Hazelbane v Hales [2006] NTSC 53

PARTIES:	SHANE GABRIEL HAZELBANE
	v
	PETER WILLIAM HALES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 88 of 2005 (20210966)
DELIVERED:	4 July 2006
HEARING DATES:	26 June 2006
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – SENTENCING – appeal – interpretation of s 43(7) Sentencing Act (NT) – restoration of suspended sentence for aggravated assault – non violent breach of domestic violence order – nature and gravity of breach – sentencing discretion – factors to take into consideration

Justices Act: s 163; Sentencing Act: s 40(6), s 43(5) and s 43(7)

Baird v R (1991) 104 FLR 113; *Davies v Deverell* (1992) 1 Tas R 214*;* *R v McElhorne* [1983] 5 Cr App R (S) 53; *Marston v R* (1993) 65 A Crim R 595; *Wilson v Taylor* (1997) 113 NTR 1, applied

REPRESENTATION:

Counsel:

Appellant:	P Saraf
Respondent:	C Baohm

Solicitors:

Appellant:	North Australian Aboriginal Justice Association
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Sou 0629
Number of pages:	17

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hazelbane v Hales [2006] NTSC 53
No. JA 88 of 2005 (20210966)

BETWEEN:

SHANE GABRIEL HAZELBANE
Appellant

AND:

PETER WILLIAM HALES
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 4 July 2006)

Introduction

[1] This is an appeal against a decision of the Court of Summary Jurisdiction made on 9 November 2005 whereby under s 43(7) of the Sentencing Act the appellant was ordered to serve six weeks of a suspended sentence of three months imprisonment. The appeal is brought under s 163 of the Justices Act.

[2] The Court of Summary Jurisdiction restored six weeks of the appellant's suspended sentence of three months imprisonment because during the two year operational period of the suspended sentence the appellant committed another offence punishable by a term of imprisonment. The appellant committed an offence contrary to s 10 of the Domestic Violence Act. He

breached a restraining order that prevented him from going within 40 metres of Diana Nielsen.

The issue

[3] The principal issue in this appeal is was it unjust for the Court of Summary Jurisdiction to order the appellant to serve six weeks of a suspended sentence of three months imprisonment because the appellant committed a non-violent breach of a domestic violence order during the operational period of the suspended sentence.

[4] In my opinion for the reasons set out below the decision of the Court of Summary Jurisdiction to restore six weeks of the suspended sentence of three months imprisonment was unjust. The aggregate sentence that was imposed on the appellant was excessive and the appeal should be allowed. The breach of the domestic violence order did not evince an intention by the appellant to abandon his obligation to be of good behaviour. The primary aim of the suspended sentence to provide an inducement to reform was largely being achieved in this case.

The facts

[5] The background to the appeal is as follows.

[6] From October 2001 to October 2002 the appellant was in a de facto relationship with Diana Nielsen. When their relationship ended and they separated the appellant was made subject to a domestic violence order. The

appellant breached the domestic violence order on 8 June 2003 and 16 July 2003. The appellant was prosecuted for the breaches of the domestic violence order and on 19 September 2003 the Court of Summary Jurisdiction fined the appellant $300 and ordered him to pay a victim levy of $40.

[7] On 8 June 2002 Ms Louise Lipscombe attended the Discovery Nightclub. The appellant and Ms Nielsen were also at the nightclub. Ms Lipscombe joined a group of girls including Ms Nielsen who were dancing on a one metre high podium. While they were dancing the girls felt liquid being thrown at them. Ms Lipscombe thought the appellant had thrown the liquid. She told the appellant that she did not appreciate liquid being thrown on her and they had a heated argument. During the argument the appellant suddenly turned and pushed Ms Lipscombe with open hands to her chest and she fell off the podium and onto her back. He was charged with aggravated assault. The appellant defended the charge. The charge was heard in the Court of Summary Jurisdiction on 8 December 2003. The appellant was convicted and given a three month sentence of imprisonment. The sentence of imprisonment was back dated by eight days. It was suspended from 8 December 2003 with an operational period specified under s 40(6) of the Sentencing Act of two years.

[8] In February 2004 the appellant and Ms Nielsen reconciled their differences for a short period of time and they again became involved in a de facto relationship for a period of about six weeks. When they separated Ms Nielsen applied for a domestic violence order which was confirmed on

24 March 2004. The appellant was served with the domestic violence order on 29 March 2004. The domestic violence order stated that the appellant was not to approach within 40 metres of Ms Nielsen or remain at any place where she was living, staying or working; he was not to approach Ms Nielsen directly or indirectly; and, he was not to act in a provocative or offensive manner towards Ms Nielsen.

[9] The appellant is the biological father of a son who Ms Nielsen gave birth to after the couple had separated in 2004.

[10] At about 10.45 am on Friday 5 November 2004 the appellant and his father were travelling along Jasmine Street, Nightcliff in his father's motor vehicle. The appellant saw Ms Nielsen pushing a pram containing their son along Jasmine Street. He asked his father to pull over. His father did so. The appellant got out of the motor vehicle and walked over to Ms Nielsen. He stood about one metre away from her. He asked Ms Nielsen if he could look at his son. Ms Nielsen offered no response and the appellant leaned over, raised the cover of the pram and looked at his son. At the same time Ms Nielsen's social worker was driving past and she witnessed the incident. She stopped her motor vehicle and told Ms Nielsen to get into her vehicle with her son. Ms Nielsen did so. The appellant then returned to his father's motor vehicle and they departed the area.

[11] At 3.40 am on Sunday 9 January 2005 the police arrested the appellant for the above offence and conveyed him to the Darwin Watch House where he

participated in an electronically recorded interview that was conducted by the police. The appellant admitted that he had been served with the domestic violence order; he knew and understood the terms of the domestic violence order; and, he had breached the order by approaching Ms Nielsen on 5 November 2004. He told the police that he had approached Ms Nielsen as he wanted to see his son. At no time was the appellant given permission to approach Ms Nielsen. The approach was not a matter of emergency. The appellant did not behave in a violent manner towards Ms Nielsen on 5 November 2004 and there was no further contact between the appellant and Ms Nielsen between 5 November 2004 and 9 November 2005.

[12] The appellant has a criminal record that extends for five pages. The offences for which he has been convicted include the offences of assault police, dangerous act, aggravated assault, criminal damage and disorderly behaviour.

[13] On 9 November 2005 the appellant pleaded guilty in the Court of Summary Jurisdiction to failing to comply with a domestic violence order. He also admitted that he committed the offence of failing to comply with the domestic violence order during the two year operational period of the suspended sentence of imprisonment that was imposed on him by the Court of Summary Jurisdiction on 8 December 2003. He was sentenced to the mandatory minimum of seven days imprisonment for breaching a domestic violence order for a third time and he was ordered to serve six weeks of the suspended sentence of three months imprisonment for committing an offence

punishable by a term of imprisonment during the operational period of the suspended sentence.

[14] Before being sentenced in the Court of Summary Jurisdiction on 9 November 2005 the appellant had formed a stable and meaningful relationship with another woman, he had moved to Adelaide River and he had obtained employment at Adelaide River with his father and his uncle under a Community Development Employment Program.

The sentencing remarks of the Juvenile Court

[15] When sentencing the appellant the presiding magistrate made the following remarks:

> Mr Hazelbane you have pleaded guilty to a charge of breaching a domestic violence order. A charge, which you are well aware, that carries with it in your case a mandatory sentence of at least seven days imprisonment. The situation is more serious than that because at the time of the breach [of the domestic violence order] on 5 November 2004 you were on a suspended sentence of three months imprisonment for the charge of assault of a different person. You were sentenced for that offence on 8 December 2003, released on that day and supposed not to commit any offence punishable by a term of imprisonment for two years after that day. You were just under 11 months of that two year term when you breached the restraining order.
>
> The circumstances of the breach appear to be an accidental sighting by you of Diana Nielsen who was walking down Jasmine Street pushing … a stroller with a baby in it. That baby was your son as well as hers. You foolishly and criminally induced your father who was driving his car to stop the car. You hopped out of the car and approached Dianna and asked her if you could have a look at your son. She did not say anything. She did not agree or disagree with your proposition to have a look at your son. I do not know whether that was because she was in favour of your request or because she

was too scared to respond to your request. Anything is possible in the situation where a domestic violence order exists.

Given the history of the relationship between you and Ms Nielsen … it is very hard to tell what would be going through her mind when you approached her blatantly breaching that order. You did not do anything worse than approach her and look at the child. As it happened a social worker who knew [Ms Nielsen] and had worked with her came driving past and she recognised you. She stopped her car and urged [Ms Nielsen] to get into the car and she drove off.

You did not stop any of that happening … That was the breach. You were not supposed to go anywhere near [Ms Nielsen] and you did. You spoke to her in breach of the order…

The reason parliament introduced this unusual provision for a mandatory sentence of at least seven days imprisonment for a second offence of being in breach of a domestic violence order … was the character and pattern of domestic violence offences and the recognition that the gentle, rational [and] merciful treatment of those who breached domestic violence orders did not bring any results … [nor] any safety to the people who are supposed to be protected by those orders.

There is a group of men, I do not know if you are one of them … who have a personality which seems to impel them to boss their wives and girlfriends about. When they are stopped from bossing them about by domestic violence orders these men seem to be forced by their personalities to test the limits of the order… [T]his sort of persistent behaviour used to be commonplace before mandatory sentencing came in … [It] would eventually drive the poor women to despair… the women would pack up and try to leave Darwin… The overall pattern of behaviour was deplorable. It created grief, misery, uncertainty and fear in the women.

After the introduction of mandatory sentencing blokes like you get one chance. They get a warning from the court. They come before the court for their first… offences… Very few are sent to prison the first time around. Everyone is told that the next time they will be given [at least] seven days imprisonment.

I do not know if you are that sort of controlling man. I do not know if your relationship with Ms Nielsen has left her fearful of any

contact with you … but the reason behind the statutory imposition of a seven-day mandatory minimum sentence of imprisonment is to stop the kind of contact that happened on 5 November 2004. [The purpose of the provision] is to allow women like Ms Nielsen and every other woman who has got a domestic violence order to have a certain amount of confidence that they can go about their lives and not be troubled, as they have been troubled in the past, by the man who made their lives a misery. The offence therefore is not trivial. It is not minor. It is a serious offence and its seriousness is evident by the penalty that must be handed out, which is one of imprisonment.

… It is a case towards the lower end … You have only one previous appearance before the court [for this type of offence] … it is not as though you are an inveterate or incurable offender who is unable to stop himself breaching restraining orders. In all the circumstances it appears to me that the minimum sentence of seven days imprisonment is appropriate for this particular offence.

The much more difficult mater is the question of the breach of the suspended sentence. The suspended sentence was imposed for the charge of aggravated assault. The victim was Ms Lipscombe and after a hearing in that matter you were sentenced to imprisonment for three months of which you had served eight days at a time that you were released. [Your counsel] has said that this is a different sort of offence to failing to comply with a restraining order. It is and it is not. It is an offence involving an offence against a person. It is an offence against public peace. On the other hand, it is not as though you are before the court for another assault. On the contrary, your breach of the domestic violence order was not attended with any violence.

However, court orders such as restraining orders under the Domestic Violence Act and such as suspended sentences ought to be observed. Section 43(7) of the Sentencing Act directs me in circumstances like this to make an order restoring the whole of the suspended part of the sentence unless I am of the opinion that it would be unjust to do so.

[I have considered] all of the circumstances that have arisen since the suspended sentence was imposed. The matters in your favour are not many and they are not very strong. The first is that you got through 11 months of the two-year period during which you were not to commit any offence punishable by a term of imprisonment. That is significant and is not to be put to one side entirely. [Secondly],

> you have only got into trouble once. [Thirdly], you have moved away from Darwin … by moving you have created a situation where it is much less likely that you are going to bump into Ms Nielsen and therefore there is less likely to be any trouble between you and her. [Fourthly], you have got some work under the CDEP with your family down in Adelaide River. [Finally], you have formed another relationship …
>
> I take all those matters into account. There is enough that it would be unjust to re-impose the whole of the three months of the suspended sentence. There is certainly not enough to overlook this breach. There is not enough that I ought not to impose some of the sentence that has been suspended. Having considered all of these matters, the most impressive of which is that you have only committed this offence over a space of almost two years, I am going to make an order pursuant to s 43 of the Sentencing Act restoring part of the suspected sentence of three months imprisonment. I am going to restore six weeks out of the 11 weeks that is left of that sentence and that six weeks of imprisonment is to commence today. It is to be concurrent with the seven days of imprisonment that I am imposing for your breach of the restraining order.

The appellant's argument

[16] The appellant relies on two grounds of appeal. First, the sentencing magistrate erred in the exercise of his discretion under s 43(7) of the Sentencing Act by partially restoring the suspended sentence of imprisonment. Secondly, the sentencing magistrate erred in the assessment of the breach offence by failing to give sufficient weight to the facts of the breach offence, by placing undue weight on the mandatory minimum sentence for the breach offence and in his assessment of the gravity of the breach offence.

[17] Ms Saraf, who appeared on behalf of the appellant, argued that the sentencing magistrate erred in not giving sufficient weight to the

circumstances that had arisen since the suspended sentence was imposed on the appellant and to the facts of the offence committed by the appellant on 5 November 2004. Further, undue weight was given to the fact that Parliament had imposed a mandatory sentence of imprisonment for the breach of the domestic violence order. The issue that should have been considered by the sentencing magistrate was whether the breach of the domestic violence order in its own right called for a term of imprisonment. The rule of thumb that a suspended sentence of imprisonment should be restored if the new offence called for imprisonment did not apply merely because the new offence attracts a mandatory minimum sentence of imprisonment. No part of the suspended sentence of imprisonment should have been restored because the breach of the domestic violence order was an offence of a different character to the initial offence of aggravated assault and it was a relatively trivial offence. The fact that an offence attracts a mandatory minimum period of imprisonment does not mean that such an offence cannot be relatively trivial. But for the mandatory provisions of the Domestic Violence Act the breach of the domestic violence order did not warrant a term of imprisonment. But for the appellant's momentary lapse of lawful behaviour that occurred spontaneously in circumstances where the offender wanted to see his child, the appellant had remained out of trouble. The objective of the suspended sentence of imprisonment had largely been achieved.

The respondent's argument

[18] Ms Baohm, who appeared on behalf of the respondent, argued that the sentencing magistrate did not fall into error and correctly exercised his discretion pursuant to s 43(7) of the Sentencing Act in partially restoring the suspended sentence of imprisonment. She said that there was no demonstrable error in the way the sentencing magistrate sentenced the appellant. It is incumbent on the appellant to show that the sentencing discretion of the sentencing magistrate was improperly exercised. The normal consequence of a breach of suspended sentence will be its restoration. To excuse or vary the consequences of the breach of a suspended sentence has a tendency to undermine the integrity of the sentencing process generally. It follows that the power to vary the consequences of a breach of a suspended sentenced should be exercised sparingly and only in cases where proper grounds have clearly been made out or where genuinely special circumstances exist. A court is required to restore the entire suspended sentence unless the court is of the opinion that it would be unjust to do so. The sentencing magistrate correctly applied the law and formed an opinion that it would be unjust to restore the whole of the suspended part of the sentence. The sentencing magistrate considered all the relevant factors including that the appellant had served close to 11 months of the bond before committing another offence; that since entering into the bond he had only been in trouble this once; the appellant had moved away from Darwin; the appellant had obtained employment with his family

at Adelaide River and the appellant had formed a new relationship. The facts of any subsequent offence are only one of the circumstances which must be considered by the court. The court must have regard not only to the facts of the offence but also its character, including the seriousness of the offence. The offence committed by the appellant did warrant a term of imprisonment. It was not a trivial offence and the aggregate term of six weeks imprisonment was not excessive. With respect to the facts of the breaching offence the sentencing magistrate acknowledged that the breach of the domestic violence order was one that did not amount to actual violence. He reiterated the facts in his judgment but considered that the breach itself was not at the minor end of the scale of offending. He correctly considered that there had been two previous breaches of domestic violence order by the appellant. The sentencing magistrate gave due consideration to the facts of the offence committed by the appellant and he did not err in the weight he attributed to the facts of the offending. While there was no physical violence the appellant's actions constituted an intrusion or an interference with the life of the victim. The sentencing magistrate correctly acknowledged that a breach of a domestic violence order is an offence against the person and against the public. A breach of a domestic violence order is an offence against the administration of justice. It is a breach of a court order that is granted for the benefit of a person and the breach of such an order interferes with a person's entitlement to go about their daily life undisturbed and without harassment. This is not a matter where it could be

logically argued that there was a gross disparity between the offending. Consideration should be given to the character of the breaching offence including the fact of whether it warrants a custodial sentence in its own right and whether it is sufficiently trivial. The offence of breach of domestic violence order is in its own right a serious offence. The sentencing magistrate was correct to consider the offence to be a serious offence, one which cannot be said to be trivial in nature. In arriving at that conclusion he gave consideration to the character of the offence not the penalty regime alone. He noted that court orders such as restraining orders under the Domestic Violence Act should be observed. The orders allow women like Ms Nielsen to have a certain amount of confidence that they can go about their lives not being troubled, as they have been in the past, by the man who made their lives a misery. The sentencing magistrate referred to the prevalence of breaches of domestic violence orders and the need for the orders themselves to bring safety to women who are supposed to be protected by those orders.

Conclusion

[19] The relevant provisions of the Sentencing Act are s 40(6), s 43(5) and s 43(7). Those provisions provide as follows:

> **40. Suspended sentence of imprisonment**
>
> (6) A court shall specify in an order suspending a sentence of imprisonment a period of not more than 5 years from –

(a) if the whole of the sentence is suspended – the date of the order; or

(b) if a part of the sentence is suspended – the date specified in the order,

during which the offender is not to commit another offence punishable by imprisonment if the offender is to avoid being dealt with under section 43.

43. Breach of order suspending sentence

(5) Where –

(a) on the hearing of an application under subsection (1) or on the hearing of its own motion under subsection (4A), a court is satisfied, by evidence on oath or by affidavit or by the admission of the offender, that, during the operational period of the suspended sentence, the offender committed another offence against a law in force in the Territory or elsewhere that is punishable by imprisonment; or

(b) on the hearing of an application under subsection (2) or on the hearing of its own motion under subsection (4B), a court is satisfied, by evidence on oath or by affidavit or by the admission of the offender, that the offender has breached a condition of the order,

the court may –

(c) subject to subsection (7), restore the sentence or part sentence held in suspense and order the offender to serve it;

(d) restore part of the sentence or part sentence held in suspense and order the offender to serve it;

(e) in the case of a wholly suspended sentence, extend the operational period to a date after the date of the order suspending the sentence;

(ea) in the case of a partially suspended sentence – extend the operational period to a date after the date specified in the order suspending the sentence; or

(f) make no order with respect to the suspended sentence.

(7) A court shall make an order under subsection (5)(c) unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the facts of any subsequent offence and, if it is of that opinion, the court shall state its reasons.

[20] The factors to be considered when a court exercises its discretion to restore a suspended sentence of imprisonment were considered by Kearney J in *Wilson v Taylor* (1997) 113 NTR 1. His Honour stated,

> In general a magistrate considering the application of s 43(7) should address, inter alia, the following questions: whether the further offence warrants a custodial sentence in its own right; *R v McElhorne* [1983] 5 Cr App R (S) 53; whether it is sufficiently trivial to justify non restoration of the suspended sentence: *Marston v R* (1993) 65 A Crim R 595; and whether, if restored, the aggregate term which results would be excessive.

[21] His Honour also approved what was said by the Court of Criminal Appeal in *Baird v R* (1991) 104 FLR 113 which considered s 6(3)(e) of the Criminal Law (Conditional Release of Offenders) namely,

> A warning given by the judge imposing the original sentence as to the consequences of a breach may be relevant. The nature of the terms of the recognisance is relevant. The nature and gravity of the breach is a relevant factor. Whether the breach of each is an intention to disregard the obligation to be of good behaviour or to abandon any such intention would normally be relevant. For instance, it would be an aggravating factor if the breach amounted to the commission of another offence of the same nature as that which gave rise to the recognisance. The length of time during which the offender observed the conditions of the recognisance may be

> relevant. The moral pressures upon the offender to commit the breach may count. The possibilities are as potentially numerous as the factors that affect the normal sentencing process itself. The materiality of any factor is determined by fairness and commonsense.

[22] It must also be kept firmly in mind that the primary aim in suspending service of a sentence of imprisonment is to provide an inducement to reform: *Davies v Deverell* (1992) 1 Tas R 214 at 218-220.

[23] While it is true that the sentencing magistrate took note of the relevant sentencing principles and that a breach of a domestic violence order is not a trivial matter I am satisfied that he fell into error and improperly exercised his sentencing discretion in restoring six weeks of the suspended sentence of three months imprisonment. The appellant's breach of the domestic violence order was adequately punished by the imposition of the mandatory minimum sentence of seven days imprisonment. While a breach of a domestic violence order is a serious matter and did warrant a custodial sentence in its own right, the nature of the appellant's offending was not such as to evince an intention to abandon his obligation to be of good behaviour. The primary aim of a suspended sentence as an inducement to reform was largely being achieved in this case. The circumstances in which the appellant's offending occurred were unique. The offending was spontaneous, opportunistic, non-violent and motivated by the appellant's desire to see his child rather than any ill will towards the victim. Further, the appellant had taken significant steps towards his rehabilitation by moving to Adelaide River, obtaining employment and forming a new

relationship. The breach of the domestic violence order was the only offence the appellant had committed in a period of about two years. In the circumstances the aggregate sentence of six weeks imprisonment was excessive. The appeal should be allowed.

Orders

[24] I make the following orders:

1. The appeal is allowed.

2. I set aside the order of the Court of Summary Jurisdiction that the appellant serve six weeks of the suspended sentence of three months imprisonment.

3. I make no order with respect to the suspended sentence of three months imprisonment.

[25] This means that if he has not already done so the appellant shall be required to serve the sentence of seven days imprisonment that was imposed by the Court of Summary Jurisdiction. I will hear the parties as to costs.
