SUPREME COURT OF SOUTH AUSTRALIA

(Magistrates Appeals: Civil)

GOTTLOB v TIGER AIRWAYS PTY LTD

[2011] SASC 36

Judgment of The Honourable Justice Anderson

22 March 2011

MAGISTRATES - APPEALS AND REVIEW - SOUTH AUSTRALIA - APPEAL TO SUPREME COURT

MAGISTRATES - JURISDICTION AND PROCEDURE GENERALLY - PROCEDURE - ORDERS AND CONVICTIONS - SENTENCING - IMPOSITION OF FINES

Appeal from decision of a magistrate - respondent airline pleaded guilty and was convicted of a breach of curfew contrary to s 6(1) of the Adelaide Airport Curfew Act 2000 (Cth) - the magistrate imposed a $5,000 fine on respondent - appeal to Supreme Court by the Commonwealth against quantum of fine imposed - whether the magistrate erred in categorising the offence as at the "lower end of the scale" - whether the fine imposed was manifestly inadequate.

Held: Magistrate erred in categorising offending at the lower end of the scale - fine imposed by magistrate inadequate and does not reflect seriousness of the breach - appeal against quantum of fine allowed - $21,250 fine imposed.

Adelaide Airport Curfew Act 2000 (Cth) s 6, referred to.
Commonwealth Department of Transport and Regional Services v Lauda-Air 2002, unreported, New South Wales Local Court, distinguished.
Department of Infrastructure, Transport, Regional Development and Local Government v Jetstar Airways Pty Ltd 2009, unreported, New South Wales Local Court, discussed.
Scroi (1989) 40 A Crim R 197; *R v Ozenkowski* (1982) 30 SASR 212; *Everett v R* (1994) 181 CLR 295; *Police v Cadd* (1997) 69 SASR 150; *Commissioner of Taxation v Doudle* [2005] SASC 442, considered.

On Appeal from MAGISTRATES COURT OF SOUTH AUSTRALIA (MAGISTRATE CANNON) AMC-10-9698

Appellant: ROGER LEONARD GOTTLOB Counsel: MS M BARNES - Solicitor: DIRECTOR OF PUBLIC PROSECUTIONS (CTH)
Respondent: TIGER AIRWAYS PTY LTD Counsel: MS J FULLER - Solicitor: LOGIE SMITH LANYAN LAWYERS

Hearing Date/s: 17/02/2011

File No/s: SCCIV-10-1790

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Magistrates Appeal: Civil

ANDERSON J.

Introduction

1 This is an appeal by Roger Leonard Gottlob, of the Department of Infrastructure, Transport, Regional Development and Local Government, from a decision of a magistrate delivered on 10 December 2010. The magistrate convicted the respondent airline of a breach of curfew contrary to s 6(1) *Adelaide Airport Curfew Act 2000* (Cth) (the Curfew Act). The respondent pleaded guilty to the offence and was fined $5,000. The appeal is against the quantum of the fine imposed on the respondent. The appellant claims that the fine imposed is manifestly inadequate. The maximum penalty for the offence is $110,00 for a body corporate.

Background

2 An agreed summary of facts was provided to the magistrate. The respondent, Tiger Airways Pty Ltd, was the operator of an aircraft scheduled to depart Adelaide Airport on a flight to Perth at 10.15 pm on 30 August 2010.

3 Section 6(1) of the Curfew Act prohibits aircraft from taking off from Adelaide Airport during the curfew period, being between the hours of 11.00 pm and 6.00 am. There is an exception to this prohibition where an aircraft operator is granted a dispensation permitting the operator to take off during the curfew period. See s 6(2) of the Curfew Act.

4 Section 6 of the Curfew Act states:

> **6 Prohibition on taking off or landing during curfew periods**
>
> (1) The operator of an aircraft commits an offence if:
>
> (a) the operator engages in conduct; and
>
> (b) the conduct results in an aircraft taking off or landing at Adelaide Airport during a curfew period.
>
> Penalty: 200 penalty units.
>
> (2) Subsection (1) does not apply if the take off or landing is permitted under Part 3.
>
> Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the Criminal Code).
>
> (3) In this section:

engage in conduct means:

(a) do an act; or

(b) omit to perform an act.

5 In this matter the respondent sought and was granted two consecutive dispensation orders on the night in question in accordance with Part 3 of the Curfew Act.

6 The first dispensation was requested after a hydraulic leak was discovered in the aircraft designated to undertake the subject flight. The respondent sought and obtained a replacement aircraft, resulting in delay to the departure time. The dispensation was granted extending the time for departure to 11.10 pm.

7 The second dispensation was requested by the respondent after it became apparent there would be a delay in refuelling the replacement aircraft. The second dispensation was granted to 11.20 pm.

8 The issue in this matter centres on the respondent's third request for dispensation. At or about 11.12 pm it became apparent to the respondent that refuelling would not be completed by the 11.20 pm deadline. At this time all passengers had boarded the aircraft. The respondent sought a third dispensation to accommodate the additional delay but that request was denied.

9 The captain of the aircraft was advised on a number of occasions, including by Adelaide Air Traffic Control, that no dispensation extension applied after 11.20 pm. In the summary of facts before the magistrate, the parties agreed that at or about 11.30 pm, the captain rang Air Traffic Control and asked if they would allow the aircraft to depart. The air traffic controller advised the captain that no additional dispensation had been granted beyond 11.20 pm, but confirmed that Air Traffic Control could not stop the aircraft departing. The captain advised that the relevant representative of the respondent would "sort out" the situation in the morning. The captain sought clearance to depart almost immediately and clearance to depart was granted by Air Traffic Control.

10 Despite being informed that it was not entitled to take off after 11.20 pm, the respondent departed Adelaide Airport at 11.41 pm, 21 minutes outside the time of the last dispensation and therefore in breach of curfew.

Grounds of Appeal

11 The appellant has raised three grounds of appeal in its notice of appeal, being:

1. The sentence was manifestly inadequate.

2. The Learned Sentencing Magistrate erred by giving undue weight to the convenience of passengers, the flight path and that the mechanical problems experienced by the respondent were unforseen.

3. The Learned Magistrate erred by not placing sufficient weight on the deliberate and flagrant nature of the offending, the financial motivation behind the offending and the interests of the residents.

12 On appeal, the appellant ask the court to set aside the fine imposed by the magistrate and impose a more substantial fine on the respondent.

Submissions of the Appellant

13 Counsel for the appellant, Ms Barnes, submitted that the sentence imposed was in all the circumstances manifestly inadequate. As indicated earlier, the maximum penalty for the offence is a fine of $110,000. The penalty imposed in this case was $5,000, being just less than 5% of the maximum amount.

14 Ms Barnes submitted that the magistrate erred in exercising his sentencing discretion by giving undue weight to certain factors. In particular, it was submitted that the magistrate gave greater weight to the convenience of the aircraft passengers then to the interests of residents in the aircraft's flight path. It was submitted that the clear policy of the Curfew Act is to prefer the interests of residents (the majority) over passengers (the minority). There was information before the magistrate which indicated that the aircraft took off over the sea in a south-west direction and therefore affected fewer residents then if it had taken off in the opposite direction over the city. Ms Barnes submitted that the magistrate gave undue weight to this mitigating factor when the policy of the Curfew Act is to protect all members of the community from undue noise pollution associated with aircraft take off and landing.

15 Ms Barnes further submitted that the magistrate erred in giving undue weight to the fact the circumstance of the refuelling delay was unforseen and that the respondent had no prior offending.

16 Although the magistrate's sentencing remarks are brief, counsel submits that it can be inferred from the sentencing remarks that the magistrate formed the view that the offending was rendered less serious by these factors.

17 Ms Barnes further submitted that any discount given by the magistrate to the quantum of the fine for the respondent's guilty plea should be a lesser discount. Ms Barnes referred to *Scroi* (1989) 40 A Crim R 197 at 200-201, and the principle in that case that there should be a lesser discount given for a guilty plea where it is clear there is a strong case against the respondent. It is not clear from the magistrate's sentencing remarks what, if any, discount was given for the respondent's guilty plea. However, given that the guilty plea was mentioned by the magistrate, I accept that some discount was given. I will assume the discount was about 15% which means that the starting point for the fine was about $6,000.

18 It was further submitted that, given the offence is one under Commonwealth legislation, the court ought to interfere to set and maintain adequate sentencing standards for such offences. Ms Barnes submitted that the high maximum penalty for this offence of $110,000 is a clear indication that Parliament considered this offending to be serious. This submission must be examined in light of the fact that the equivalent legislation for Sydney Airport fixed the maximum penalty at $550,000. That makes standards between jurisdictions difficult to apply, although comparisons can be made as to where the fine sits in the context of seriousness.

19 It was submitted that the magistrate erred in characterising the subject offending as being at the lower end of the scale of offending. Ms Barnes submitted that the respondent's offending was deliberate and flagrant in circumstances where the respondent was well aware they were going to be departing in breach of curfew and therefore could not be at the lower end of the scale.

20 Ms Barnes referred to the decision in *Department of Infrastructure, Transport, Regional Development and Local Government v Jetstar Airways Pty Ltd* (2009, unreported, New South Wales Local Court) as an analogous case. In *Jetstar*, the aircraft operator applied for and was refused a dispensation. Jetstar was aware it had been refused a dispensation before the decision was made to take off, 28 minutes into the curfew period. The magistrate of the New South Wales Local Court characterised the airline's breach of curfew as both wanton and deliberate and imposed a fine of $148,500, approximately 25% of the maximum penalty of $550,000. This was contrasted with the case of *Commonwealth Department of Transport and Regional Services v Lauda Air* (2002, unreported, New South Wales Local Court), a case submitted by Mr Burns to be an example of offending at the lower scale of offending. In this case the airline breached curfew by three to four minutes due to a safety check and was fined $10,000 out of a possible $550,000.

21 Finally, it was submitted that the $5,000 fine imposed by the magistrate was so inadequate as to serve as no real specific or general deterrence. Ms Barnes submitted that a penalty must be of a sufficient level to ensure there is no temptation on the part of the respondent company or another airline to make a commercial decision to breach curfew.

Submissions of the Respondent

22 Ms Fuller, counsel for the respondent, submitted that the magistrate took into account all relevant matters in forming his view that the offending was at the lower end of the scale of seriousness. The magistrate has not been shown to be wrong in either his assessment of the facts nor in the exercise of his discretion.

23 Ms Fuller responded to my request that I be addressed specifically as to whether the magistrate had erred in his consideration of either or both specific and general deterrence. I indicated that both aspects troubled me.

24 Ms Fuller submitted that in terms of specific deterrence the magistrate properly considered that it was a matter that did not assume prominence given the operational procedures that had been implemented by the respondent following the offence.

25 Ms Fuller emphasised that there was no dispute that proper internal operational procedures had been implemented by the respondent after the incident. This included amendments by the respondent airline to the various operation manuals of the flight staff to make it explicitly clear that there is no flexibility surrounding curfew requirements. She submitted that there was no reason for the magistrate to have any doubts that such new procedures would be conscientiously followed given the airline's unblemished record. The magistrate said as much in his brief reasons.

26 In terms of general deterrence, Ms Fuller submitted that this factor should also assume little prominence in this case because of the fact of the two successful dispensation applications. It was Ms Fuller's submission that the consideration of general deterrence should be determined by reference to the particular facts of the case. Ms Fuller submitted that the learned sentencing magistrate was correct to characterise the respondent's offending as at the lower end of the scale. It was submitted that the magistrate correctly weighed the unforseen nature of the mechanical issues, the fact there were no prior breaches by the respondent, and the fact two dispensation applications had been successfully granted. Mr Fuller maintained that this was all relevant to the question of general deterrence.

27 Section 6(2) of the Curfew Act contemplates that in certain circumstances aircraft will be permitted to take off into the curfew period. Ms Fuller submitted that this is persuasive in that Parliament considered there would be certain circumstances where disturbance to the amenity of residents is permitted. Although there are no guidelines in the Curfew Act, Ms Fuller submitted that factors such as the unforseen nature of the mechanical failure, whether the aircraft could reduce noise pollution by taking off over water, the number of passengers involved and the likely hardship to the passengers, were all factors taken into account in determining whether to grant a dispensation and therefore were appropriate to be taken into account by the magistrate. She submitted that the magistrate was reflecting the criteria that justified the original dispensations and these were appropriate considerations to take into account in mitigating penalty.

28 Finally, Ms Fuller submitted that this is not an appropriate case for setting a sentencing standard for this type of offence.

Consideration

29 In my view the issue comes down to whether, despite all the mitigating factors, the fine imposed is so far out of a reasonable range for penalty that this court is justified in interfering.

30 The principles relating to Crown appeals against sentence must be considered. Those principles permit allowing appeals for the purpose of maintaining adequate sentencing standards, ensuring consistency in those standards or to correct any manifest inadequacy. It is really only the last of those principles which is relevant here. See *R v Osenkowski* (1982) 30 SASR 212 and *Everett v R* (1994) 181 CLR 295.

31 It seems to me that a $5,000 fine for breach of curfew, by a deliberate act by the respondent to ignore the Commonwealth authority is a very minimum penalty.

32 I accept what Ms Fuller submits as to specific deterrence and I would not interfere on that account.

33 In relation to general deterrence Ms Fuller puts it that, because of the peculiar facts of this matter, any penalty is not really going to be looked at from the point of view of a general deterrence to others. I do not agree.

34 I think it is important to indicate that a flagrant breach, albeit with some deficiencies in the airline's communication systems, including its operation manuals, is a serious breach.

35 I am of the view that the magistrate did not properly consider the aspect of general deterrence in his assessment of the seriousness of the offence. It is a small price to pay, that is $5,000, for a deliberate breach of the curfew purely for reasons associated with the convenience and commercial advantage of the airline. It does not adequately bring home to the corporate offender the seriousness of the offence.

Conclusion

36 This is the first prosecution for this offence in South Australia since the legislation was enacted in 2000. General deterrence is nevertheless important. In my view the offending was more akin to the offending referred to in the *Jetstar* decision than that in the *Lauda Air* decision.

37 In my view the offending in *Lauda Air* was clearly at the lower end of the scale. I do not consider this offending was of that order. I consider it more serious. It warranted a fine of more than about 5% of the maximum. It is not at the higher end of the scale of seriousness but a fine of $5,000 does not reflect the seriousness of the breach. I disagree with the magistrate that it is an offence at the lower end of the scale.

38 In my view the appropriate fine for this offending is $25,000. I will then reduce that by 15% for the guilty plea, making the fine payable by the respondent $21,250. I therefore allow the appeal. I will hear the parties as to costs.