

Reid v Rowbottam

11 February, 1 March 2005

(BR) Martin CJ, Riley & Southwood JJ

**[2005] NTSC 7, 15 NTLR 1, 190 FLR 17, 152 A
Crim R 132**

In August 2004, the appellant pleaded guilty to one count of aggravated unlawful assault which was committed in May 2004. In sentencing the appellant to 4 months imprisonment, suspended after 14 days, the magistrate treated a conviction recorded against the appellant in July 2004, for offences committed in 1993, as being a prior conviction for the purpose of s.78BA of the *Sentencing Act*. Section 78BA provides that where an offender is found guilty of a second or subsequent violent offence, the court must order that the offender serve a term of actual imprisonment or a term of imprisonment that is partly, but not wholly, suspended.

The appellant appealed against the sentence to the Supreme Court on the basis that the magistrate's sentencing discretion had miscarried. The appellant argued that a prior conviction had to be recorded before the commission, not the conviction, of a subsequent offence to attract a mandatory sentence. Because of a divergence of opinion between members of the Supreme Court, the judge hearing the appeal referred the appeal to the Full Court.

A general rule of construction has developed in relation to statutory provisions imposing increased penalties in relation to second or subsequent offences. The general rule is that where the legislature imposes an increased penalty for a second offence, the second offence is an offence committed after conviction of a first offence (unless there is some indication in the particular Act that raises an inference to the contrary). In the present case, the primary issue for determination was whether s.78BA displaced that general rule.

The court allowed the appeal holding that:-

1. The magistrate erred in determining that s.78BA of the *Sentencing Act* obliged him to order that the appellant serve a term of actual imprisonment or a term of imprisonment that was partly, but not wholly, suspended. The error was significant and the sentencing discretion therefore miscarried.
2. Section 78BA has the ultimate purpose of protecting the public. In achieving that purpose, its deterrent effect is particularly important. The legislature intended that where an offender is guilty of a violent offence, that offender knows that the commission of a second violent offence will result in a mandatory period of imprisonment. That knowledge, and the deterrent effect flowing from that knowledge, necessarily cannot exist if the second offence is committed before the offender has been found guilty of the first offence.
3. *D v Gokel* (1998) 101 A Crim R 587, a decision to the contrary, was wrongly decided and should be overruled.