Ngambe v Hales [2000] NTSC 76

PARTIES:	JOHN NGAMBE
	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:	JA29/2000 (20004441)
DELIVERED:	19 September 2000
HEARING DATES:	4 and 11 August 2000
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL – APPEAL FROM MAGISTRATE
Appeal – appeal from Magistrate – sentence manifestly excessive – discount on sentence for plea of guilty – proportion of sentence to be discounted – whether worst case example – whether non parole period to be fixed – appeal allowed – appellant re-sentenced.

Criminal Code 1983 (NT), s 277 and s 278; *Sentencing Act 1995* (NT) s 53 (1).

Baumer v The Queen (1988) 166 CLR 51; referred to.
Veen v The Queen [No. 2] (1988) 164 CLR 465; applied.

REPRESENTATION:

Counsel:

Appellant:	N Batten and J Condon
Respondent:	T Austin

Solicitors:

Appellant:	NAALAS
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

Ngambe v Hales [2000] NTSC 76
JA29/2000 (20004441)

BETWEEN:

JOHN NGAMBE
Appellant

AND:

PETER WILLIAM HALES
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 19 September 2000)

[1] This is an appeal from a sentence imposed by a stipendiary magistrate sitting in the Court of Summary Jurisdiction in Darwin.

[2] The background to this matter as relayed by counsel for the appellant is as follows:

> "On 21 March 2000 the appellant pleaded guilty in the Magistrate's Court at Darwin to a charge that on 21 February 2000 at Millner he attempted to steal cash the property of Millner Supermarket and immediately before doing so threatened to use violence upon Sharon Mead in order to obtain the property (contrary to ss 211 & 277 of the *Criminal Code*). The robbery involved one circumstance of aggravation, that the appellant was armed with an offensive weapon, namely a knife (Code s 211(2)) to which the appellant entered a separate plea of guilty. …… The appellant was sentenced to 5 years imprisonment and the magistrate decided not to fix a non-parole period."

[3] The grounds of appeal are as follows:

1. That the sentence of five years imprisonment is manifestly excessive.

2. That the magistrate erred in not fixing a non parole period.

3. That the magistrate erred in not taking into account the appellant's prospects of rehabilitation.

4. That the magistrate gave undue weight to the appellant's prior criminal record.

[4] The learned stipendiary magistrate made the following finding of fact:

> "The facts of the case are pretty bad. You had been drinking around the Millner Supermarket and the pattern of your behaviour on the day in question, which was 21 February, was that you went in there, bought a couple of cans of beer, went outside somewhere and had a drink. During the course of your having those beers, your eventual victim, Ms Mead, came out to have a cigarette. She is the checkout operator at the supermarket. You and she had an apparently polite chat, a friendly chat, and she went back to work.
>
> A little later you went back in there and bought one more can. You went outside and drank that and that was the end of your money, it would seem. You decided you wanted more money in order to get more drink and some food, and went back into the shop. You called Ms Mead over to you and, at that point, you assaulted her by holding an open pocketknife very near her, near her face, and despite her struggling and trying to push the knife further away from her, you held that knife steady and close to her and caused her great fear no doubt.
>
> She, in the struggle, called out to the owner of the shop and it would seem that it was the fear of the owner or his approach, or your knowledge of his approach, or something, that caused you to desist from your attempted robbery and desist from the assault upon Ms Mead. You let her go. You apologised, you said, "It's all right, I'm sorry', and you left."

[5] The appellant has a very extensive history of serious offences of violence, details of which were canvassed by the learned stipendiary magistrate in his reasons for sentence as follows (t/p 3 – 4):

> "In the course of the last 20 years you've committed a huge number of offences which are detailed or summarised in the presentence report which I've ordered in this case. For the first few years I don't think anyone would've been particularly alarmed by those offences of break, enter and steal, interference with motor vehicle, and so on, because a lot of young fellows in Port Keats do that sort of thing and you were then – I'm talking about 1982 – rather a young bloke. You were only 18 or 19 when those things were going on.
>
> They kept on going on. You were sent to gaol a number of times for those sorts of offences. In 1984, for the first time, you came before the court for a frank offence of violence and you were sentenced to three months' hard labour, which was suspended, for an offence of aggravated assault in this court here in Darwin. You breached that bond as you were subsequently to breach every bond you've ever been given.
>
> In October 1984 you came before the court, charged with aggravated assault on a female and an act of gross indecency. You seem to have got 12 months' imprisonment and there seems to have been no non-parole period fixed in relation to that, although that just about makes sense.
>
> You would have done eight months of that 12 months, and in June 1985 you were before the Supreme Court charged with an aggravated sexual assault for which Nader J, as I pointed out yesterday, sentenced you to four years' imprisonment with no non-parole period. That's what Nader J thought of your chances of rehabilitation 15 years ago.
>
> A few days after your release from that sentence you committed another very serious assault, which put you back before the Supreme Court and Asche CJ sentenced you to four years' gaol for aggravated assault, which is as much as anyone, in my knowledge, has ever received for that offence, with a non-parole period of two years and six months which is the longest non-parole period I've ever heard of. Jonathan Chula got three years recently for that sort of offence.
>
> That was not the end of your serious offending. In 1993 you were before this court, the Darwin Magistrates Court, for an aggravated assault by male on female, for which you were sentenced to two

years' imprisonment, the most the court could possibly impose, with a non-parole period of 12 months.

In 1997 you were back before the Supreme Court, this time for an offence of robbery – a complete offence of robbery, not an attempt this time - on what I take to be very likely the same supermarket. You received a sentence of imprisonment of 17 months with a non-parole period of nine months, but at that time you were already in gaol serving various sentences from the Court of Summary Jurisdiction. I'm not sure exactly how much time you spent in gaol round about then.

Later on in 1997 you came back before this court, while you were still in gaol, and received another month's imprisonment, perhaps from me, for an aggravated assault on an under 16 female.

At least three of those previous offences, Mr Ngambe, are really serious offences and I suspect four of them, at least – that is, the three that have gone to the Supreme Court and the fourth possibility is the one you got two years from this court for in 1993. I can't find out anything about that case but I know about the other three because I've looked them up in public records kept in our library, and you're now before the court for a fourth very serious offence, and possibly your fifth."

[6] The learned stipendiary magistrate had before him a pre-sentence report (Exhibit 3) on this appeal. John Ngambe was born on 22 October 1964. He is 36 years of age. His Worship referred to the fact that the report indicates that for a long time Mr Ngambe's life has been drinking to excess in Darwin, getting into trouble and spending time in gaol. The learned stipendiary magistrate assessed the appellant's chances of rehabilitation as "nil or next to nil". He described the offence as being serious and stated that the community looks to the courts for protection from men like the appellant who are likely seriously to re-offend.

[7] His Worship took into account in the appellant's favour his plea of guilty and accepted that the appellant's apology to his victim indicated remorse and contrition which continued by the entering of a plea of guilty.

[8] The learned stipendiary magistrate then stated (t/p 5):

> "The maximum penalty for this offence is seven years' imprisonment and I do not believe that any authorities specify exactly what discount should be given for an appropriate sentence for remorse and contrition in guilty pleas, but once again I can refer to the sentence of Angel J in that matter of Jonathan Chula when Angel J was moved to give Mr Chula something close to the maximum for that offence, five years, but discounted it by one year in the recognition of Mr Chula's plea of guilty.
>
> In your case, Mr Ngambe, given your apology, given your contrition, evidence at the time which was not really clear in Mr Chula's case I can tell you, and given you plea of guilty, it seems to me that it is reasonable enough to allow a couple of years off the maximum penalty for that, but this is a very serious offence by a very serious offender and I can't see that anyone would discount the otherwise appropriate sentence by more than a couple of years."

[9] Mr Batten, on behalf of the appellant, argued that the learned stipendiary magistrate fell into error because he did not consider the facts of the case and consider where it fell within the range of cases for attempted armed robbery. It is the submission on behalf of the appellant that the learned stipendiary magistrate imposed a sentence for a worst case example of the offence, when it was not such a case. It is the appellant's submission that the result was a manifestly excessive sentence.

[10] Counsel for the respondent does not dispute that the learned stipendiary magistrate fell into error by treating this case as in the "worst case" category. The maximum penalty for this offence under s 211 of the

Criminal Code 1983 (NT) read with s 277 and s 278 of the Criminal Code is seven years imprisonment. Counsel for the respondent submits the learned stipendiary magistrate allowed a discount of approximately two years from the maximum penalty for the appellant's early plea of guilty. The submission for the respondent is that accordingly the learned stipendiary magistrate regarded the proper sentence as one of seven years imprisonment, the maximum penalty available for the offence. Counsel for the respondent stated it follows from this the learned stipendiary magistrate regarded the particular offence, for sentencing purposes, as being in the "worst" category. That is, cases for which the maximum penalty is reserved.

[11] The respondent does not take issue with the appellant's submission that in approaching the matter in this way the learned stipendiary magistrate fell into error. The learned stipendiary magistrate described the facts of the case as "pretty bad", as indicating "a pretty serious attempted armed robbery", the offence being a "serious one". He did not state it was in the "worst case" category.

[12] I agree that it would appear the learned stipendiary magistrate treated this offence as being in the worst case category because he appears to have fixed the maximum penalty of seven years as the appropriate sentence and then allowed a discount of two years for the plea of guilty to arrive at a sentence of five years imprisonment.

[13] I agree that in approaching the matter in this way the learned stipendiary magistrate fell into error. It was certainly a serious example of an attempted armed robbery but not in the worst case category which would justify the maximum penalty of seven years imprisonment.

[14] Both the appellant and the respondent submit that the appellant should be re-sentenced by this Court.

[15] I agree with the submissions made both on behalf of the appellant and the respondent that by imposing the maximum sentence for this offence of attempted armed robbery the learned stipendiary magistrate treated the facts of this case as being in the worst category and in that he was in error.

[16] The facts of this particular case do not put it in the "worst category of cases". "….. the sole criterion relevant to a determination of the upper limit of an appropriate sentence is that the punishment fit the crime. Apart from mitigating factors, it is the circumstances of the offence alone that must be the determinant of an appropriate sentence" *Baumer v The Queen* (1988) 166 CLR 51 at 58.

[17] The learned stipendiary magistrate quite correctly referred to the appellant's record of prior convictions for offences of violence.

[18] I apply the principles expressed in *Veen v The Queen* [No. 2] (1988) 164 CLR 465 Mason CJ, Brennan, Dawson and Toohey JJ at 477 - 478:

> "There are two subsidiary principles which should be mentioned. The first is that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v. Ottewell*. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties.
>
> The second subsidiary principle material to this case is that the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed: *Ibbs v. The Queen*. That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category."

[19] The facts in the matter before this Court are recognisably outside the worst category.

[20] This was an offence committed on impulse without premeditation or planning. The victim knew the offender who made no effort to effect a disguise. The victim did not suffer any physical injury. Fortunately, from the facts presented to the learned stipendiary magistrate the victim did not suffer any long term psychological effect although she was stressed and

frightened by the incident and has become more cautious in her dealings with customers. The value of the property sought to be stolen was minimal, being food and drink. The weapon used was a penknife.

[21] I would allow the appeal.

[22] I then proceed to re-sentence the appellant.

[23] Whilst not in the worst case category, the offence is serious calling for condign punishment. The protection of the community is a significant factor.

[24] I would consider an appropriate sentence for the offence itself to be five years. In fixing a head sentence I would reduce this period to allow a discount for the expressed contrition and the plea of guilty to arrive at a head sentence of three years and nine months.

[25] The learned stipendiary magistrate refused to fix a non parole period and the appellant also appeals this decision.

[26] Counsel for the appellant argued that the Court of Summary Jurisdiction failed to take into account an important relevant consideration in the appellant's favour, namely that the appellant had been sentenced to terms of imprisonment with non parole periods fixed on three occasions in the past. The Parole Board had not revoked such periods of parole. Counsel for the appellant argued that the following matters were relevant:

"(a) on 14.11.97 the Supreme Court sentenced the appellant to 18 months imprisonment for robbery causing bodily harm and stealing and fixed a non-parole period of 9 months; the appellant was further sentenced on 12.12.97 at Darwin CSJ for aggravated assault and sentenced to a further one months imprisonment cumulative to the earlier sentence and a non-parole period of 10 months from 14.11.97 was fixed; the appellant did not breach his parole;

(b) on 17.9.93 Darwin CSJ sentenced the appellant to 2 years imprisonment with a non-parole period of 12 months for aggravated assault; it appears that the appellant did not breach his parole;

(c) on 11.8.88 & 23.11.89 the appellant was sentenced in the Supreme Court and the CSJ & non-parole periods were set; the appellant appears to have re-offended on parole in a minor way but parole was not revoked by the Court;

(d) when Nader J elected not to fix a non-parole period in 1985 the appellant had engaged in a distinct intense period of offending and defiance of Court orders immediately prior to His Honour's decision."

[27] The appellant may not have breached his parole on any occasion but he has continued to offend with a flagrant disregard for the law and the rights of other persons in the community.

[28] The learned stipendiary magistrate assessed Mr Ngambe's chances of rehabilitation as nil or next to nil. There is no reason to disturb this finding. The learned stipendiary magistrate referred to comments of Justice Nader who was called upon to sentence the appellant in 1985. Justice Nader stated at that time, now some 15 years ago, that the appellant's prospects of rehabilitation were nil. Since 1985 the appellant has been convicted of the further offences of violence already outlined. He has on two occasions since 1985 been convicted on a Breach of Bond by the Court of Summary Jurisdiction in Darwin, those dates being 30 October 1997 and 31 July 1997.

This information is contained in the Record of Prior Convictions (Exhibit 2). The protection of the community must be a primary consideration in the sentence imposed on this offender.

[29] I have considered the provisions of s 53(1) of the Sentencing Act 1995 (NT) and I would not fix a non parole period.

[30] The order I make is that the appellant be convicted and sentenced to three years and nine months imprisonment. I decline to fix a non parole period.

[31] The sentence is to be backdated to take into account the time he has already spent in custody in respect of this offence.

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