Denham v Hales [2003] NTSC 87

PARTIES:	DENHAM, Veronica Anne
	v
	HALES, Peter William
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA55 of 2003
DELIVERED:	1 August 2003
HEARING DATES:	10 July 2003
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

JUSTICES APPEAL
Appeal against sentence – manifestly excessive – cumulative sentence imposed on all offences – departure from s 50 Sentencing Act considered – consideration of either a cumulative or concurrent sentence –

Criminal Code 1999 (NT), s 188(1) and s 189A
Sentencing Act, s 50

Attorney-General v Tichy (1982) 30 SASR 84

REPRESENTATION:

Counsel:

Applicant:	J Sharp
Respondent:	G Dooley

Solicitors:

Applicant:	CAALAS
Respondent:	DPP

Judgment category classification:	C
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Mar0336

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

Denham v Hales [2003] NTSC 87
No. JA55 of 2003

BETWEEN:

VERONICA ANNE DENHAM
Applicant

AND:

PETER WILLIAM HALES
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 1 August 2003)

[1] Appeal against sentence. On 14 February 2003 the appellant was sentenced upon her plea of guilty in the Court of Summary Jurisdiction sitting in Darwin upon one count of breaching a domestic violence order, one of using objectionable words, two of common assault and one of assaulting a police officer in the execution of the officer's duty. As to the breach of the domestic violence order, his Worship imposed a sentence of imprisonment to one month and nineteen days, for the first of the common assaults, one month and nineteen days, for the second of the common assaults, one month and nineteen days and for assault police, two months and fourteen days. All the sentences were ordered to be served cumulatively, a total sentence of

five months and seventy one days. His Worship declined to suspend the whole or any part of that sentence. A fine imposed on the remaining charge is not in question here.

[2] The domestic violence order was that the appellant not assault, cause or threaten to cause personal injury to Rebecca Kathleen Mackie and not cause or threaten to cause damage to her property, or act in a provocative or offensive manner towards her. The appellant was ordered not to approach or contact, directly or indirectly, Ms Mackie her sister.

[3] That offence occurred on 30 August 2001 on an occasion when the appellant had consumed a large quantity of beer and had become extremely intoxicated. She went to Ms Mackie's residence. Ms Mackie was present, and she permitted the defendant to enter the residence, but after a short while an argument developed between them and the appellant picked up a frying pan and slammed it into the kitchen sink and shouted that she was going to get a rock and smash the place up. The police were called, the appellant departed, but she continued to shout abuse. When police arrived she was arrested and continued to shout towards Ms Mackie using abusive and insulting language. She also threatened to return and "smash her".

[4] Counsel for the appellant before his Worship explained the breach with reference to tensions between the sisters. The appellant's daughter was residing with Ms Mackie, a dispute arose between them and Ms Mackie threw a mobile phone at the girl which struck her on the forehead. When the

daughter returned to the appellant's residence an injury was observed and the daughter told Ms Denham what had happened. The appellant did nothing then, but the following day she was drinking and decided to take matters into her own hands and remonstrate with Ms Mackie as she admitted.

[5] The appellant had previously been convicted on one occasion of three similar offences. The first for an occurrence on 17 May 2001, the next on 7 June and the next on 8 June. The record indicates that for all that, she received fines totalling $2,000. On that same day she was convicted of separate offences involving assault (two counts), unlawful damage to property (two counts) and was also dealt with for a breach of an order suspending sentence. For present purposes it is sufficient to note the convictions in respect of a breach of the domestic violence order and that as a consequence the appellant stood to be imprisoned for a period of not less than seven days out of a maximum penalty of six months.

[6] It is complained that that sentence was manifestly excessive. In arriving at that term of imprisonment his Worship allowed a discount of fifteen percent for the plea, indicating that he had a sentence of two months imprisonment in mind. No error of principle has been shown to vitiate that sentence. After taking into account the circumstances of the offence and the circumstances of the offender, to be provided in detail hereunder, I do not consider that it has been shown that his Worship erred in the exercise of his discretion in imposing that sentence. I note that the offending did not take

place as an immediate reaction to the assault upon the appellant's daughter, but the following day and after the appellant had consumed alcohol, which on the facts appears to have been the immediate motivation for the criminal behaviour.

[7] The assaults took place when the appellant was again very much under the influence of alcohol. During the afternoon of 23 January she went to the Palmerston Tavern and at about 7.30 that evening was asked by the manager to leave because she had been annoying customers, asking for drinks and had begun to doze off at the table. She left without disturbance, but returned at about ten past eight and was again asked to leave. She became verbally aggressive in abusing the staff. When she was again asked to leave she starting swinging punches towards them, including Mr Withers who was punched in the throat. He suffered some soreness and bruising as a result. The appellant then turned on the manager, Mr Eyres, and punched him in the face with a closed fist whereupon he called the police. He suffered bruising and swelling.

[8] When police arrived the appellant continued her abuse, was arrested and taken to the rear of the police van where she refused to get into the van and had to be wrestled into it by the police officers. She was then lying on her back with her feet towards the rear of the van and started kicking. One of her kicks landed with full force on the right hand side of the face of Constable Curyer. He suffered grazing and redness to his chin. He was at

the time a member of the police force in uniform and acting in the execution of his duty.

[9] When questioned about these matters, the appellant made admissions, but pleas of guilty were only entered after some time during which it was anticipated the matters would go to trial. It was for that reason his Worship did not allow a greater discount. It will be noted that there was a break of one year and five months between the breach of the domestic violence order and the occurrences of 23 January, a factor to be considered later.

[10] The appellant's circumstances are summarised by the learned Magistrate as follows:

> "I'm dealing with a 29 year old year female who has had a unhappy, dysfunctional, dysempowering upbringing. She's a mother and we've seen that the experiences or the lack of … support that she experienced as a child is now being replayed in her daughter's life.
>
> She is a woman who has, it would appear briefly, had some happiness in life. Mr Bryant says and it doesn't seem to be the subject of dispute that she had about 18 months of absence from alcohol. And in Adelaide she underwent some counselling it would seem of an alcohol and psychological nature, and she embarked on a relationship with a non-violent, non-drinking working man after 5 previous relationships with violent men."

[11] It is not suggested that his Worship overlooked the features of the appellant's background which led to those remarks. It was put to him that she had been the subject of sexual abuse by her brother when a child, she was blamed for that brother's suicide by other members of the family, she had suffered other abuse from her stepfather, a violent alcoholic, she had

also been abused by the men with whom she had had relationships. There was a correlation between those ongoing events and her indulging in alcohol to excess when she tried to deal with her depression and grief. It was also put that there was a relationship between the physical abuse which she had suffered and her resort to violence when intoxicated.

[12] After the incident on 30 August 2001, the appellant continued to drink heavily, but ultimately left Darwin travelling to members of her family in Western Australia and then to Canberra for ten months and finally to Adelaide. During the time she was in Canberra she had the opportunity of participating in counselling not only for her alcohol abuse, but for problems that arose during her childhood and the feeling of guilt surrounding the suicide of her brother. Counsel told the court that she was making great progress and when she went to Adelaide she enrolled in a alcohol rehabilitation course. Prior to the events of 23 January 2003 she had been abstinent from alcohol (18 months would seem to be an overestimate given the time between the breach of the domestic violence order and the time of the latest offences, but it may be accepted as a submission indicating that she had not drunk alcohol for a significant period).

[13] It was said that the alcohol rehabilitation had taken place at a facility known as Annie Koolmatrie House in Adelaide. Her rehabilitation had also been aided by her relationship with another man for four months up until the January events. He was said to be a non-drinker, not violent and in full time employment. He had exercised a stabilising influence on the appellant. It

was in all those circumstances that the appellant decided to return to Darwin to regain custody of her daughter who was then aged thirteen and a half. However, that attempt was unsuccessful partly, at least, because the daughter had rejected her. It was in that state of mind that she was said to have gone to the tavern and began to drink heavily – "to drown her sorrows".

[14] It was noted that she had left the hotel when first asked, but it was put on her behalf that she returned because she was homeless and it was raining and she had nowhere else to go. It was not doubted that the hotel staff were acting within their obligations to see her removed from licensed premises, bearing in mind her state of intoxication.

[15] His Worship was bound by the provisions of s 50 of the Sentencing Act in that the sentences imposed were to be served concurrently unless otherwise ordered. I consider that if a court intends to depart from the statutory direction in s 50, then reasons ought to be given so that the offender will know why he is being punished to a greater degree than might have been expected and so that due consideration can be given to the reason should the matter be subject to appeal. No reasons were given by his Worship.

[16] The difficulties facing a sentencer in deciding whether to leave sentences to run concurrently or whether to accumulate them, wholly or in part, can frequently be aided by reference to what fell from Wells J in *Attorney-General v Tichy* (1982) 30 SASR 84 at 92-93. Here, the appellant had

engaged in a course of conduct in the hotel by assaulting each of the employees in rapid succession in what may properly be regarded as one transaction. The nature of the offences was identical and in those circumstances I see no valid reason to depart from that which s 50 of the statute provides.

[17] The assault upon the police officer in the execution of his duty, however, stands aside from the previous assaults. It is a different offence, it carries a greater maximum penalty (two years imprisonment as opposed to one year). I regard that offence as being separate and distinct from the assaults upon the employees, but the nature of the offence, that is, the assault being a continuation of the appellant's drunken resistance to authority, allows for mitigation by way of reduction of the period of accumulation which might otherwise follow.

[18] In brief, I consider that his Worship erred in accumulating all of the sentences.

[19] It is apparent that his Worship paid little regard to what appeared to be the appellant's prospects of rehabilitation. He said:

> "One can always say that human nature being what it is that things can get better, but the difficulty for Ms Denham is that she has had previous court warnings, she hasn't taken them."

[20] There was nothing to suggest that the apparently significant improvement of the appellant's way of life was not genuine. Further, the background to the

offending on 23 January is to be found in her disappointment at not being able to become reunited with her daughter. In my view what was required was a degree of sympathy for her situation, bearing in mind her tragic personal life to that stage, and her apparently largely successful attempts to get herself onto a better footing. She should also have been given the opportunity to resume the rehabilitation which she had undertaken under penalty of return to prison if she failed to do that. His Worship was informed that enquiries had been made on behalf of the appellant at the rehabilitation centre in Adelaide and she would be welcome to return there to continue grief counselling and counselling for alcohol abuse. I appreciate that the facility is out of the Northern Territory and accordingly Correctional Services may not have been able to properly exercise effective supervision over her, but that is not to say she should not have been given the opportunity to volunteer as she had done previously. It may be that Correctional Services could come to arrangements with their counterparts in South Australia to supervise the appellant, but that option was not explored. Although prospects of rehabilitation may be a significant factor in allowing suspension of a sentence to imprisonment, it is not the only matter relevant to that consideration (*Dinsdale* (2000) 115A Crim R 558). His Worship appears to have been too restricted in his consideration of factors which might justify the suspension or part suspension of the sentence. I consider that his Worship erred in the exercise of his discretion in failing to suspend part of the sentence.

[21] I am not satisfied that his Worship's individual sentences fell aside the bounds of sound discretionary judgment.

[22] The sentence imposed in respect of the breach of the domestic violence order stands.

[23] The sentences imposed in respect of each of the assaults upon the employees at the hotel stand. The order that they be served cumulatively is set aside and they are to be served concurrently. The sentence imposed in respect of the assault on the police officer in the course of his duty stands, but the order that it be served cumulatively on the other terms of imprisonment is set aside. It is to commence one month and fourteen days prior to the expiry of the other sentences.

[24] The effective sentence for all of the offending accordingly is to imprisonment for a period of four months and eight days. That sentence is to commence as from 23 January 2003. Since it has now expired the appellant is to be discharged forthwith. Had it not been for that fact I would have partly suspended it out of mercy and as an aid to rehabilitation so that the appellant could return to Adelaide, undertake further rehabilitation and rejoin the man who appears to have exercised a stabilising influence on her life.
