

Lalara v Day

12 December 2003

Angel ACJ, Thomas & Bailey JJ

Ex tempore judgment

On 21 January 2003, the appellant Lalara was sentenced by the Court of Summary Jurisdiction to imprisonment for nine months following his plea of guilty to one count of unlawfully entering business premises and unlawfully damaging property in the business premises contrary to s. 226B(2) of the *Criminal Code*. The offence carries a maximum penalty of seven years imprisonment.

The appellant then appealed to the Supreme Court on the grounds that the sentence was manifestly excessive, and that the magistrate erred in failing to consider alternative sentencing options. The court allowed the appeal holding that the sentencing magistrate had erred in his treatment of the appellant's prior convictions. The court was of the view that a significant period free from conviction normally justifies substantial mitigation. Here, there was a gap from 1991 to 2000, when a relevant offence was committed, and a further gap of two and a half years before this event. To hold, as did the magistrate, that in those circumstances the appellant was disentitled to mitigation of sentence, including by way of suspension of it, wholly or in part, amounted to error.

On 20 August 2003, the Supreme Court quashed the sentence of imprisonment of nine months and, in lieu thereof, sentenced the appellant to six months imprisonment to be suspended after he had served three months. An operational period of one year and six months from the date of release from custody was fixed. See *Lalara v Day* [2003] NTSC 90. The practical effect of the order was that appellant was released from custody on 20 August 2003, having served seven months of what was now a three month sentence with a further three months hanging over his head if he offended within the operational period.

In fixing the new sentence, the Supreme Court overlooked the fact that the appellant had not sought bail pending the determination of his appeal by the Supreme Court and that as a consequence thereof, he had in fact served seven months imprisonment by the time the appeal was determined. In the event the appellant breached the terms of the suspended sentence, he was liable to serve an additional three months imprisonment on top of the seven months already served. Thus the appellant was exposed to the possibility of having to serve a greater sentence (10 months) than that imposed by the court (six months).

The appellant appealed to the Court of Appeal seeking an order that that part of the order of the Supreme Court suspending three months of the sentence and fixing an operational period be set aside. The respondent did not oppose the orders sought and conceded the appeal because of the error caused by the oversight. In an *extempore* judgment, the Court of Appeal allowed the appeal, confirmed the sentence of six months imprisonment imposed by the Supreme Court on 20 August 2003, backdated the sentence to commence on 21 January 2003, and vacated the orders suspending part of that sentence and fixing an operational period.