

***Olsen v Sims* [2010] NTCA 8 (30 November 2010) – Northern Territory Court of Appeal**

‘Breach of restraining order’ – ‘Repeal of statute’ – ‘Statutory interpretation’

Charge: Breach of restraining order

Appeal type: Appeal against sentence

Facts: The appellant was convicted of breaching a restraining order. Some months later he was convicted of failing to comply with the terms of the order. Contrary to the order, the appellant visited the victim at her home and entered in a verbal argument with her after consuming alcohol. The restraining order was made and the offences were against the *Domestic Violence Act 1992* (NT) (the former Act). This Act was repealed on 1 July 2008 and replaced by the *Domestic and Family Violence Act 2007* (NT) (the current Act). The appellant’s trial in respect to the second offence did not occur until after the current Act came into force. The magistrate found that sentencing provisions under the former Act applied to the appellant. Under s 10(1A) of the former Act, where a person is found guilty of a second offence the Court must impose a minimum sentence of at least seven days’ imprisonment. Accordingly, the magistrate imposed a sentence of seven days’ imprisonment. Section 121 of the current Act provides no mandatory minimum sentence for a second breach where no harm is caused and the court is satisfied it is not appropriate to record a conviction and sentence in the circumstances.

On appeal to the Supreme Court, Riley J held the magistrate did not err in sentencing the appellant.

Issue: Whether the magistrate erred in punishing the appellant to a greater extent than was authorised by the current Act by imposing the mandatory sentence of imprisonment of seven days under s 10(1A) of the former Act.

Decision and Reasoning: All three judges on the Court of Appeal allowed the appeal. The sentence was quashed and the matter was referred back to the Court of Summary Jurisdiction for the appellant to be resentenced.

Section 14(2) of the *Criminal Code* (NT) provides that while the appellant could be sentenced under the former Act for his second breach of the restraining order, he could not be punished to any greater extent than was authorised by both the former Act and the current Act.

Mildren J concluded that the mandatory minimum sentence of seven days' imprisonment under s 10(1A) of the former Act is a punishment 'to any greater extent than is authorised by the current law' pursuant to s 14(2) of the *Criminal Code* (NT). The Magistrate's discretion to impose a lesser sentence than seven days under the current Act conferred a punishment to a greater extent than authorised by the current Act.

Southwood J, agreeing with Mildren J, held that the sentence of seven days imprisonment imposed on the appellant was a greater punishment than authorised by ss 121(1) and (3) of the current Act. Those provisions of the current Act decreased the severity of the penalty required to be imposed for a second breach of a restraining order for the purposes of s 14(2) of the *Criminal Code* (NT). The sentence imposed was disproportionate to the gravity of the offending. Had the magistrate sentenced the appellant pursuant to s 121, he would not have imposed a sentence of seven days' imprisonment. As a result, the Magistrate failed to sentence the appellant in accordance with s 14(2) of the *Criminal Code* (NT).

Blokland J held that s 121(3) of the current Act does not authorise a sentencing magistrate to sentence on the basis that its starting point is a conviction and seven days' imprisonment unless that penalty is appropriate and just in all the circumstances. This was the approach of the magistrate in finding he was bound to apply the mandatory minimum term under s 10(1A) of the former Act. The sentence imposed by the magistrate was not authorised when considering the application of s 14(2) of the *Criminal Code* (NT).