Hales v Nebro [2003] NTSC 2

PARTIES:	HALES, Peter William
	v
	NEBRO, Laura Jane
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 77 of 2002
DELIVERED:	15 January 2003
HEARING DATES:	25 November 2002
JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Counsel:

Appellant:	G Fisher
Respondent:	P Cantrill

Solicitors:

Appellant:	Cwth DPP
Respondent:	Bill Piper

Judgment category classification:	B
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Mar0301

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

Hales v Nebro [2003] NTSC 2
No. JA77 of 2002

BETWEEN:

PETER WILLIAM HALES
Appellant

AND:

LAURA JANE NEBRO
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 15 January 2003)

[1] Prosecution appeal against sentence brought pursuant to s 163 of the Justices Act (NT). It arises from an order made in the Court of Summary Jurisdiction sitting at Darwin on 16 July 2002 whereby upon finding the respondent guilty upon two counts upon complaint laid under the provisions of the Public Order (Protection of Persons and Property) Act (Cwth), the respondent was discharged without conviction.

[2] The grounds of appeal contain much detail by way of particulars, but revolve around suggested errors on the part of his Worship in the exercise of a discretion by failing to take into account the matters outlined in s 16A of the Crimes Act (Cwth) before exercising those powers under s 19B of the

Act, failing to give adequate weight to matters adverse to the appellant, improperly taking into account the personal experiences and opinions and making erroneous findings of fact. It is also said that the sentence was manifestly inadequate.

[3] There is contained in s 16A a number of matters to which a court is to have regard when passing sentence including, particularly for these purposes, the nature and circumstances of the offence, the degree to which the offender has shown contrition, the deterrent effect that any sentence or order under consideration may have on the offender, the need to ensure that the person is adequately punished for the offence and the character, antecedents, cultural background, age, means and physical or mental condition of the offender. It is now accepted that the list contained in s 16A(2) is not exhaustive in that the court may take into account "any other matters" including, general deterrence (*Director of Public Prosecutions (Commonwealth) v L El Karhani* (1990) 97 ALR 373).

[4] The offences for which the respondent was found guilty, after trial, were that on 23 May 2001 at Casuarina she, being in or on Commonwealth premises, namely Centrelink, refused to leave those premises on being directed to do so by a constable (s 12(2)(c) of the Public Order (Protection of Persons and Property) Act) and at the same time and place she behaved in a disorderly manner in that she was yelling and screaming contrary to s 12(2)(b) of that Act. His Worship dismissed a third charge arising from the same incident in which it was alleged that the respondent behaved in an

offensive manner in that she used the words, “fuck” and “cunt” contrary to s 12(2)(b) of the Act. His Worship was of the view that in the circumstances those words were not offensive, but they were subsumed within the charge relating to disorderly manner. There is no appeal in respect of those findings of guilt nor as to the manner in which his Worship dealt with the offensive manner charge.

[5] On each charge a maximum penalty of a fine of $2,200 could have been imposed, but his Worship applied the provisions of s 19B of the Crimes Act which relevantly provides as follows:

> “(1) Where:
>
> (a) a person is charged before a court with an offence against the law of the Commonwealth; and
>
> (b) the court is satisfied, in respect of that charge or more than one of those charges, that the charge is proved, but is of the opinion, having regard to:
>
> (i) the character, antecedents, cultural background, age, health or mental condition of the person;
>
> (ii) the extent (if any) to which the offence is of a trivial nature; or
>
> (iii) the extent (if any) to which the offence was committed under extenuating circumstances;
>
> that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the offender on probation;
>
> the court may, by order:
>
> (c) dismiss the charge or charges in respect of which the court is so satisfied;”

[6] The leading authority in this field is *Cobiac v Liddy* (1969) 119 CLR 257 arising upon the equivalent South Australian legislation. At p 276 Windeyer J said:

> "… the magistrate must be of opinion that the exercise of the power is expedient because of the presence and effect of one or more of the stated conditions, namely character, antecedents, age, health or mental condition. One of these by itself, or several of them taken together, must provide a sufficient ground for a reasonable man to hold that it would be expedient to extend the leniency which the statute permits. The Act speaks of the court exercising the power it confers "having regard to" the matters it states. I read that as meaning more than merely noticing that one or more of them exists. Its, or their, existence must, it seems to me, reasonably support the exercise of the discretion the statute gives. They are not mere pegs on which to hang leniency dictated by some extraneous and idiosyncratic consideration. But they are wide words. None of the matters they connote is necessarily to be regarded in isolation with the others, or apart from the whole of the circumstances of the offender and the offence."

[7] The Commonwealth legislation was the subject of consideration in the Court of Criminal Appeal of New South Wales in *Commissioner of Taxation v Baffsky* (2001) 122 A Crim R 568. Their Honours there held that the application of the discretion in s 19B consists of two stages. The first is the identification of one or more of the factors identified in s 19B(1)(b) and the second is the determination that, having regard to the factor or factors so identified it "is inexpedient to inflict any punishment, or to reach the other committed conclusions". In determining that second stage the Court must take into account the matters referred to in s 16A(2).

[8] The prosecution witnesses gave evidence of the respondent, an indigenous Australian, having used the particular words complained of together with

"fucking cunt" and "coconut" by reference to indigenous staff at Centrelink (apparently that is a derogatory description of an indigenous person who, like a coconut, is black on the outside but white on the inside). His Worship accepted that the words were used and seems to have accepted that the words complained of were not directed to any particular person in the Centrelink office, but were part of the general vocabulary employed by the respondent when distressed.

[9] In the prosecution case a witness attending at the service counter at the office said that when the respondent approached her she said, "I want to see a social worker and not that cunt I saw yesterday". The witness said she replied: "Well what is it in regard to?" and then went on to describe how the respondent started screaming out, saying that she wanted to have money for her nephew's funeral, whereupon the supervisor and others at the office intervened and unsuccessfully tried to calm her down.

[10] As to the Crown evidence regarding what the respondent first said when approaching the Centrelink staff officer, the respondent acknowledged that she had said those words, but denied saying them to the person who gave evidence about it. She said they were addressed to another person and apparently in the context of having asked to see a particular person upon whom she had previously relied for assistance. In cross-examination she accepted that she was swearing and talking loudly, but that her swear words were not directed to any particular person, being the employees of Centrelink because "they are the representatives of the Government that

makes these laws that we have to suffer under". It was her intention to shock the Centrelink staff into doing something and to look at the way they handled people. She accepted that it took half an hour before she was removed, but she needed assistance and she was not going until she was helped. During that period she was talking loudly about "the system" and using expletives to accentuate the points that she was trying to make. As to her refusal to leave when requested to do so by staff, she said that she refused because she felt her rights had been violated.

[11] His Worship also took into account that those words were said, that they were yelled out, that the respondent was at the same time waving her arms about and being "in general terms, a nuisance". His Worship held that she behaved in a way which far overstepped the bounds of decorum. There was evidence, which was not contested by the respondent, that the incident referred to took place over a period of twenty to thirty minutes or thereabouts, that during the whole of that period she was speaking loudly, repeatedly using the words complained of, pacing up and down throughout the office area, that she refused to leave when asked by Centrelink staff on three or four occasions. She was permitted to use a telephone in the office and when she did so rang the Aboriginal Legal Aid Service with a view to getting assistance and Channel 8 Television Station with a view to getting publicity. During the course of those telephone conversations she continued to use the words complained of and behave in an angry manner, neither of those whom she called apparently responding positively to her requests.

[12] The police were called and whilst the respondent was talking on the telephone they arrived and asked her to leave the premises, she successfully sought to have some further time to complete her telephone call, it went on for five minutes or thereabouts and the police eventually intervened to terminate the call. Upon her consistent refusal to leave the premises, the police removed her from them and placed her under arrest.

[13] There were of the order of 15 or 20 people, men, women and children in the office at the time of these events, both staff and people awaiting attention and the evidence from the prosecution was that although three or four Centrelink staff endeavoured to calm down the respondent, she did not respond and they were unable to assist her with the matter she apparently wished to raise. There was evidence that members of the public were disturbed by the respondent's behaviour, and that her actions disrupted the operation of the office.

[14] To better understand the circumstances giving rise to this extraordinary behaviour I turn to the evidence of the respondent. The day prior to the offending she received information that her nephew had hung himself and she was under a social and cultural obligation to attend his burial in Bunbury WA. She was in receipt of sole parent benefits, together with a pension education supplement. She approached Centrelink with a view to obtaining financial assistance to enable her to attend the funeral and was told that she was entitled to an advance on her personal entitlements of just under $400. By that I understand her to have meant that she would be paid

that amount in advance of the due date. She also enquired about obtaining a loan for $500, but was told she was not eligible for it. She was informed that she could obtain the $400 advance, but that was all. That sum would not be sufficient to enable her to travel to the funeral and return to Darwin. Later on that day she contacted other welfare agencies, the Uniting church, Catholic church, Salvation Army, ATSIC and Aboriginal Land Councils, but was unsuccessful, except for receiving an offer of $300 from the Uniting church. Her evidence was that she still needed $400 for the two return airfares to Perth (the other airfare apparently being for her son of about 11 years of age who accompanied her to the Centrelink office on the day of the offending).

[15] When asked about what happened on the day of the offending, the respondent gave a long rambling answer. Her stated reason for being upset was because she had participated in a workshop with Centrelink staff to explore how the staff could better provide services to a variety of clients. She said that at the workshop the staff attending had been happy to listen to what she had to say about strategies to help deal with problem clients, "like myself". She went on:

> "I am quite highly educated and I know that when your under a lot of stress of course your going to, you know, react loudly like I did. But I felt that instead of helping me they were setting me up."

[16] The respondent claimed to have been told at interview, immediately prior to the offending, that she would not be given anything because she had refused

the offer made the day before and that within five minutes they were telling her to get out. His Worship made no findings in that regard, but it is plain on the whole of the evidence that the behaviour about which complaint was made commenced at or shortly after the time the respondent first spoke to Centrelink staff in the office. The respondent's complaint as given in her evidence was that she was not being attended to in a culturally sensitive manner by the Centrelink staff and that that was what had made her angry.

[17] In the course of a cross-examination the respondent informed the court that she believed herself entitled to a loan of $500, but acknowledged that it was available only once in a financial year, that she had paid off a previous loan but had to wait another six months before she could obtain another. She acknowledged that she was not eligible for another loan at the time of this incident, but that she was relying upon what she described as "special circumstances" relating to the obligation upon her to go to Bunbury for the funeral. The rights or wrongs of the respondent's belief as to her entitlements to advances or loans, by discretion or otherwise, were not determined by his Worship. However, I consider her belief to be relevant to the question of the circumstances of the offending.

[18] During the course of his reasons for arriving at the findings of guilt, his Worship, unfortunately, drew upon some personal experiences in dealing with what he called "Social Security officers". His Worship appears to have endeavoured to set the scene in which the respondent's behaviour was to be placed, that is, a place where people go because of problems or obligations

and a place where people go to try and get money. In that place are the members of the Centrelink staff who, in his Worship's view, would like to be able to deal civilly with people who come to them and try to do their work as expeditiously as possible. His Worship may be criticised for drawing upon his own observations, but they were in the context of leading to his findings of guilt and there is no appeal against them.

[19] At the conclusion of those remarks his Worship found the respondent guilty on counts 1 and 3, but found in respect of count 2 that the words "merged into count 3 but as to the matter of offensive manner I don't find it made out" and accordingly she was not guilty and discharged on that count.

[20] When his Worship made his findings a record of the respondent's prior convictions was tendered and received without objection. The record discloses offences in Western Australia commencing in June 1988 when she was dealt with for disorderly conduct, refusing to leave Commonwealth premises and resisting arrest. The prosecutor before his Worship informed him that the facts in relation to the 1988 offence were disarmingly similar to those surrounding this offending:

> "The defendant attended the Department of Social Security in Perth, requesting prepayment of the benefit so she could visit her sick mother in Bunbury. She was granted payment and then requested a further payment be granted and she was advised that the Department was not able to make the grant. She then became abusive towards staff, called them liars, she was told to leave, she refused and became more abusive".

The similarities were conceded on the respondent's behalf. In response his Worship informed counsel for the respondent that if it had not been for that prior conviction, then she could be looking at a discharge.

[21] There followed a number of traffic and motor vehicle offences until late 1991 when she was convicted and fined for possessing cannabis and associated offending, the same in 1992 and other drug related offences in 1993 and 1997. There was a conviction for common assault on two counts for which the respondent was fined $100 each in February 1997 and lastly in October 1998 a conviction for "disorderly, committing a nuisance" which, on her advice to the learned Magistrate, was dealt with by an order for community work. The respondent had intervened in the proceedings to inform the court about that and added, "I'll be defiant to the day I die. I just wipe my hands of the system." Other remarks at about that same time by the respondent in that Court indicate that she did not accept the verdict, but she conceded that she had overstepped the mark and says she was sorry about that. Just where the respondent considered the mark to have been is not clear.

[22] The plea in mitigation put on the respondent's behalf disclosed that she was a single mother with one child, then aged 11, whom she was raising. She was studying at university. She had obtained a teaching degree and was then undertaking studies to lead to a degree in law. It was submitted that any pecuniary penalty imposed upon her may cause hardship, which his Worship took to be a reference to a possible difficulty that such a conviction

and penalty might present if and when she sought to be admitted to practice law. The respondent had commenced her university studies in Darwin after coming here from Western Australia to "get away from her past" and it was put on her behalf that she was progressing well, getting good results "but life remained to be difficult for her". It was submitted that a minimum penalty would be the most beneficial penalty.

[23] The thrust of the respondent's case on penalty was that, taking into account the character, antecedents, cultural background and age of the respondent together with the extenuating circumstances under which the offence was committed, it was inexpedient to inflict any punishment upon her. His Worship acceded to those submissions.

[24] His Worship proceeded with his remarks on sentencing immediately. It is unfortunate that in the course of those remarks his Worship again brought personal experiences to bear. He appears to have taken an adverse view of the conduct of the employees at Centrelink which, on the facts as his Worship found them in coming to the findings of guilt, do not appear justified. His Worship said he was concerned to impose penalties which, "will stop the streets from flowing in blood, penalties which are consonant with justice. Penalties which are no more severe than they need be to effect some degree of improvement and I am not concerned with making martyrs" and expressed the hope that the appellant had no wish to become one. Other remarks indicated his Worship considered that the appellant had been ill treated in the application of the rules relating to her eligibility for public

funds. As I have already indicated, there was nothing to show that the law in relation to the disposition of those funds for the benefit of the appellant had not been properly applied, but his Worship appears to have taken the view that given her need to get to the funeral, the inflexibility of the requirements regarding advances and loans amounted to a significant mitigating feature.

[25] Looking at the circumstances in which the offence came to be committed, his Worship reminded himself that there was,

> "a certain amount of grandstanding going on here, at least while she's on the phone with the police around the place and I look at the reasons for her committing the offences".

But he proceeded to warn himself that he had to be very careful not to allow thoughts he may have of mercy "to preponderate to the extent to where I do an injustice if for no other reason that if I'm weakly merciful the poor woman has got to go through this again on appeal." The learned Magistrate noted that his findings might tell against the appellant if she succeeded in obtaining her law degree and applied for admission to practice in the Northern Territory, and added that he was not at all confident that anything much that he could do within the constraints of the law was likely to have "such an effect on her that when she gets distressed she won't go a bit overboard again".

[26] Finally, apparently turning to s 19B of the Crimes Act, but without mentioning it, his Worship said he was going to make an order "based on the

circumstances leading to the offence and to her age and antecedents" and ordered that she be discharged without conviction.

[27] Reading the whole of his Worship's sentencing remarks, I consider that he impermissibly allowed himself to be influenced by personal experiences and opinions. When taking into account the circumstances of the offending his Worship took a view regarding the behaviour of Centrelink staff, which was not justified on the evidence properly before him. They appear to have unreasonably excited sympathy for the respondent. Further, in my opinion there was nothing arising from the appellant's age, 38 at the time of the offending, or antecedents which would render it inexpedient to inflict any punishment. The order made by his Worship must be set aside and I turn to consider the appropriate sentence in all the circumstances.

[28] The evidence does not disclose that the respondent's intemperate and prolonged outburst was brought about as a result of a failure on the part of Centrelink staff to apply the proper rules as to the provision of public funds, nor that they dealt with the respondent in any insensitive or otherwise inappropriate way. Nothing said or done by anyone at the office at the commencement of the interview on the day of the offending is open to valid criticism, the respondent immediately commenced her outburst and thereafter Centrelink staff endeavoured to calm her down so that they could talk to her, but she did not. Her misconduct continued until she was bodily removed from the premises by police. On the other hand I accept that the appellant was distressed concerning the death of her nephew and most

anxious that she should be able to carry out her duties in that regard. Although those circumstances may explain the behaviour, they do not excuse it and only mitigate her culpability to some degree.

[29] As to those matters, it was said by Anderson J in *Woods v The Queen* (1994) 14 WAR 341 at 350:

> "When emotional stress is put forward in mitigation, the court must be persuaded that the offending is connected to the emotional condition in a way that to some sensible degree lessens the offender's culpability or the criminality of his/her behaviour, or makes retribution less imperative, or positively indicates that the offending is out of character and therefore may not be repeated, so as perhaps to lead to the conclusion that there is no need, in the particular case, to place emphasis on personal deterrence or so as perhaps to lead to the conclusion that the case is not one in which it is appropriate to emphasis general deterrence."

[30] Bearing in mind the conviction in 1988 for what was a very similar criminal conduct, it cannot be said that the offending on this occasion was out of character, notwithstanding the period of time which had elapsed between the two events. I am not satisfied that in this particular case there is no need to place emphasis on personal deterrence.

[31] In *Neal* (1982) 149 CLR 305 at 324 Brennan J described the general rule in these terms:

> "Emotional stress which accounts for criminal conduct is always material to the consideration of an appropriate sentence, although its mitigating effect can be outweighed by a countervailing factor … the sentencing court takes account of emotional stress in evaluating the moral culpability of the offender just as it is entitled to have regard to the motive for the offence … Consideration of emotional stress is common place in the exercise of a sentencing discretion."

At p 326 his Honour made the now oft repeated remarks which are apt in this case:

> "The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice."

[32] I have identified specific errors on the part of his Worship, in particular the taking into account of irrelevant matters in the purported exercise of discretion. It was a difficult sentencing task for his Worship given the objective circumstances of the offending, complicated by the respondent's prior convictions and patent lack of remorse. She did not contest the evidence going to the elements of the offence, but sought a trial to attempt to vindicate her behaviour. She is not punished for that, but is not entitled to any mitigation. In these circumstances, notwithstanding that this is a prosecution appeal, the order made by his Worship must be set aside. In doing so I bear in mind, in so far as they apply to this case, the principles relating to such appears as recently revisited in *Powell* (2001) 126 A Crim R 137 especially per Prior J at p 140 and Perry J at p 143. This Court has the responsibility "to establish and maintain adequate standards of punishment for a crime" as well as to correct identified errors in the sentencing process.

[33] In lieu of the order made by his Worship, the respondent is convicted in respect of each of the offences.

[34] I was minded not to proceed to fix a penalty, but Mr Fisher, counsel for the appellant, drew the following decisions to my attention, namely, *Mulcahy v Clark* 107 FLR 448 and *Petherbridge* 93 A Crim R 235. Upon consideration of them I am satisfied that it is necessary to impose a penalty consequent upon conviction otherwise the Court's function would not be discharged.

[35] Bearing in mind that this is a prosecution appeal, the time which has elapsed since the offending and the respondent's means, I fine the respondent $25 on the first count, $10 on the second count and allow three months to pay.
