Duncan v Hales [2003] NTSC 14

PARTIES:	DOUGLAS LAWRENCE DUNCAN
	v
	PETER WILLIAM HALES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 46/02 (20109638)
DELIVERED:	7 March 2003
HEARING DATES:	20 January 2003
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL - JUSTICES - appeal against sentence - receiving stolen property - whether the sentence imposed by the magistrate was manifestly excessive - whether the magistrate failed to take into account or placed insufficient weight on the defendant's personal circumstances - whether the magistrate gave insufficient weight to the defendant's assistance to the police -whether the magistrate gave insufficient weight to the defendant's plea of guilty - whether the magistrate erred in assessing the gravity of the appellant's offending behaviour in imposing and wholly suspending sentence of imprisonment - Justices Act 1928 (NT)

Criminal Code 1999 (NT), s 229; *Sentencing Act 2002 (NT)*, s 5(2)(e), s 6(a), (b), (c).

Kelly v R (2000) 113 A Crim R 263, *Salmon v Chute & Anor* (1994) 94 NTR 1 applied.

REPRESENTATION:

Counsel:

Appellant:	G. Bryant
Respondent:	A. Elliott

Solicitors:

Appellant:	North Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Duncan v Hales [2003] NTSC 14
No. JA 46/02 (20109638)

BETWEEN:

DOUGLAS LAWRENCE DUNCAN
Appellant

AND:

PETER WILLIAM HALES
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 7 March 2003)

[1] This is an appeal from a sentence of a magistrate imposed on the appellant on 22 March 2002 for an offence of receiving stolen property.

[2] On the abovementioned date the appellant entered a plea of guilty in the Court of Summary Jurisdiction to an offence that on 10 April 2001 at Palmerston in the Northern Territory of Australia received tools and power tools to the value of $7,000.00 which had been obtained by means of a crime, namely stealing, knowing it to have been so obtained.
Contrary to s 229 of the Criminal Code.

The maximum penalty for this offence is seven years imprisonment.

[3] The learned stipendiary magistrate convicted the appellant. He imposed a sentence of six months imprisonment. This sentence was suspended forthwith. Pursuant to s 40(6) of the Sentencing Act a period of two years was fixed as the period during which the offender was not to commit another offence punishable by imprisonment to avoid being dealt with under s 43 and sent to gaol for that period of six months.

[4] The notice of appeal specifies the grounds of appeal as follows:

> "1. That the sentence imposed by the Learned Magistrate was manifestly excessive in that:
>
> (a) The Learned Magistrate failed to take into account or placed insufficient weight on the Defendant's personal circumstances in particular his;
>
> (i) Previous good character
>
> (ii) Work record
>
> (iii) Family Circumstances
>
> (b) The Learned Magistrate gave insufficient weight to the Defendant's assistance to the police.
>
> (c) The Learned Magistrate gave insufficient weight to the Defendant's plea of guilty."

[5] Leave was granted at the commencement of the hearing of the appeal to add an additional ground namely:

> 2. That the Learned Magistrate erred in assessing the gravity of the appellant's offending behaviour in imposing a wholly suspended sentence of imprisonment.

[6] Before dealing with the grounds of appeal individually it is appropriate to set out the agreed facts in support of the charge as set out at tp 2 - 5 of the proceedings before the learned stipendiary magistrate:

> "MR DUGUID: Your Worship, the facts of the matter are that between 3am and 3.30 am on Tuesday, 10 April 2001, the defendant in this matter was awoken at his residence, being 17 Lockwood Crescent, Moulden by two male people who he only knew as ET - - -
>
> HIS WORSHIP: ET?
>
> MR DUGUID: ET who I think is, in fact, a gentleman by the name of John Henry Webber, another known only to the defendant as Gypsy, who I think, in fact is one Nicholas Carter.
>
> HIS WORSHIP: I see. I know there's at least one other Gypsy in town.
>
> MR DUGUID: And I should perhaps add at that point that ET and Gypsy have both been charged but their matters have not been finalised. ET then stated to the defendant that they had just done a job at Bunnings and requested that they be allowed to store the property that they had stolen from Bunnings in one of the bedrooms of the defendant's residence.
>
> The defendant agreed and the other two men then carried the stolen property, which included - Your Worship, there's quite a long list here. What I might do is read through it then I can probably hand something up - - -
>
> HIS WORSHIP: That would be nice. That would be nice.
>
> MR DUGUID: - - - give you an idea of what's involved. Cordless drills, Leatherman tools, Mini Maglite torches, grinders, router sets, spirit levels, drop saws, toolbox, spotlight, Makita battery pack, two cordless circular saws, belt sander, battery charger, socket and spanner set and a Craftech 900 watt router and other associated tools and power tools to a total value of $7000, and they were carried from a vehicle parked outside the residence into one of he bedrooms at 17 Lockwood Crescent.
>
> HIS WORSHIP: Mm.
>
> MR DUGUID: On Wednesday, 11 April 2001 the next day, ET returned to the property and removed $3406.50 worth of power tools and other tools.
>
> HIS WORSHIP: That's precise.

MR DUGUID: Yes. Presumably some kind of inventory was done based on what was taken and what was left - - -

HIS WORSHIP: Yes.

MR DUGUID: - - - as you will see.

HIS WORSHIP: It's a pretty even split though, isn't it, anyway?

MR DUGUID: Yes, perhaps half the value of the property stolen. I think near enough, Your Worship. They were removed from the residence and ET later sold those items to various persons unknown in and around the Darwin area.

HIS WORSHIP: Yes.

MR DUGUID: In the early hours of Thursday, 12 April 2001, the police executed a search warrant on the defendant's residence and as a result, power tools and other tools stolen from Bunnings were located in the bedrooms of 17 Lockwood Crescent, Moulden, and, Your Worship, again I'll simply read through the list of items and hand up a document - - -

HIS WORSHIP: Yes.

MR DUGUID: - - - detailing them. There was a Makita cordless drill, value $300, two Leatherman tools, valued at $120 each, one Mini Leatherman tool, $20, two Mini Maglite torches, $35 each, an Ozato (?) cordless drill, $300 - must be a good one, Your Worship. Craftech 900 watt grinder, $250. Three 15 piece router sets, $30 each. Craftech grinder, $250, Medalist spirit level, $31.50, Makita drop saw, $546, Bosch circular saw, $250, toolbox, $25, spotlight, $25, Makita battery pack $60, Makita cordless circular saw, $250, GMC belt sander $100, Makita cordless circular saw, $350, Makita battery charger, $100, Makita socket and spanner set, $86, Craftech router, $250, for a total value of property recovered being $3593.50.

HIS WORSHIP: Mm mm.

MR DUGUID: 1.15 pm on Thursday, 12 April 2001, the defendant attend the Palmerston Police Station where he participated in an electronic record of interview in relation to the stolen property.

HIS WORSHIP: So they didn't arrest him on the spot?

MR DUGUID: It was - - -

HIS WORSHIP: Invited to come down in the morning, yes.

MR DUGUID: Yes, it was dealt with by way of summons, Your Worship. During the electronic record of interview, the defendant made admissions to knowingly receiving stolen property and at the conclusion of the interview, the defendant was informed that he would receive a summons in regard to the matter.

MS MUSK: That's basically admitted sir.

HIS WORSHIP: I find the offence proved.

MR DUGUID: Your Worship, I just hand up an exhibit list from one of the police statements.

HIS WORSHIP: Yes.

MR DUGUID: You can disregard the part stuck out at the bottom but that gives you an idea of what property was recovered but as you've heard, there was other property not recovered.

HIS WORSHIP: Yes.

MR DUGUID: Your Worship, the only other thing I would say at this stage is that - - -

HIS WORSHIP: Will become exhibit 1.

EXHIBIT 1 Exhibit list.

HIS WORSHIP: Anything known?

MR DUGUID: Yes, Your Worship. And just while my friend's checking that, Your Worship, the police were anxious for me to make it known to the court that the defendant assisted police, not only by making full admissions in the record of interview but also provided - took the unusual step, perhaps, of making a formal statement to police.

He is willing to give evidence in relation to two nominated offenders responsible for actually stealing the stuff and - - -

HIS WORSHIP: Yes.

MR DUGUID: - - - so that will no doubt be taken into account.

HIS WORSHIP: He's entitled to consideration for that. …"

[7] Counsel for the appellant had submitted to the learned stipendiary magistrate the matter should be dealt with by releasing the appellant on a bond and that a sentence of imprisonment would be entirely inappropriate.

[8] I will deal with each ground of appeal.

1. That the sentence imposed by the Learned Magistrate was manifestly excessive in that:

(a) The Learned Magistrate failed to take into account or placed insufficient weight on the Defendant's personal circumstances in particular his;

(i) Previous good character

(ii) Work record.

(iii) Family circumstances.

[9] Counsel for the appellant refers to the relevant provisions of the Sentencing Act which are as follows:

> "**5. Sentencing guidelines**
>
> (2) In sentencing an offender, a court shall have regard to –
>
> ……
>
> (e) the offender's character, age and intellectual capacity; …"
>
> **"6. Factors to be considered in determining offender's character**
>
> In determining the character of an offender, a court may consider, among other things –
>
> (a) the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender;
>
> (b) the general reputation of the offender; and
>
> (c) any significant contributions made by the offender to the community."

[10] The appellant was at the time a 55 year old man. A record of his prior convictions had been tendered before the learned stipendiary magistrate and marked Exhibit P2. The appellant had a prior conviction in 1978 for drive exceed .08 per cent. A conviction for possess cannabis in 1990 and a conviction for failing to ensure a child was wearing a seat belt in 1991.

[11] His Worship noted that he had led a blameless life for ten years (tp 5). During the course of submissions to him his Worship noted the appellant suffered from diabetes and high blood pressure (tp 6). He also noted the appellant was 55 years of age (tp 7) and that he had been on a disability pension since 1993 (tp 11). In considering a sentence of imprisonment his Worship made these observations "For a man of his age, it would be fairly devastating. A man of his health problematical" (tp 17).

[12] Detailed submissions were made to the learned stipendiary magistrate as to the appellant's employment history which included security work at the Bagot Community and his position as President of the Bagot Community for four years until he retired for reasons of ill health including diabetes and back problems. His Worship commented "I'm sure that it's a stressful job." (tp 10).

[13] Submissions were put to the learned stipendiary magistrate as to the appellant's family situation. He has been in a relationship with a woman since 1983. They have six children. The family situation was the subject of some discussion between Ms Musk who appeared for the appellant in the Court of Summary Jurisdiction and the learned stipendiary magistrate (tp 11).

[14] Counsel for the appellant submits the learned stipendiary magistrate fell into error when he said (tp 15):

> "Most good fences have got obvious good character. He's not a fence, I know that. But it's very handy to have a good character. You can get all the licences you need then."

[15] This remark was made following a submission as to the appellants "obvious good character".

[16] I note this was said by his Worship during the course of submissions to him. It is not part of his reasons for sentence. It appears to be a somewhat peripheral observation of no relevance to this case. It was not a matter that his Worship took into account in the reasons he gave for imposing the sentence that was given. For these reasons I do not accept the submission of counsel for the appellant that it discloses any error in the sentencing process.

[17] Counsel for the appellant further submits that in accepting as he did that the appellant was of prior good character he was in error in imposing a sentence of imprisonment and not as he was requested to do, release the appellant on a good behaviour bond. Counsel for the appellant says that the magistrate fell into the error of placing too great a weight on the aspect of general deterrence and that by making these remarks set out below he effectively made an example of this person of good character specifically to deter other persons of good character. The remarks complained of are set out at tp 18:

> "As to a straightforward good behaviour bond, I think that is sending a totally wrong message to people about their duty in the face of thieves. They may have no positive duty to go and report to the authorities but they certainly have a negative duty not to provide assistance, as this man did."

[18] I do not accept the submission on behalf of the appellant on this aspect. His Worship was doing no more than explaining why he considered a bond would be inappropriate, because the nature of the offence of receiving is one that warrants a component for general deterrence in the sentence. I do not accept his Worship has been shown to be in error.

(b) The learned magistrate gave insufficient weight to the Defendant's assistance to the police.

(c) The Learned Magistrate gave insufficient weight to the Defendant's plea of guilty.

[19] The prosecutor had informed the learned stipendiary magistrate (as quoted in par 6 of these reasons for judgment) as to the assistance the appellant had given to police. His Worship had noted that the appellant was entitled to consideration for that, and had also said at tp 15 he could be assured of getting a good discount for the assistance given to authorities.

[20] In his reason for sentence his Worship said as follows (tp 17):

> "To his credit, the defendant has pleaded guilty at an early - I'm sorry, has confessed at a very early opportunity. Okay. He was caught with the stuff, or half the stuff. That's fairly inevitable. But nonetheless, he has done it. He has also named names. He has told the police that he is prepared to give evidence."

[21] The essence of the complaint made by the appellant is that the learned stipendiary magistrate did not quantify the amount of the discount for the appellant's cooperation with the police nor did he quantify the discount for

the guilty plea. The submission is that the failure to do so amounted to error.

[22] Counsel for the appellant refers to the following passage in *Kelly v R* (2000) 113 A Crim R 263 at 270 - 271:

> "In our opinion it is desirable that a sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor, but we do not consider that it is possible to lay down any tariff. The weight to be given to the plea will vary according to the circumstances.
>
> Often, as here, the assistance given to the law enforcement authorities in investigating the offence may diminish the value of the plea given the strength of the prosecution case arising from that assistance. The combination of those two factors, however, allows for greater mitigation than would a plea without that cooperation. Public expense occurs not only in the courts, but also in the investigatory process.
>
> In addition, it may be appropriate in the circumstances, rather than reduce the head sentence, to give effect to the value of the plea by other means such as a partially suspended sentence or home detention order, or by the imposition of a fine, to mention only some of the obvious examples.
>
> .....
>
> We do not believe that by encouraging sentencers to quantify the discount allowed for a guilty plea we are placing the sentencing discretion in a procedural straitjacket."

[23] The learned stipendiary magistrate did indicate he was allowing a discount for the plea of guilty. In addition to the quote from his Worship's reasons for sentence referred to above, he also made the following comments on the issue of a discount (tp 18):

> "I'm accepting that he indicated that he would do it and that that has certainly the potential for making the life of the prosecuting authorities easier and their expenses less, whether because a man will

plead guilty knowing that someone else is going to tell on him if he doesn't or for some other reason, is beside the point.

MR DUGUID: Yes.

HIS WORSHIP: So he does get substantial discount for his co-operation with the authorities. …"

[24] Whilst the judiciary are encouraged to quantify the amount of the discount that is allowed the fact that it was not quantified does not amount to error. In the circumstances of this case the learned stipendiary magistrate made it quite clear that the plea of guilty and the appellant's assistance to police were a matter he took into account to the credit of the appellant and allowed him a discount on his sentence. The amount of the discount is a matter within the discretion of the magistrate. I do not consider the learned stipendiary magistrate has been shown to be in error.

[25] I would dismiss this ground of appeal.

2. That the learned magistrate erred in assessing the gravity of the appellant's offending behaviour in imposing a wholly suspended sentence of imprisonment.

[26] Mr Bryant, counsel for the appellant, submitted that the learned magistrate failed to properly give consideration to the objective circumstances of the offence. I propose to address the factors referred to by counsel for the appellant.

(1) The maximum penalty for the offence is seven years imprisonment.

(2) The total value of the property stolen and stored in one of the bedrooms of the appellant's home was $7000. The following day one of the persons involved in the theft removed some of the property. The next day police executed a search warrant on the appellant's residence and located the remainder of the property valued at $3593.50.

(3) & (4) The magistrate accepted that when the two persons who committed the theft arrived at the appellant's residence with the stolen goods the appellant was in bed. The magistrate noted he had taken medication and had described himself as "groggy" when they arrived. However, on the agreed facts the appellant was well aware the property was stolen when he allowed the men to leave the property in a bedroom at his residence in the early morning of 10 April 2001. I agree with the submission made by Mr Elliott, counsel for the respondent, that the appellant played a critical role in enabling the persons who had committed the theft to conceal the property. One of them returned on 11 April to remove half the property which was subsequently sold and has not been recovered.

(5) & (6) The appellant himself did not expect to make any profit, he was by assisting the thieves enabling them to make a profit. The learned stipendiary magistrate noted that the appellant made it clear he did not want to be involved and only did it as a favour to one of the two persons involved in the theft. The learned stipendiary magistrate

also noted that the appellant was put upon by the two who had committed the theft to take care of the gear just for a short time.

(7) I have already dealt with the issue of the degree of cooperation with the authorities and the way in which the learned stipendiary magistrate took that into account.

[27] The appellant takes issue with a remark made by the learned stipendiary magistrate in the course of his reasons for sentence when the learned stipendiary magistrate said (tp 17):

> "The community has to understand that one of the better ways of stopping thieves is by making it unprofitable for them."

[28] Counsel for the appellant submits that in the context of this offence such a comment is incongruous as the appellant did nothing to assist the co-offenders in making a profit, nor was he to receive any reward or profit from the sale of the stolen items. Mr Bryant on behalf of the appellant contends that the magistrate fell into error in assessing the gravity of the offending behaviour and took into account aggravating factors which did not form part of the circumstances of the case against the appellant. Counsel for the appellant further submits that the learned magistrate proceeded to sentence the appellant on the basis that there was a need to make it unprofitable for thieves to use people, such as the appellant, to store their stolen goods. It is submitted this had the effect of punishing the appellant for the actions of the two co-offenders who were the only parties with an expectation of a profit.

[29] I do not accept the submission on behalf of the appellant that his Worship fell into error.

[30] To put the comment in context I conclude the paragraph from which the comment was extracted (tp 17):

> "The community has to understand that one of the better ways of stopping thieves is by making it unprofitable for them. Thieves sometimes take things for their own use. People who steal food and drink are often in that situation but a great deal of the thieving that goes on is to obtain money for other things, and one can easily imagine that ET and Gypsy weren't really trying to set up a carpenter's workshop."

[31] I agree with the submission made by Mr Elliott on behalf of the respondent that this comment has been misconstrued. All the learned stipendiary magistrate was saying was that the appellant played an important role in helping the two co-offenders make a profit i.e. by agreeing to store the stolen property for them.

[32] Counsel for the appellant contends that the objective circumstances of the offence and the appellant's good character are such that no prison sentence was called for in all the circumstances of this case.

[33] The test to be applied on an appeal of this nature is not whether I would have imposed a lesser sentence.

[34] The principles applicable to an appeal of this nature are as follows:

> *"Salmon v Chute & Anor* (1994) 94 NTR 1 at p 24 where Kearney J repeated the comments made in *Raggett, Douglas and Miller v R* (1990) 50 A Crim R 41 at p 42.

> It is fundamental that a trial judge's [or magistrate's] exercise of his sentencing discretion is not to be disturbed on appeal, unless error in that exercise is shown. … The presumption is that there is no error. …
>
> An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error."

[35] There were mitigating circumstances relating both to the offence and to the offender. These were such as to justify the full suspension of the sentence of imprisonment.

[36] I am not able to conclude either that the learned stipendiary magistrate fell into error or that the sentence he imposed was outside his sentencing discretion such that it was manifestly excessive.

[37] For these reasons I would dismiss the appeal.
