O'Rourke v Hales [1999] NTSC 47

PARTIES:	IAN CHARLES O'ROURKE
	v
	PETER WILLIAM HALES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction
FILE NO:	JA89/98 (9820577)
DELIVERED:	5 May 1999
HEARING DATES:	29 March 1999
JUDGMENT OF:	THOMAS J

CATCHWORDS:
Appeal – justices – appeal against conviction – trespass – plea of guilty – duty of magistrate when dealing with unrepresented accused – *Justices Act* 1928 (NT).

Justices Act 1928 (NT), s 177
Trespass Act 1987 (NT), s 7
Sentencing Act 1995 (NT), s 8(1)

Cooling v Steel (1971) 2 SASR 249 at 250 – 251, applied.
Bates v Haymon (1988) 90 FLR 55 at 67, considered.
Salter v Seebohm (1972) 4 SASR 192, considered.
Browne v Smith (1974) 4 ALR 114, considered.

REPRESENTATION:
Counsel:

Appellant:	M. Little
Respondent:	I. Rowbottam

Solicitors:

Appellant:	M. Little
Respondent:	Office of the Director of Public Prosecutions

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

O'Rourke v Hales [1999] NTSC 47
No. JA89/98 (9820577)

BETWEEN:

IAN CHARLES O'ROURKE
Appellant

AND:

PETER WILLIAM HALES
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 5 May 1999)

[1] This is an appeal from a decision of a magistrate to convict the appellant following the appellant's plea of guilty to a charge:

> "That on the 29th day of September 1998 at Jabiru in the Northern Territory of Australia the said Ian Charles O'Rourke trespassed on a place, namely, Jabiluka Mineral Lease, and after being directed to leave that place by Energy Resources Australia, refused to do so forthwith.
> Contrary to section 7 of the *Trespass Act*."

[2] The agreed facts, as read by the Police Prosecutor Sergeant Hales, were as follows:

> "… in the early hours of the morning of Tuesday, 29 September this year, each defendant was one of a group of about 200 persons who were on the Oenpelli road at the entrance to the access road to the portal compound of the Jabiluka Mineral Lease.

> Your Worship, that road from its junctions travels about 2.7 kilometres in to the Jabiluka Mineral Lease to the portal compound which is the area in which the mining operations conducted by ERA are actually conducted.
>
> The defendant and each of these defendants were there to protest at the activities of Energy Resources of Australia who are the holders of that lease.
>
> At the time, the group were addressed by Robert Korljan, an employee of Energy Resources of Australia and were told as a group that if they entered the lease, they would be trespassing and liable to arrest.
>
> Each of these defendants and a majority of the group ignored that warning. They left the roadway, entering the Jabiluka Mineral Lease by way of the access road.
>
> As the group entered the lease and walked up the road towards the portal compound, they were continually addressed by Korljan who repeatedly required them to leave the lease and warned them that failure to do so would result in arrest.
>
> On these repeated warnings, some of the group turned around and left the lease but the – each of these defendants and in fact, a majority of the group, did not. Each of these defendants were arrested by police somewhere between 80 and 400 metres inside the lease. Each defendant was arrested and conveyed to the Jabiru Police Station where after supplying personal details, each defendant was served with a summons and was released ….”

[3] After giving the appellant an opportunity to make further submissions and listening to the very brief submission made by the appellant the learned stipendiary magistrate proceeded to record a conviction for the offence and imposed a fine of $300 plus a victim levy of $20.

[4] It is the recording of the conviction which is the subject of this appeal.

[5] The grounds of appeal are as follows:

"1. That the learned Stipendiary Magistrate erred in his application of section 8 of the Sentencing Act 1995 NT when exercising his discretion as to whether to record a conviction.

2. That the learned Stipendiary Magistrate failed to ensure that the defendant, as an unrepresented person, was able to place all matters to the Court on the issue as to whether a conviction was recorded.

3. That the learned Stipendiary Magistrate erred by placing too much emphasis on deterrence and the prevalence of the offence and insufficient emphasis on rehabilitation of the defendant.

4. That the learned Stipendiary Magistrate failed to take adequate or any consideration of the defendant's employment when recording a conviction.

5. That the learned Stipendiary Magistrate failed to take adequate account of the defendant's character and antecedents when recording a conviction.

6. That the sentence imposed was manifestly excessive in all the circumstances of the case.

7. That the learned Stipendiary Magistrate failed to give sufficient weight to the defendant's personal circumstances and employment at the time of sentencing and in particular the effect a conviction may have on his employment.

8. That the learned Stipendiary Magistrate failed to take full account of the facts of the case including the circumstances of the offence.

9. That the learned Stipendiary Magistrate erred by hearing the matter without explaining the charge and the range of penalties to the defendant prior to taking a plea of guilty.

10. That the learned Stipendiary Magistrate erred in allowing the charge to be read to the defendant and the plea of guilty to be taken at the same time as other defendants who were not charged on the same charge sheet.

11. That the learned Stipendiary Magistrate erred by not informing the unrepresented defendant that he would require further evidence on the question of whether or not a conviction would affect his career.

12. That leave be granted to file further ground or grounds of appeal."

[6] Ms Little, counsel for the appellant, seeks an order pursuant to s177 of the *Justices Act* that the conviction recorded by the learned stipendiary magistrate be quashed, his order of 26 October 1998 be set aside and the matter remitted for hearing before the Court of Summary Jurisdiction.

[7] The essence of the submissions on behalf of the appellant are that there were procedural errors in the hearing before the learned stipendiary magistrate. If this Court agrees the learned stipendiary magistrate was in error then the conviction should be quashed and his orders set aside. Counsel for the appellant indicated that there are further matters the appellant would wish to place before the Court in support of his submission that no conviction be recorded.

[8] I will deal firstly with the following ground of appeal:

[9] ***Ground 2: "That the learned Stipendiary Magistrate failed to ensure that the defendant, as an unrepresented person, was able to place all matters to the Court on the issue as to whether a conviction was recorded."*** There is a degree of overlap between grounds 2, 4, 7 and 11.

[10] At the hearing before the Court of Summary Jurisdiction, the appellant indicated that he wanted the learned stipendiary magistrate to exercise his discretion not to record a conviction.

[11] Section 8(1) of the *Sentencing Act* 1995 (NT) sets out the factors to be taken into account in deciding whether or not to record a conviction. Section 8(1) provides that:

> "8(1) In deciding whether or not to record a conviction, a court shall have regard to the circumstances of the case including –
>
> (a) the character, antecedents, age, health or mental condition of the offender;
>
> (b) the extent, if any, to which the offence is of a trivial nature; or
>
> (c) the extent, if any, to which the offence was committed under extenuating circumstances."

[12] The appellant tendered two references which were marked as exhibit 1 and made submissions as to the possible consequences that a conviction could have on his employment as follows (t/p 6):

> "MR O'ROURKE: Yes, I'd like to confirm what sergeant said, that that's true, and I don't recoil from that. I am, you know, I don't intend to do this again and I also would like to say that I am committed to the Northern Territory and to improving the health services of the Northern Territory and, I guess, this – if a conviction is recorded, it could interfere with our work. It may or may not, but that's my only statement, sir."

[13] The appellant did not elaborate on how a conviction would interfere with his employment. The learned Stipendiary Magistrate, who had already acknowledged that Mr O'Rourke was t/p 5:

> "A person of very high repute and standing within the community, and obviously a person who is making a very substantial contribution to the community at large."

then proceeded to balance the appellant's excellent character and antecedents against the actions of the defendant and the prevalence of this type of offence. He concluded that t/p 7:

> "Unfortunately, I consider that those factors override the excellent character and antecedents of the defendant and I find that in this case I am compelled after exercising my discretion in a judicial way, that a conviction must be entered.
>
> I do accept that it may or may not have an effect on Mr O'Rourke's career. Again, that is somewhat speculative, but in the absence of something a little bit more cogent, I don't think that that's a matter which at this point could sway me in not recording a conviction."

[14] It is the appellant's contention that the learned Stipendiary Magistrate did not make the appellant aware of what he was thinking and did not give the appellant an opportunity of putting further materials or submissions to him as to the possible effect that a conviction would have on the appellant's employment.

[15] Counsel for the respondent submits the learned stipendiary magistrate was well aware of the factors which were to be taken into account when deciding whether to impose a conviction and specifically asked for relevant information. It is the further submission of counsel for the respondent that the duties of the presiding magistrate did not require him to run the appellant's case for him.

[16] The principles to be exercised by the Court when dealing with unrepresented persons pleading guilty in the Court of Summary Jurisdiction have been set

out in *Cooling v Steel* (1971) 2 SASR 249; *Bates v Haymon* (1988) 90 FLR 55; *Salter v Seebohm* (1972) 4 SASR 192 and *Browne v Smith* (1974) 4 ALR 114.

[17] Courts must be ever alert to an unrepresented accused: *Bates v Haymon,* supra at 67.

[18] In *Cooling v Steel,* supra, Wells J stated at 250-251:

> "It is imperative, therefore, that courts of summary jurisdiction should follow practices that will avoid the possibility that a party or a witness should feel that he has not been permitted to give a good account of himself because he has been overawed, or he has not been made aware of his rights, or no, or no sufficient, explanation has been made of what is required of him.
>
> Difficulties arise at a number of stages in the proceedings. I refer more particularly to the typical case of the defendant who attends unrepresented and pleads guilty. It seems to me that the court should give careful attention to the following matters of practice and procedure.
>
> …It should be made clear that if a plea of guilty is offered and recorded, the defendant may put matters in mitigation either by unsworn statement or on oath (more especially if the offence may be held to be trifling) and that he may call witnesses or produce other relevant material for the consideration of the court…If, after hearing the defendant, the court feels that there are relevant areas that he has not covered, he should be invited to cover them …"

[19] A reading of the transcript demonstrates that the learned stipendiary magistrate made every effort to treat the appellant fairly. He advised Mr O'Rourke of the reasons he was having difficulty in proceeding to not record a conviction and sought a response from Mr O'Rourke. However, there was no clear and unambiguous statement to the effect that the appellant could seek to adjourn the proceedings to obtain more information.

The appellant himself was most inadequate in his own representation. He was clearly unfamiliar with the processes and procedures of the Court. He provided the learned stipendiary magistrate with no material in respect of whether a conviction would affect his career. The learned stipendiary magistrate was obviously concerned with this aspect but considered without "something a little bit more cogent" he could not proceed to acquiesce to the appellants request.

[20] The Police Prosecutor submitted that the Crown opposed the application not to record a conviction.

[21] On balance, I have come to the conclusion that the learned stipendiary magistrate, having been alerted to the fact that the appellant sought no conviction and did not know if it would interfere with his work, should have told the appellant he required more information and given him the opportunity of an adjournment to obtain further evidence.

[22] Counsel for the appellant submits that there is further material that the appellant seeks to put before the Court.

[23] Prior to the time of stating his reasons for decision and imposing penalty, the learned stipendiary magistrate did not advise the appellant that he may have been persuaded not to record a conviction had the appellant provided further evidence. I am of the view that the learned stipendiary magistrate failed to ensure or satisfy himself that the unrepresented appellant understood his right to apply for an adjournment to obtain legal advice or to

obtain further evidence and to be in a position to place all matters to the Court on the issue as to whether there should be no conviction recorded. It may well be that when the Court does have all the material placed before it there is not sufficient reason to proceed in the manner requested by the appellant. However, in the circumstances of this case I have come to the conclusion he should have an opportunity to put forward all the relevant material.

[24] Accordingly, I am of the opinion that this ground of appeal should be allowed and pursuant to s 177 *Justices Act* 1928 (NT), the conviction is quashed and this matter is remitted to the court of summary jurisdiction for re-hearing.

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