Aboriginal Areas Protection Authority v S & R Building & Construction Pty Ltd [2011] NTSC 3

PARTIES:	ABORIGINAL AREAS PROTECTION AUTHORITY v S & R BUILDING & CONSTRUCTION PTY LTD (ACN 098 369 638)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 49 of 2010 (20935996)
DELIVERED:	10 January 2011
HEARING DATES:	7 January 2011
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

APPEAL AGAINST SENTENCE – Sentencing discretion – whether sentencing Magistrate erred in failing to have due regard to cultural impact of conduct – whether sentence manifestly inadequate – whether sentencing Magistrate erred in his application of s 8 of the *Sentencing Act* – appeal dismissed

EVIDENCE – Effect of s 104A of the *Sentencing Act* – effect of s 91 of the *Northern Territory National Emergency Response Act* 2007 (Cth)

Northern Territory Aboriginal Sacred Sites Act s 34(1)
Northern Territory National Emergency Response Act 2007 (Cth) s 91
Sentencing Act s 5, s 8, 104A

R v Wunungmurra (2009) 231 FLR 180, referred to
Cobiac v Liddy (1969) CLR 257; *Mansfield v Evans* [2003] WASCA 193, cited

REPRESENTATION:

Counsel:

Appellant:	G McMaster
Respondent:	M Johnson

Solicitors:

Appellant:	Solicitor for the Northern Territory
Respondent:	Povey Stirk

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

Aboriginal Areas Protection Authority v S & R Building & Construction Pty Ltd [2010] NTSC 3
No 20935996

BETWEEN:

ABORIGINAL AREAS PROTECTION AUTHORITY
Appellant

AND:

S & R BUILDING & CONSTRUCTION PTY LTD
(ACN 098 369 638)
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 10 January 2011)

Introduction

[1] On 17 September 2010 the respondent pleaded guilty to a charge that, contrary to s 34(1) of the *Northern Territory Aboriginal Sacred Sites Act,* on 24 October 2007 at Numbulwar in the Northern Territory of Australia the respondent carried out work on an Aboriginal sacred site. The Court of Summary Jurisdiction, without conviction, imposed a fine of $500 on the respondent and a victim levy of $40.

[2] At the time the respondent committed the offence the maximum penalty which could be imposed on a corporation was 2000 penalty units which amounted to a fine of $220,000. The value of a penalty unit at that time was $110.

[3] The appellant appeals against the sentence imposed on the respondent on the following grounds:

(1) the sentencing magistrate erred in law by imposing a sentence that was manifestly inadequate;

(2) the sentencing magistrate erred in law by failing to properly address s 8 of the *Sentencing Act*; and

(3) the sentencing magistrate erred in law by failing to adhere to the sentencing guidelines contained in s 5 of the *Sentencing Act*.

The Northern Territory Aboriginal Sacred Sites Act

[4] In the Northern Territory, Aboriginal sacred sites are protected by the *Northern Territory Aboriginal Sacred Sites Act*. The object of the Act is to effect a practical balance between the need to preserve and enhance Aboriginal cultural tradition in relation to certain land in the Northern Territory and the aspirations of the Aboriginal and all peoples of the Territory for their economic, cultural and social advancement, by establishing a procedure for the protection and registration of sacred sites, providing for entry onto sacred sites and the conditions to which such entry

is subject, and establishing a procedure for the avoidance of sacred sites in the development and use of land.

[5] A sacred site means a site that is sacred to Aboriginals or is otherwise of significance according to Aboriginal tradition, and includes any land that, under a law of the Northern Territory, is declared to be sacred to Aboriginals or of significance according to Aboriginal tradition.

[6] Under s 34(1) the *Northern Territory Aboriginal Sacred Sites Act* it is an offence for a person or corporation to carry out work on or use a sacred site. There are two defences provided by the Act to a charge that a corporation has engaged in conduct contrary to s 34(1) of the Act. First, it is a defence if it is proved that a corporation carried out work on the Sacred Site with, and in accordance with the conditions of, an Authority Certificate or a Minister's Certificate permitting the defendant to do so. Secondly, it is a defence if the defendant's presence on the sacred site would not have been unlawful if the land had not been a sacred site; and the defendant had taken reasonable steps to ascertain the location and extent of sacred sites on any part of the land visited by the defendant; and the defendant had no reasonable grounds for suspecting that the site was a sacred site.

The facts

[7] The facts of the offending are as follows.

[8] In the second half of 2007, Indigenous Business Australia[1] awarded a contract to NT Link to build a Government Business Manager facility in the Aboriginal Community of Numbulwar which is located in the Gulf of Carpentaria 570 kilometres east-southeast of Darwin. NT Link is the business name of a privately owned company based in the Northern Territory. NT Link subcontracted part of the construction works to the respondent. The respondent was retained to connect the facility to the local electricity, water and sewerage services.

[9] Prior to receiving planning approval NT Link sent two large trucks carrying containers of equipment and buildings to Numbulwar. The containers arrived at Numbulwar on 14 October 2007. They were placed opposite the proposed construction site while planning approval was sought.

[10] There was a sacred site to the rear of the containers. The sacred site is known as the Madayin Grounds. Kunabibi rituals are performed by men only at this site. Women are not permitted on the site as it is a men's site.

[11] On or about 24 October 2007 Mr Marc Renshaw, the managing director of the respondent, Mr Ross Pearce and Mr Nathan Bongiorno, who are servants of the respondent arrived at Numbulwar. Upon arrival the men were advised that the respondent's employees could use the bathroom and toilet facilities at the Training Centre which was approximately 100 metres from the

[1] A Statutory Authority established under the *Aboriginal and Torres Straight Islander Act 2005* (Cth).

construction site. However, the men were unable to access the toilet and bathroom facilities in the Training Centre.

[12] As a result, the respondent its servants and agents decided to build a pit toilet behind the containers so there was a toilet which they and others could use. Sand was dug out of the area where the pit toilet was located with a shovel. A hole about one metre deep was dug and a portable toilet seat was placed over the hole. Unbeknown to the men, the land on which the toilet was located was part of a sacred site.

[13] The respondent completed its contract work and its servants and agents left Numbulwar on 2 November 2007. The men did not have a permit to enter onto the Aboriginal land at Numbulwar. No Authority Certificates were issued for the building works at the time of the offence and no permission to enter the sacred site or to erect a toilet on the site was obtained from any of the traditional owners responsible for the site.

[14] Sometime between 2 and 5 November 2007 the custodians of the sacred site became aware that there was a toilet on the sacred site. They visited the site and found that the toilet was still in place with the shovel beside it and toilet paper was strewn across the sacred site.

[15] A victim impact statement was tendered in evidence. In it a number of traditional elders who are custodians of the sacred site state as follows. They feel bad, angry and hurt inside. Their hurt has not been healed and cannot be healed without proper compensation to restore the balance. Under

traditional Aboriginal law an offender would have to pay compensation or face spearing. The traditional owners feel ashamed about this incident. Other Aboriginal people across the top end of the Northern Territory from Groote Eylandt to Ngukurr, Borroloola, Bulman, Maningrida and Ramingining are all saying the traditional owners at Numbulwar have done the wrong thing by letting this happen. Great shame has been brought upon the traditional owners of the sacred site.

[16] By way of explanation of the offending Mr Stirk, who then appeared on behalf of the respondent, told the sentencing magistrate that the circumstances in which the respondent became involved in the matter were inextricably linked to the Northern Territory Intervention. The Northern Land Council granted a permit to enter on Aboriginal land to NT Link. The permit to enter was granted for the purposes of NT Link constructing the emergency accommodation at Numbulwar.

[17] NT Link designs and constructs and relocates service built transportable buildings. Once transported, the transportable buildings have to be connected to sewer and water services on the ground on which they are located. The respondent had the contract to connect the services to the transportable buildings that were placed at Numbulwar. Neither Indigenous Business Australia nor NT Link nor the respondent turned their minds to obtaining Authority Certificates for the construction works at Numbulwar. Further, the permit obtained by NT Link to enter Aboriginal land did not extend to the servants and agents of the respondent.

[18] The plan was that the employees of the respondent including Mr Renshaw, Mr Pearce and Mr Bongiorno were to have access to bathroom and toilet facilities at the Training Centre at Numbulwar. However, despite attempting to do so on two occasions, they were unable to obtain access to the bathroom and toilet facilities in the Training Centre. There was a pressing need for the respondent's employees to be able to access toilet facilities. A transportable pit toilet was amongst the materials they had been provided with and they constructed the toilet on the land which unbeknown to them was a sacred site.

[19] Within 24 hours of arrival Mr Renshaw and the other workers employed by the respondent managed to link up the toilet and water facilities in the transportable accommodation to the sewerage and water services at Numbulwar. Thereafter the toilets in the transportable accommodation were used by the workers in the normal way. Instructions were given to NT Link for the removal of the toilet which had been used in that first 24 hour period. However, NT Link failed to remove the toilet.

[20] It is common ground that the respondent its servants and agents did not know that the land on which the toilet was constructed was part of a sacred site. However, they failed to make any due enquiries as to whether any part of the land on which they were to undertake the construction work was a sacred site. They did not obtain a clearance from the Northern Territory Land Council. Nor did they obtain an Authority Certificate or a Minister's Certificate permitting the respondent to carry out work on the area of land

on which the toilet was placed. Nor did they obtain permission to construct the toilet from any custodians of the sacred site.

[21] It should be noted that the land on which the Government Business Manager's facility was to be constructed was not a sacred site. The only work done on the sacred site was the construction of the pit toilet.

Subjective factors

[22] The incident took place some two years after the respondent was incorporated. The respondent has been trading in Central Australia since 2005. The company had no prior convictions. It was a first offender.

[23] The respondent its servants and agents have shown remorse for their conduct. The matter proceeded as a plea once a number of issues about the exact location the toilet and the sacred site were clarified. Mr Renshaw and Mr Pearce apologised to the traditional owners by way of letters and a statutory declaration and Mr Smith, who is a director of NT Link, also conveyed the respondent's apologies to a meeting of traditional owners which was held on 19 December 2007.

The remarks of the sentencing magistrate

[24] The sentencing magistrate made the following remarks:

> Taking into account all of the factors including the temporary use of the works by the people who placed them there and I am not going to take into account the permanent nature because in a sense that amounts to a desecration, in my view that has now been withdrawn. Given the prior history of the company, without conviction, they are fined $500 plus the $40 levy.

[25] It is apparent from the sentencing magistrate's remarks that, having considered the circumstances of the offending and the respondent's antecedents and remorse, he thought it expedient to exercise the power granted to him under s 8 of the *Sentencing Act*.

The submissions of the appellant

[26] As to the first ground of appeal, the appellant submitted that parliament considers such offences to be serious offences. At the time of the offending parliament had specified a maximum fine for a corporation of $220,000. The objective circumstances of the offending were serious. The respondent knew it was on Aboriginal land. There were procedures available to the respondent to ensure that no work was undertaken by its servants and agents on an Aboriginal sacred site and the respondent chose not avail itself of these procedures. The respondent foresaw that a possible consequence of it constructing the toilet on the land was that work would be done on a sacred site and an ordinary person similarly circumstanced and having such foresight would not have engaged in that conduct. The site on which the respondent placed the toilet was sacred to Aboriginal people or was otherwise of significance according to Aboriginal tradition. It was not just any piece of land. The sacred site was still used and cared for by Aboriginal people and the traditional custodians of the site were emotionally traumatised and shamed by the offence committed by the respondent. There was a need for denunciation and both specific and general deterrence. In the

circumstances the penalty imposed by the Court of Summary Jurisdiction was so unreasonable and so plainly unjust as to be manifestly inadequate.

[27] As to the second ground of appeal, the appellant submitted the only factor referred to in s 8(1) of the *Sentencing Act* which was established by the evidence was the fact that the respondent was a first offender. The offence committed by the respondent was not a trivial offence and there were no truly extenuating circumstances. The onus was on the respondent to ensure that its servants and agents did not conduct work on a sacred site and there were statutory provisions for ensuring that did not occur. The respondent showed a casual disregard for the rights of Aboriginal people. The respondent's servants and agents were not even lawfully on Aboriginal land. The respondent did not obtain a permit to enter Aboriginal land so that its servants and agents could lawfully enter Aboriginal land. In the circumstances there was no reasonable basis for the sentencing magistrate to exercise the discretion granted by s 8(1) of the *Sentencing Act*.

[28] As to the third ground of appeal, the appellant submitted that the sentencing magistrate had failed to give sufficient weight to denunciation, to the emotional harm suffered by the victim's, to the damage, injury or loss caused by the offender and to the fact that the respondent's plea of guilty was not a plea at the earliest opportunity. As to the question of damage, counsel for the appellant initially submitted that according to traditional Aboriginal law and custom the damage to the site was permanent and irreparable. However, counsel for the appellant ultimately and properly, in

my opinion, conceded that neither this Court nor the sentencing magistrate could have regard to this submission because no affidavits in support of the submission had been read in accordance with s 104A of the *Sentencing Act* and under s 91 of the *Northern Territory National Emergency Response Act 2007* (Cth) a sentencing court must not take into account any form of customary law or cultural practice as a reason for aggravating the seriousness of the criminal behaviour to which the offence relates[2]. The fact that these matters cannot be taken into account in a case such as this re-emphasises the comments I made about s 91 of the *Northern Territory National Emergency Response Act* in *R v Wunungmurra*[3].

Section 8 of the Sentencing Act

[29] Section 8 of the Sentencing Act states:

> (1) In deciding whether or not to record a conviction, a court shall have regard to the circumstances of the case including:
>
> (a) the character, antecedents, age, health or mental condition of the offender;
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> (b) the extent, if any, to which the offence is of a trivial nature; or
>
> (c) the extent, if any, to which the offence was committed under extenuating circumstances.

[30] Prior to exercising his or her discretion under s 8 of the *Sentencing Act*, the sentencing magistrate must be of the opinion that:

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[2] *R v Wunungmurra* (2009) 231 FLR 180.
[3] (2009) 231 FLR 180 at par [25].

> … the exercise of the power is expedient because of the presence and effect of one or more of the stated conditions, …. One of these by itself, or several of them taken together, must provide a sufficient ground for a reasonable man to hold that it would be expedient to extend the leniency which the statute permits. The Act speaks of the court exercising the power it confers "having regard to" the matters it states. I read that as meaning more than merely noticing that one or more of them exists. Its or their existence must it seems to me reasonably support the exercise of the discretion the statute gives. They are not mere pegs on which to hang leniency dictated by some extraneous and idiosyncratic consideration. *But they are wide words. None of the matter they connote is necessarily to be regarded in isolation from the others, or apart from the whole of the circumstances of the offender and the offence* [emphasis added][4].

[31] In *Mansfield v Evans*[5] Pullin J stated:

> The word "extenuating" means in ordinary meaning "to serve to make the offence seem less serious": see "Macquarie Dictionary". In *Lanham v Brake* (1983) 74 FLR 284, it was said that "extenuating circumstances" are those "that lessen, or seem to lessen, the seeming magnitude of (guilt or offence) by partial excuses". In *O'Sullivan v Wilkinson* [1952] SASR 213, the phrase was said to mean circumstances which excuse, in any appreciable degree, the commission of the offence charged. See also *Nitschke v Halliday* (1982) 30 SASR 119. Extenuating circumstances may be many and varied, but there must be some link between the extenuating circumstances relied on and the commission of the offence. This is because the provision does not allow the court to have regard to extenuating circumstances generally. The court has to decide "the extent to which the offence was committed under extenuating circumstances": *Commissioner of Taxation v Baffsky* (supra) at [47].

Consideration

[32] In my opinion, the sentence imposed on the respondent was not manifestly inadequate nor did the sentencing magistrate fail to have regard to the provisions of s 5 and s 8 of the *Sentencing Act*. It was the task of the

[4] *Cobiac v Liddy* (1969) 119 CLR 257 per Windeyer J at 275.
[5] [2003] WASCA 193 at [20].

sentencing magistrate to consider all the circumstances of the offending and the circumstances of the particular offender and judge whether the case fell within the bounds of s 8(1)(a), (b) or (c) of the *Sentencing Act*. A magistrate does not fall into error in his or her discretion provided such discretion is exercised within the scope of the legislation. I can see no error in the exercise of the sentencing magistrate's discretion. It was exercised within the bounds of the law as provided by s 5 and s 8 of the *Sentencing Act*.

[33] The gravamen of the offence was that the respondent its servants and agents were negligent in not conducting proper enquiries or obtaining necessary certificates prior to going on to the land. The respondent did not deliberately conduct the work on the sacred site. Its servants and agents did not know there was a sacred site at the location where the toilet was constructed. The offence was committed under extenuating circumstances. The construction of the toilet took place on the spur of the moment in circumstances where other works were lawfully being conducted in a remote location on Aboriginal land and there was no other toilet facility available to the respondent its servants and agents. The works were to take a number of days to complete and through no fault of theirs the respondent's servants and agents could not access the toilet facilities which they were told they could use. The construction of the toilet involved very minor works. A small hole, one metre deep, was dug in the ground and a removable portable seat was placed on top of it. From a practical point of view the matter could

be rectified by removing the toilet cover and refilling the land on which the toilet was constructed. Instructions were given to NT Link to this effect. The toilet was only used for a period of 24 hours. As soon as the services were connected to the facility, the employees of the respondent used the toilet in the Government Managers facility. Prior to the offending the respondent was of good reputation and the servants and agents of the respondent are genuinely remorseful about their conduct.

[34] In the circumstances the appeal should be dismissed and I will hear the parties further as to costs.
