(tho94013)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

JUSTICES APPEAL

No. SCC No 46 of 1994

BETWEEN:

CHARLIE PEIPEI
Appellant

AND:

PETER JOHN ROBERTS
Respondent

CORAM: THOMAS J

REASONS FOR DECISION

(Delivered 12 August 1994)

By Notice of Appeal dated 14 July 1994, the appellant appeals, pursuant to s172 of the Justices Act, against sentences imposed by the learned Stipendiary Magistrate sitting in Alice Springs on 11 July 1994.

The grounds of the appeal are:

(a) that the said sentence imposed by the learned Stipendiary Magistrate was in all the circumstances manifestly excessive.

(b) that the learned Stipendiary Magistrate imposed a sentence of imprisonment which was not proportional to the objective circumstances of the offence.

On 11 July 1994, the appellant entered a plea of guilty before the learned Stipendiary Magistrate to the following two charges:

On 29 June 1994 at Yulara in the Northern Territory of Australia

(1) Unlawfully damaged property, namely windscreen of a white Toyota troop carrier the property of Mutitjulu Community.

Contrary to Section 25(1) of the Criminal Code.

(2) Being a person against whom a restraining order is in force, did contravene and fail to comply with that order.

Contrary to Section 10(1) of the Domestic Violence Act.

The facts found in support of the two charges were as follows:

". . . on Wednesday, 29 June 1994, the defendant was at Yulara with a friend. The defendant had been drinking most of the afternoon and at about 6.00 pm that evening, the defendant's wife and family arrived at Yulara town square to do some shopping. The defendant approached his wife to give him a lift back to Mutitjulu. The defendant's wife currently has a restraining order against the defendant not to approach her under the influence or threaten her or assault her.

The defendant jumped in the front seat of the vehicle, which is a Women's Council Toyota troop carrier. The defendant's wife then drove the vehicle to the car-park near the takeaway to get some dinner for her children. The defendant saw his friend and told his wife to stop and pick him up. The defendant's wife saw that the friend had a cask of wine and told the defendant that it was wrong to take grog to Mutitjulu.

The defendant was angry and punched the front windscreen, causing a crack from the top to the bottom. The defendant's wife was worried for what the defendant had done and drove to the police station. The defendant then started to argue with his wife, who started to get scared. The defendant's wife jumped out of the vehicle and ran away from the defendant, as she was scared that he was going to hurt her.

The defendant's wife attended the police station the following day and made a statement in relation to the incident. Later that day, police spoke to the defendant and in a formal record of interview the defendant made full admissions to the offences. At no time did the defendant have permission to damage the windscreen and the defendant's wife was scared that

the defendant was going to hurt her because she went to the police station."

These facts were not in dispute and the learned Stipendiary Magistrate proceeded to find each of the offences proved.

The facts were then supplemented with further information concerning the offences and the background of the appellant in a submission made on behalf of the appellant by his counsel, Ms Douglas. This submission was not challenged and I set out the further submission made by counsel for the appellant to the learned Stipendiary Magistrate on 11 July 1994:

"MS DOUGLAS: Your Worship, from the outset my client makes it clear to me that he pleads guilty to the breach of the restraining order. The main basis for his plea of guilty is that he was drunk when he was in contact with his wife on this occasion.

He tells me that he had been drinking on this occasion at Sand Hill camp, which is the other side of the tavern in Yulara, and he had been drinking there with quite a few people; one of those people was Adam Kumanjarra. He says that after this drinking bout he went into the town square to have a break from the group that he was with. He says that his wife turned up in the troop carrier with some of his children there. There was a discussion between the two, where my client says that his wife eventually agreed to take him home.

They then drove off a little way and my client agrees with the precis; he noticed his friend Adam, who he had been drinking with previously, needing a lift back to Mutitjulu. My client tried initially to talk his wife into giving Adam a lift; that turned into an argument which eventually turned into my client smashing the windscreen, which ultimately caused a small crack, on my instructions, in the windscreen. But in any event, the windscreen has to be replaced for roadworthy purposes, so effectively he did damage the windscreen seriously. Your Worship, he does make full admissions. He made full admissions initially to the police in the record of interview, and I would ask you to take that into account. He also pleads guilty at the earliest possible time.

My client tells me that he is a Pitjantjatjara person born at Haasts Bluff. He went to school at the mission school in Hermannsburg and he tells me that he can write and read quite proficiently. He has been living at Mutitjulu for some time

and he has been married to his wife for approximately 11 years, although there have been some troubles in the recent past; he says probably because of his alcohol consumption more than anything else.

They have got two sons together and three daughters. He says some of them are quite small still and they certainly need the care of both himself and his wife. He says his wife basically takes care of those children, but he helps her from time to time. In relation to income he says that his wife receives money - she works - and with that money she supports him. He tells me that he gets about $150 a week which is paid from his wife directly.

Your Worship, he has no prior convictions for breaching a restraining order in the past. He has one prior conviction for criminal damage back in 1985. There was no assault on my client's wife occurring in this set of circumstances, and I would ask you to take that into account. In the circumstances I would ask that you impose fines in relation to the criminal damage. My client tells me that he will make efforts to repay the money to the Women's Centre, but ironically that will come from his income which he receives from his wife. But he certainly will pay to have the windscreen repaired.

As he has no prior convictions for breaching restraining orders in the past, Your Worship, I would ask that you impose a fine; or, alternatively, that you consider a non-immediate period of imprisonment such as a suspended sentence or, alternatively, a community service order. I don't think there is anything else I can add, Your Worship."

The learned Stipendiary Magistrate imposed sentence as follows:

". . . I take into account what has been put to me. I made it quite clear to you when the order was issued that you were not to go near your wife if you were drinking, because that lady has had a lot of trouble with you. On the first count you're convicted and you will pay a fine of $800 plus $20 levy, in default 17 days' imprisonment. For the breach of the restraining order you are convicted and sentenced to 2 months' imprisonment. . . ."

At the time of imposing sentence, the learned Stipendiary Magistrate had before him the appellant's record of prior

convictions. Copy of this record of prior conviction is annexed to this reasons for decision.

It was noted by the learned Stipendiary Magistrate on 11 July 1994 when the matter was before him, that the breach of bond found proved by the court on 29 March 1994 and the conviction for assault on the same day also involved the appellant's wife.

The maximum penalty for the offence of criminal damage under s251(1) of the Criminal Code is two years imprisonment.

Under the provisions of s10(1) of the Domestic Violence Act the maximum penalty for breach of a domestic violence order is $2000 or six months imprisonment for a first or second offence under this Act.

I accept the appellant does not have previous convictions under the Domestic Violence Act.

By consent the appellant entered into an order pursuant to the *Domestic Violence Act* on 13 May 1994.

The order was made in the following terms:

"The COURT hereby orders:

By consent, The defendant not to approach or remain within 100 metres of the Applicant whilst under the influence of alcohol nor of any place where visiting or residing. Not to assault nor threaten to assault the applicant. Not to damage nor threaten to damage the property of the applicant. Order to expire in 6 months.

Dated 13 May 1994 (signed) Clerk of the Court

This order shall, unless it is sooner revoked or varied, continue in force to and including the 12 November 1994."

On 11 July 1994 on the same day as the appellant entered a plea of guilty to a charge of criminal damage and breach of a domestic violence order, this order was varied by consent in the following terms:

"The Court hereby orders: not to approach or remain at any place where the applicant is living or staying. Not to assault or threaten to assault the applicant. Not to damage or threaten to damage the property of the appl. Not to communicate with the appl. whilst under the influence of alcohol order to expire on 12/11/94 at midnight.

Date: 11.7.94 (signed) Magistrate

This order shall, unless if it sooner revoked or varied, continue in force to and including the 12th November 1994."

Counsel for the appellant argues that the appeal is most specifically in respect of the charge of breaching the domestic violence order. The basis of the appeal is that the sentence is excessive in all the circumstances and is not proportional to the offence.

The actual breach of domestic violence order, took place on 29 June 1994 approximately six weeks after the original order was made. The facts in respect of the breach of the domestic violence order have already been stated.

It is the submission of counsel for the appellant that it is unreasonable and unjust for a sentence of imprisonment to be imposed in relation to the breach of a domestic violence order when this is the first offence under the Domestic Violence Act.

It was further submitted that the appellant had assisted the court and his wife by consenting to the domestic violence order on 13 May 1994 and to a subsequent variation on 11 July 1994. His wife was spared the ordeal of giving evidence to obtain a domestic violence order.

It was also submitted, on behalf of the appellant, that the actual breach is on the lower end of the scale of offences for breach of a domestic violence order. There is no allegation that in breaching the domestic violence order the appellant assaulted his wife and did not offer violence towards her. This should set this apart from his previous convictions for assault in March 1994, when he did in fact assault his wife.

I accept that this is the appellant's first conviction under the provisions of the Domestic Violence Act. However, the appellant can not be given credit for having no relevant prior convictions. He has two recent relevant prior convictions. On 21 March 1994, he was convicted of aggravated assault and sentenced to two months imprisonment which sentence was suspended upon him entering into a recognisance himself in the sum of $500 O/R to be of good behaviour for two months. A short time later on 29 March 1994, he was convicted of assault and sentenced to fourteen days imprisonment. He was on the same day found to have breached his good behaviour bond and sentenced to serve the two months imprisonment. It is conceded those assaults were upon his wife.

I accept the submission that on 13 May 1994 the appellant spared his wife the difficulty of giving evidence to obtain a domestic violence order in that he consented to such an order being made. I give him credit for this.

However, the appellant has demonstrated very little commitment to the promises he has made. Approximately six weeks after he entered into the domestic violence order by consent, he commits a breach of the order. This is similar to his behaviour in March 1994 when having entered into a promise to be of good behaviour on 21 March 1994, he breached the recognisance a few days later by assaulting his wife.

The third submission on behalf of the appellant, is that the breach was lower down the scale of offending, in particular, there was no actual assault upon his wife or violence toward her.

I accept that in breaching the domestic violence order the appellant did not assault his wife. Had he done so I would have expected the penalty to be more severe. The uncontested facts, as submitted by the prosecution, are that the appellant became angry with his wife, he became violent in that he punched the front windscreen of the vehicle driven by his wife. His wife became worried about the defendant's action, she drove toward the police

station. There was an argument, his wife became scared and ran away from the appellant because of her fear he would hurt her.

In light of the appellant's behaviour and the previous assault upon his wife, the reasonable inference from those agreed facts is that the appellant's wife was in fear of a physical assault upon her and ran away to escape such an incident occurring. The appellant's behaviour toward his wife was threatening and placed his wife in fear.

This court was informed by counsel for the appellant of publicity given in recent times to the plight of aboriginal women in the Northern Territory in respect of acts of violence toward them. This publicity highlights a problem the courts have been well aware of for many years. The aspect of general and specific deterrence is important in this case.

The very purpose of domestic violence orders, whether made by consent or otherwise, is to afford safety and protection towards those persons who obtain them from the courts against acts of violence or from threatening behaviour toward them. They are orders which the legislature and the courts intend be taken very seriously and breaches will not be condoned by the court.

In considering the question of sentence by the learned Stipendiary Magistrate on appeal, I refer to the decision of Kearney J Salmon v Chute and Anor 94 NTR 1 p24:

> "(a) **The general principles applicable to appeals against sentence**
>
> I venture to repeat certain comments I made in Raggett, Douglas and Miller v R (1990) 50 A Crim R 41 at 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: Griffiths v R (1977) 15 ALR 1; 137 CLR 293 at 308-9, per Barwick CJ. The presumption is that there is no error.
>
> See also R v Anzac (1987) 50 NTR 6 at 11-12.

In R v Tait (1979) 24 ALR 473 at 476; 46 FLR 386 at 388, the Full Court of the Federal Court, citing from Cranssen v R (1936) 55 CLR 509 at 519, set out the fundamental rule on appeals against sentence as follows:

> "The jurisdiction to revise such a discretion must be exercised in accordance with recognised principles. It is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe . . ."
> . . .
> An appellate court does not interfere with the sentence imposed merely because it is 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 . . . [emphasis added]."

I am not persuaded that in this matter before me on appeal the learned Stipendiary Magistrate was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence.

I do not consider there is reason for this court to interfere with the sentences imposed by the learned Stipendiary Magistrate.

Accordingly, I affirm the orders made by the learned Stipendiary Magistrate.

The appeal against sentences imposed by the learned Stipendiary Magistrate is dismissed.