount (or part of that amount) prescribed for section 88 of the *Fines and Penalties (Recovery) Act 2001* that comprises the fine;
- (b) the period is not to be less than one day;
- (c) the period is not to exceed 3 months.

(4) If an offender serves the total period of imprisonment under a warrant under subsection (3), the fine is taken to be satisfied.

(5) If an offender serves part of the period of imprisonment under a warrant under subsection (3), the fine is to be taken to be partially satisfied by the amount calculated at the rate prescribed for section 88 of the *Fines and Penalties (Recovery) Act 2001* for each day served.

(6) Unless otherwise ordered by the court, any period of imprisonment that an offender has to serve as a result of an order under subsection (2) is to be served:

- (a) cumulatively on any incomplete sentence or sentences of imprisonment imposed on the offender for the default of a payment of a fine or sum of money; and

(b) concurrently with any incomplete sentence or sentences of imprisonment imposed on the offender other than for the default of a payment of a fine or sum of money, whether the other sentence was or the other sentences were imposed before or at the same time as that term.

15. I consider that an order of commitment to imprisonment in default of payment of a fine is an order pursuant to section 7(k) of the *Sentencing Act 1995*. It is a sentencing order. In my view, it is not an order that can be exercised independent of sentencing.
16. Further, in the same way forfeiture orders are considered penal in character, I consider that any order of imprisonment in lieu of payment of a fine is penal in character, and so section 26(2) of the *Sentencing Act 1995* is to be strictly construed. There being no specific legislative provision in section 26(2) of the *Sentencing Act 1995* permitting the power to be exercised at some date after a sentence has been imposed, I consider there is no such power.
17. Defence Counsel further submitted that section 26(2) of the *Sentencing Act 1995* applied to levies imposed under section 61 of the *Victims of Crimes Assistance Act*. However, there is no specific provision in either of those Acts which deems that such levies are fines. This is in contrast to the former *Crimes (Victims Assistance) Act*, which deemed a levy to be a fine<sup>6</sup>.
18. I consider that section 6(1)(b) of the *Fines and Penalties (Recovery) Act 2001* is relevant to this issue, which provides as follows,

6 Meaning of *fine* and *penalty*

(1) For this Act, a fine is a monetary penalty imposed by a court for an offence and includes any of the following:

...

(b) a levy payable under Part 6 of the *Victims of Crime Assistance Act 2006*.

19. I consider that the current legislative regime specifically provides for any unpaid victims levies to be recovered under the provisions of the *Fines and Penalties (Recovery) Act 2001*. There being no similar legislative provision deeming the levies to be fines for the purposes of the *Sentencing Act 1995*, I consider that the court cannot make orders under section 26(2) of the *Sentencing Act 1995* in respect of unpaid levies.

---

<sup>6</sup> *Crimes (Victims Assistance) Act* s 25B(7)(b)

20. Having proceeded to conviction and sentence on the driving file in my view I am functus and cannot now reopen the sentencing proceedings to make an order under section 26(2) of the *Sentencing Act 1995*.

21. The application is dismissed.

Dated this 17th day of June 2020

---

Elisabeth Armitage  
LOCAL COURT JUDGE