SUPREME COURT OF QUEENSLAND

CITATION:	*R v Alibasic and Salajdjiza; ex parte Cth DPP* [2005] QCA 108
PARTIES:	**R** v **ALIBASIC, Ismet** (respondent) **EX PARTE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (appellant) **R** v **SALAJDJIZA, Omer** (respondent) **EX PARTE COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (appellant)
FILE NO/S:	CA No 401 of 2004 CA No 402 of 2004 DC No 2015 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Sentence Appeal by Cth DPP
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 April 2005
DELIVERED AT:	Brisbane
HEARING DATE:	22 March 2005
JUDGES:	McPherson and Keane JJA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**In each appeal:** **1. sentence appeal by Commonwealth Director of Public Prosecutions allowed** **2. the following sentence be substituted:** **12 months imprisonment, to be released after having served four months imprisonment upon giving security by recognizance in the sum of $1,000 conditioned that he be of good behaviour for a period of five years**

3. direct that the Sheriff reduce the recognisance release order to writing and cause a copy to be given to the respondent, together with an explanation of the purpose and consequences of making that order

4. a warrant issue for the apprehension of the respondent but lie in the registry for 48 hours

CATCHWORDS: CRIMINAL LAW - APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION - APPEAL AGAINST SENTENCE - APPEAL BY ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER - APPLICATIONS TO INCREASE SENTENCE - OTHER OFFENCES - where two accused each pleaded guilty to one count of unlawfully moving tobacco leaf - where each accused sentenced to 12 months imprisonment - where each accused to be released forthwith upon giving a recognizance in the sum of $1,000 - where condition of recognizance is that the accused be of good behaviour for five years - whether sentencing judge had fixed sentence in appropriate range - whether sentence imposed was manifestly inadequate

Excise Act 1901 (Cth), s 44, s 117D

R v Kopa; ex parte DPP (Cth) [2004] QCA 100; (2004) 206 ALR 197, considered

R v Melano; ex parte Attorney-General of Queensland [1994] QCA 523; [1995] 2 Qd R 186, cited

R v Solway; ex parte Attorney-General of Queensland [1995] QCA 374; CA No 164 of 1995 and CA No 187 of 1995, 22 August 1995, cited

COUNSEL: G R Rice for appellant
A J Donaldson for respondents

SOLICITORS: Commonwealth Director of Public Prosecutions for appellant
Jacobson Mahony Lawyers (Southport) for respondents

[1] **McPHERSON JA:** I agree with the reasons of Keane JA for allowing this appeal by the Commonwealth Director of Public Prosecutions, and with the orders he proposes.

[2] **KEANE JA:** These appeals were heard together. The respondents each pleaded guilty to one count of unlawfully moving tobacco leaf in contravention of s 117D(1) of the *Excise Act* 1901 (Cth). The offence was committed on 8 September 2002.

[3] The learned sentencing judge ordered that, in each case, a conviction be recorded; and sentenced each respondent to imprisonment for 12 months but ordered that each respondent be released forthwith upon his giving security by recognizance in the sum of $1,000 conditioned that he be of good behaviour for a period of five years.

[4] The Commonwealth Director of Public Prosecutions ("the DPP") appeals against that sentence on the grounds that the learned sentencing judge erred in law in

holding that the decision in this Court in *R v Kopa; ex parte DPP (Cth)*[1] applied only in relation to offending that occurred after April 2004, and on the further ground that the sentence is manifestly inadequate.

Background

[5] At 11.20 pm on 8 September 2002, the respondent Alibasic was stopped by police at the Kennedy Highway near Walkamin. He was driving a truck which had been following a Toyota Camry motor vehicle being driven by Salajdjiza. Twenty-four bales of tobacco were found in the back of the truck. The respondents had been observed transporting the tobacco from Veness Road in Dimbulah. The total weight of the tobacco was 2,480.36 kgs. The total amount of excise which would have been payable on that tobacco was $645,402.40. Neither the respondent nor Salajdjiza had permission under s 44 of the *Excise Act* 1901 (Cth) to transport the tobacco.

[6] The Toyota Camry had been rented by the respondent Salajdjiza that day. When he was interviewed by police he falsely denied any connection with the truck and the respondent.

[7] The respondent Alibasic, when interviewed by the police, said that he had rented the truck in Brisbane a few days earlier and had driven to Cairns. He said that he did not know who had loaded the bales in the truck; and he gave no information as to where the bales had been collected or from whom he had received his instructions.

[8] The respondent Alibasic was born in Bosnia on 13 July 1952. Thus he was aged 50 at the date of the commission of the offence.

[9] The respondent Salajdjiza was born in Yugoslavia on 23 February 1969. He was aged 33 at the date of the commission of the offence.

The sentence

[10] The maximum penalty for each offence is two years imprisonment or the greater of:

(a) a fine of $55,000; and

(b) five times the amount of duty that would be payable if the tobacco had been manufactured into excisable goods.[2]

Therefore, a total fine of $3,227,012 could have been imposed in each case.

[11] The learned sentencing judge referred to the circumstances that each respondent had no prior convictions, and had made an early plea of guilty. His Honour held that there was no reason to differentiate between the criminality of the respondents.

[12] The DPP relied upon the decision of this Court in *Kopa* in support of a submission that a head sentence of 12 to 16 months represented the appropriate range and, more importantly, that each respondent should be required to serve four months of actual imprisonment.

The issues on appeal

[13] In *Kopa*, Williams JA, with whom the other members of the Court agreed, said:[3]

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1 [2004] QCA 100; (2004) 206 ALR 197.

2 *Excise Act* 1901 (Cth) s 117D(1)(b).

3 [2004] QCA 100 at [25]; (2004) 206 ALR 197 at 204.

> "[25] While there is not a direct comparison between these and other offences broadly categorised as defrauding the Commonwealth where sentences involving actual terms of imprisonment are regularly imposed, nevertheless it is the fact that these offences are but another instance of that type of offending. Deliberately defrauding the revenue is a serious offence and, particularly where the amount involved is large, a significant custodial sentence is called for. As the type of offence in question is prevalent a deterrent penalty is called for. Against that background any sentence which did not require the offender to serve at least 6 months in actual custody where the excise avoided was more than $500,000 would, in my view, be inappropriate. Where the amount of duty avoided was between $250,000 and $500,000 an appropriate sentence recognising the seriousness of the offence and the need for deterrence would ordinarily involve the offender serving at least 3 months in actual custody. Of course, as noted above, factors personal to the offender could justify the imposition of some other (higher or lower) sentence."

[14] Counsel for the respondents sought to persuade the learned sentencing judge that the decision of this Court in *Kopa* was not intended to afford direction as to the appropriate range of sentence in respect of the offence in question, but rather was to be understood as expressing the Court's view as to the appropriate range of sentence applicable to offences committed after the date of the decision in *Kopa*, viz 8 April 2004. It is apparent, from the record of the proceedings and from the learned sentencing judge's reliance on earlier decisions in which a custodial sentence was not imposed, that his Honour acceded to this submission. In doing so, in my respectful opinion, the learned sentencing judge fell into error.

[15] It is apparent from the reasons of Williams JA in *Kopa*[4] that the only reason a custodial sentence was not imposed in that case was that at the time when the respondents there were sentenced, the sentence imposed was within the range of sentences being imposed at that time. It is also clear that the Court was of opinion that those decisions should no longer be followed. The important point for present purposes is that the time which was the focus of the Court's attention was the date of sentence, not the date of the offence.

[16] In *Kopa*, McPherson JA said:[5]

> "I agree with the reasons of Williams JA for dismissing this appeal. I also agree with his Honour's comments about reasons for a possible change of judicial attitude to sentencing in future cases of this kind."

[17] It is to be emphasized that McPherson JA expressly referred to "sentencing in future cases of this kind", not to "sentencing for future offences of this kind".

[18] Williams JA said:[6]

> "[28] … However, as noted above, in future for offences of this seriousness ordinarily the offender would be required to serve an actual period in custody.

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4 [2004] QCA 100 at [25] - [27]; (2004) 206 ALR 197 at 204 - 205.
5 [2004] QCA 100 at [1]; (2004) 206 ALR 197 at 198.
6 [2004] QCA 100 at [28] - [30]; (2004) 206 ALR 197 at 205.

> [29] As already noted a number of District Court judges have sought guidance from this court as to the approach which should be adopted for sentencing with respect to offences of the type in question here. These reasons have gone beyond the facts of the two cases in issue in order to indicate, in broad terms, what the approach in the future should be.
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> [30] The appellant has not satisfied the court that in all the circumstances it would be appropriate to increase the sentences imposed on each respondent by providing that each should serve a short period in actual custody. However, these reasons should be given some publicity so that persons contemplating committing offences of the type in question would be aware that any sentence imposed in the future would ordinary provide that some actual time in custody be served where a significant amount of duty was avoided."

[19] In *Kopa* Philippides J said:[7]

> "I would also emphasise for the reasons stated by Williams JA that the sentences imposed in these cases ought not to be viewed as being indicative of the likely sentence which an offence of the type in question might attract in the future."

[20] The observations in *Kopa* should not be understood as if they were a legislative pronouncement to be applied in accordance with a presumption against retrospectivity. It is, in my respectful opinion, clear that this Court was concerned to give guidance to sentencing judges charged with the discharge of that function, ie to indicate, "in broad terms, what the approach in the future should be". The last sentence of [30] in the reasons of Williams JA, upon which the respondents rely, was an exhortatory statement directed to the executive government. It was not a statement directed to judges charged with the function of imposing a sentence in accordance with an authoritative appreciation of the legislature. It should not have been understood as if it purported to create, contrary to the will of the legislature and in excess of the powers of the Court, two categories of offence, one category consisting of offences committed before April 2004 and the other category consisting of offences committed thereafter.

[21] In *Kopa* this Court declined to interfere with the sentences which had been imposed below in deference to the approach of the Court in cases such as *R v Melano; ex parte Attorney-General of Queensland*.[8] A sentence, which at the time it is imposed, is within the range of then accepted sentences should not be disturbed on appeal by the DPP by reason of a concern that the accused should not be exposed to double jeopardy in respect of his sentence. The Court of Appeal in *Kopa* declined to impose a term of actual imprisonment because the sentence imposed below was within the range indicated by earlier decisions at the time of sentence, even though the Court was at pains to make it clear that those earlier decisions should no longer be followed.[9]

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7 [2004] QCA 100 at [33]; (2004) 206 ALR 197 at 206.

8 [1994] QCA 525 at [22]; [1995] 2 Qd R 186 at 190. See also *R v Solway; ex parte Attorney-General of Queensland* [1995] QCA 374; CA No 164 of 1995 and CA No 187 of 1995, 22 August 1995.

9 *R v Kopa; ex parte DPP (Cth)* [2004] QCA 100 at [25] - [27]; (2004) 206 ALR 197 at 204 - 205.

[22] Because the learned sentencing judge erred in his failure to appreciate that the observations in *Kopa* applied to guide him in his disposition of the case before him, and that he should no longer regard the earlier sentences referred to as indicative of the appropriate range of penalties, his exercise of the discretion in relation to sentence miscarried. It is, therefore, open to this Court to impose what it considers to be the appropriate sentence.

[23] As to the respondents' personal circumstances, the respondent Alibasic came to Australia in 1987. He has been a labourer for most of his life, but was injured in the 1990's and has been on a disability pension for some time. He suffers from back trouble and from high blood pressure. It was submitted to the learned sentencing judge that his involvement in the commission of this offence was due to his financial problems. He was, it is said, offered a couple of thousand dollars to drive the vehicle and agreed to do so.

[24] As to the respondent Salajdjiza, he arrived in Australia in 1993 and married here. He has three children. He was divorced in 2000. He has been unable to work because of a psychiatric condition. At the time of the offence he was under treatment by a psychiatrist.

[25] It is necessary to recognize each respondent's early plea of guilty, the fact that each of them has no previous convictions, and the circumstance that, in the case of the respondent Alibasic, he was vulnerable to succumb to temptation because of straightened financial circumstances; and, in the case of the respondent Salajdjiza, that he was suffering from a psychiatric condition.

[26] The DPP argues that these factors are no stronger than the factors of personal mitigation involved in *Kopa*, in which the Court of Appeal said that four months actual custody would have been ordered. That submission seems to me, with respect, somewhat to understate the factors of personal mitigation present in this case (especially in relation to the respondent Salajdjiza) but not in a way which is of significance having regard to the seriousness of the offence in each case and considerations of deterrence.

[27] Each respondent is a mature adult who lent his aid to an organized attempt, in effect, deliberately to defraud the Commonwealth. The full extent of that aid, and the full circumstances of their involvement in this crime, have apparently not been revealed by them to the authorities. That is the respondents' choice; but they cannot expect to be sentenced on a footing that they were not willing participants in a serious piece of organized crime. In my view, the considerations of the seriousness of the offence and of deterrence referred to in *Kopa* require the imposition of a custodial sentence. For these reasons I consider that no sentence other than imprisonment is appropriate.

Conclusion

[28] I would, therefore, order in each appeal:

(a) the appeal be allowed; and

(b) the following sentence be substituted: 12 months imprisonment, to be released after having served four months imprisonment upon giving security by recognizance in the sum of $1,000 conditioned that he be of good behaviour for a period of five years;

(c) direct that the Sheriff reduce the recognisance release order to writing and cause a copy to be given to the respondent, together with an explanation of the purpose and consequences of making that order;

(d) that a warrant issue for the apprehension of the respondent but lie in the registry for 48 hours.

[29] **FRYBERG J:** I agree with the orders proposed by Keane JA and with his Honour's reasons for those orders.