Manakgu v Russell [2013] NTSC 48

PARTIES:	**MANAKGU, Malachi**
	v
	RUSSELL, Adam
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 17 of 2013 (21311165)
DELIVERED:	14 August 2013
HEARING DATE:	19 June 2013
JUDGMENT OF:	BARR J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – assessment of objective seriousness of offence – Magistrate drew an impermissible inference – sentence manifestly excessive – sentence quashed – offender re-sentenced

SENTENCING – Appeal against sentence – breach domestic violence restraining order – turns on own facts –situational breach – Magistrate drew an impermissible inference – sentence manifestly excessive – sentence of 3 months imprisonment quashed – sentence of 15 days substituted taking into account events post sentence.

DOMESTIC AND FAMILY VIOLENCE ACT – breach of restraining order – range of offending encompassed by offence – relevant considerations

Criminal Code (NT) s 188
Domestic and Family Violence Act (NT) s120
Justices Act s 177 (2)(c)
Sentencing Act s 6A(f)
Summary Offences Act s. 47AB

R v Di Simoni (1981) 147 CLR 383, referred to

REPRESENTATION:

Counsel:

Appellant:	J Hunyor
Respondent:	D Jones

Solicitors:

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

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

Manakgu v Russell [2013] NTSC 48
No. JA 13 of 2013 (21311165)

BETWEEN:

MALACHI MANAKGU
Appellant

AND:

ADAM RUSSELL
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 14 August 2013)

[1] On 26 March 2013 the appellant came before the Court of Summary Jurisdiction at Oenpelli, near Jabiru in the Northern Territory, and pleaded guilty to engaging in conduct that resulted in a contravention of a Domestic Violence Order, contrary to s 120(1) *Domestic and Family Violence Act* (NT).

[2] The magistrate convicted the appellant and imposed a sentence of three months imprisonment.

[3] The appellant appeals to this court on several grounds, including that the sentence was manifestly excessive in all of the circumstances.

[4] The facts can be briefly stated. On 27 June 2012 a Domestic Violence Order (DVO) was made by the Court of Summary Jurisdiction in Darwin against the appellant in favour of the protected person, his wife. Under that order, the appellant was restrained from "approaching, entering or remaining in the company of the protected person when consuming alcohol … or when under the influence of alcohol …". The order also restrained the appellant from causing harm or attempting to cause harm or intimidating, harassing or verbally abusing the protected person.

[5] On 16 March 2013 the appellant attended the Gunbalunya Sports and Social Club where he consumed about 13 cans of full strength beer which rendered him intoxicated. He walked home from the club and then went to the home of the protected person. He was observed by police on patrol to be in the company of the protected person in the doorway of her home. Police spoke to the appellant and made observations as to his level of intoxication. He was arrested and taken to the Oenpelli Police Station and after resting and sobering up he was spoken to. He declined to participate in a formal interview with police. At the time of his being in the company of the protected person in an intoxicated state, the DVO was in force.

[6] The DVO had been made by the Darwin Court of Summary Jurisdiction on 27 June 2012. Therefore, at 16 March 2013, the order had been in force for almost nine months, without breach. It only had some three months to go. This can be gleaned from the Crown facts and the record of prior offending which were read and tendered in the sentencing proceeding. However, it

would appear that the appellant had been in prison for five of those nine months, which somewhat detracts from the full merit of the appellant's compliance with the DVO from the time it was made up to the time of offending in March 2013.

[7] Defence counsel made submissions to the magistrate to the effect that the appellant came before the court to plead guilty at the very earliest opportunity. She asked the magistrate to take into account that the offending was "at the lower end of the scale in this type of offending albeit it is still a breach of a court order". When queried as to why she submitted the offending was at the lower end of the scale, counsel for the appellant referred to the absence of any allegation as to threatening behaviour, infliction of harm or any attempt to cause harm. Counsel for the appellant informed the magistrate, without objection, that the appellant had been at the club and went to speak to his wife because he understood that she had prepared dinner for him; he went to pick up his food. As he was leaving his wife's house, the police saw him at the front door.

[8] The magistrate responded:

> So there's pre-planning. He knows that he has got to go and pick up dinner, but he goes and has a whole lot of drinks. So he absolutely set out to have the same disregard that he has to every single court order that has ever been made in his life …

[9] The references to "pre-planning" and the appellant's setting out to disregard the DVO suggest that the magistrate had concluded that the appellant knew

that his wife would be preparing dinner for him before he started drinking his 13 beers. However, the defence submission does not expressly or by implication concede that fact, and there is otherwise no evidence to ground the adverse conclusion beyond reasonable doubt. Consistent with the admitted facts and the defence submission, the appellant may have learnt that his wife had prepared his dinner before he started drinking; he may have learnt that fact anywhere along the way from beer number one to beer number thirteen; or he may have learnt that fact when he returned home but before he went to the home of his wife. When counsel told the magistrate that she would obtain instructions to answer the specific question asked by the magistrate, namely: "How did he know that dinner was going to be there for him", her Honour replied "Don't [*take instructions*] it doesn't matter".

[10] The magistrate then referred defence counsel to the appellant's two prior convictions for breach of domestic violence orders, one for a contravention committed in August 2007 (for which he had been sentenced to 7 days imprisonment) and another committed in October 2009 (for which he had been sentenced to one month imprisonment). I note that he had committed aggravated assaults on a female in October 2010 and in June 2012.

[11] The magistrate then proceeded to sentence the appellant. I reproduce below her Honour's sentencing remarks:

> The reason that you are here in court today and the offence that you have said you are guilty of is approaching Bronwyn when the court ordered that you not go near her when you have been drinking.

Now you know that that is what the court ordered. It is true that you did not hit and harm – or harm her. But the statement of facts says that the police found you there talking to her in the door way. …

I am told that he went there to pick up a meal but he is not allowed to go near here when he has been drinking. That order is put there for her protection. And it must have been put there for her protection because you must have hurt her in the past when you had been drinking.

You have disobeyed the order of the court. And you have disobeyed orders of courts many many times. This is your criminal history. It is a long one. Many times courts have given you bail, you have broken your bail. The courts have given you suspended sentences. You have broken the suspended sentences.

Twice before courts have made domestic violence orders or protection orders and you have broken them. You are deliberately not doing what the court says you must do.

I am not punishing you again for something that happened in the past. That is finished. But what this tells me is that you have many many many times disobeyed a court order. And the law says that in the worst kind of case you can go to gaol for two years.

This is not the worst case, I agree. But I don't think it's a very minor case either, and it certainly would not be appropriate to give you a fine. There is no choice but to send to you gaol so that you understand that you must obey orders of the court.

You have pleaded guilty, and you have pleaded guilty as early as possible so I will not send you to gaol as long as what I might have thought would have been proper.

Your partner has not had to come to court and give evidence which is good. But even so, you will get less but you still will be going to gaol. You are convicted and sentenced to a term of imprisonment of three months which dates from today.

Consideration of arguments on appeal

[12] Counsel for the appellant argues that the magistrate erred in her assessment of the objective seriousness of the offending conduct. He also argues that the sentence was manifestly excessive in all the circumstances.

[13] There is no doubt that a sentencing magistrate must assess the objective seriousness of the offending conduct when sentencing for a DVO contravention. Objective seriousness would normally be considered relative to the various behaviours on the part of the offender which were the subject of restraint under the DVO and relative to the serious kinds of conduct which could constitute a DVO contravention.

[14] I agree with Mr Hunyor, counsel for the appellant, that, consistent with *R v Di Simoni*,[1] a magistrate assessing the objective seriousness (including the relative seriousness) of the offending conduct should take into account, by way of comparison, not only conduct constituting a DVO breach which falls short of establishing a separate offence, for example: offensive, intimidating, threatening, harassing and demeaning conduct, but also conduct which establishes a criminal offence, albeit less serious, such as common assault[2] or threatening violence.[3] Mr Jones, counsel for the respondent, does not contest Mr Hunyor's submission in this respect.[4] In

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1 (1981) 147 CLR 383.

2 Under s 188 *Criminal Code*, common assault carries a maximum penalty of imprisonment of one year; whereas under s 121(1) *Domestic and Family Violence Act*, a DVO breach carries a maximum of two years.

3 Under s 47AB *Summary Offences Act*, a person who threatens to damage a dwelling-house with intent to intimidate another person is guilty of an offence for which the maximum penalty is imprisonment for 12 months.

4 Respondent's Further Outline of Submissions, par 10 and par 11.

my opinion, a magistrate may properly reason that the maximum penalty and indeed the higher range of penalties would apply in the case of physical assaults as well as the more serious instances of offensive, intimidating, threatening, harassing and demeaning conduct.

[15] It is trite law that a sentencing magistrate should take account of all the circumstances of the offence, whether those circumstances increase or decrease the culpability of the offender. The circumstance that an offence involves violence or the threat of violence is an aggravating factor for the purposes of s 5(2)(f) *Sentencing Act*.[5] In the case of an offender who has previously been found guilty of a DVO contravention, the court must record a conviction and sentence the person to imprisonment for at least 7 days unless (1) the offence does not result in harm being caused to the protected person, and (2) the court is satisfied it is not appropriate to record a conviction and sentence the person to imprisonment in the particular circumstances of the offence. In that context it would be necessary for the sentencing magistrate to look at the nature and extent of any harm caused by the DVO contravention.

[16] In the present case it can be seen from a consideration of the terms of the DVO that the appellant was restrained from doing things which would cause harm and fear of harm to the protected person. The appellant was also restrained from being in situations which might lead to the appellant causing harm or fear of harm (that is, being with the protected person when he was

[5] *Sentencing Act* s 6A(f).

intoxicated, thereby increasing the risk that he might do things causing harm or fear of harm to the protected person). Generally speaking, a breach where harm or fear of harm is caused to the protected person is worse than a merely 'situational' breach. The appellant's breach was a low order 'situational' breach. No harm or fear of harm was caused.

[17] However, given that the DVO contravention in this case was a breach of a court order, it is important to consider the extent to which the offending conduct represented a contemptuous response to the court's order. In general, the more egregious the conduct in terms of causing harm or fear of harm to the protected person, the greater the probable degree of contempt for the court's order or orders. However, other relevant considerations include how soon the breach has occurred after the making of the court's order. Even a relatively minor breach occurring the day of or shortly after the court's order might be regarded as serious. Each breach will depend on its own facts.

[18] Mr Hunyor submits that the magistrate erred in assessing the objective seriousness of this offence in that she failed to give appropriate weight to the following: the absence of aggravating features such as threats, harm, violence, damage to property, intimidation or humiliation; the fact that the conduct constituting the breach was otherwise lawful (picking up dinner); that the circumstances of the breach did not establish some other less serious offence, such being armed with an offensive weapon; that the breach was of short duration and was not sustained or repeated; and that the conduct

constituting the breach did not cause fear or distress to the protected person (or any other person); and that the appellant pleaded guilty at the very earliest opportunity. Mr Hunyor also submits that the magistrate placed improper weight on the appellant's prior convictions. Further, Mr Hunyor submits that the magistrate failed to take into account the extent of compliance with the DVO over the period of approximately 9 months before the breach.[6]

[19] I accept Mr Hunyor's submission in substantial part. In my judgment, the magistrate erred in the exercise of her sentencing discretion by failing to properly assess the objective circumstances of the offence, including drawing an unjustified inference as to the appellant's "pre-planning" which appears to have then coloured her Honour's assessment of the offender's conduct. The sentencing discretion miscarried. Additionally, I consider that in all the circumstances the sentence was not just arguably but manifestly excessive.

Conclusion and orders

[20] I allow the appeal on Grounds 3 and 4. It is not necessary for me to decide the other grounds. Pursuant to s 177(2)(c) *Justices Act* I affirm the finding of guilty and the conviction imposed by the learned magistrate, but for the reasons given I quash the sentence of three months' imprisonment imposed.

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[6] Although the force of that submission is lessened by the fact that the appellant was in prison for five of those nine months.

[21] My re-sentencing of the appellant is complicated by the fact that he commenced to serve his sentence of imprisonment until released on bail pending the outcome of this appeal. He was in prison from 26 March to 9 April 2013, and thus spent 15 days in custody.

[22] In the circumstances, I impose a sentence of 15 days imprisonment which I note has been served in full.

[23] The substituted sentence should not be taken to be a sentence which I consider should necessarily have been imposed by the learned magistrate. The substituted sentence is intended to take account of the events which have taken place since the learned magistrate dealt with the appellant, including the grant of appeal bail. Nonetheless, I consider that a sentence of some actual imprisonment was justified. Even though the appellant's conduct was at the low end of the scale of seriousness, a sentence of an actual term of imprisonment was and remains appropriate to make clear to the appellant and the community that any material breach of a court order will be acted upon and punished as appropriate; and also (given the appellant's offending history) for reasons of specific deterrence.
