Worumbu v Hales [2003] NTSC 79

PARTIES:	STEVEN JAMES WORUMBU
	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:	JA 103 of 2002 (20215058)
DELIVERED:	17 July 2003
HEARING DATE:	17 July 2003
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	S. Barlow
Respondent:	J. Karczewski QC

Solicitors:

Appellant:	North Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	ril0323
Number of pages:	9

ril0323

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

Worumbu v Hales [2003] NTSC 79
No. JA 103 of 2002 (20215058)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

STEVEN JAMES WORUMBU
Appellant

AND:

PETER WILLIAM HALES
Respondent

CORAM: RILEY J

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 17 July 2003)

[1] On 9 October 2002 the appellant pleaded guilty in the Court of Summary Jurisdiction to two offences appearing in the same information. The first was assault with the circumstance of aggravation that the victim was threatened with a dangerous weapon, namely a knife. The maximum penalty for that offence is imprisonment for 5 years, although, when dealt with summarily, the Court of Summary Jurisdiction could only impose a sentence of imprisonment of up to 2 years. The second was going armed in public,

with a knife, in such manner as to cause fear to a person of reasonable firmness and courage. The maximum penalty for that offence is imprisonment for 3 years.

[2] The circumstances of the offending were not in dispute. On 8 October 2002, the day before the plea was entered, the appellant had been at the Palmerston Shopping Centre where he met with his cousin. The appellant had been drinking and was intoxicated at the time. At the shopping centre he approached the victim of the aggravated assault, Dion Martin, and punched him on the left-hand side of the nose with a closed fist. A fight then developed and the appellant's cousin joined in the fight against the victim. The cousin then left the building and obtained a black-handled knife, approximately 30 centimetres in length with a 15 centimetre long blade, from a motor vehicle. He returned to the shopping centre and gave the knife to the appellant. The appellant then approached Mr Martin and, with the knife, chased him through the shopping centre. The victim was very frightened and jumped over the Coles cigarette counter in order to escape the appellant. Witnesses to the scene were, not surprisingly, also very frightened.

[3] The appellant was approached by police at the shopping centre but ran away. He dropped the knife, which was seized by police. He was subsequently arrested and participated in a record of interview. When asked for his reason for acting as he did, he said: "Cause I was drunk". He said he carried the knife for various reasons, one of which was "to hit him".

[4] The learned sentencing magistrate sentenced the appellant to an aggregate sentence of 12 months imprisonment. It was ordered that the sentence be suspended after the appellant had served 3 weeks imprisonment on condition that he accept supervision by the Director of Correctional Services and take part in an alcohol rehabilitation program if directed to do so. An operational period of 3 years was fixed.

[5] The appellant appeals against that sentence asserting that it was manifestly excessive and that it was imposed in contravention of the terms of s 52(3) of the Sentencing Act. Further, it was contended that the learned magistrate erred by finding the maximum penalty for the assault was 5 years (a ground now abandoned) and by "failing to administer the proper test in deciding whether to impose a fully or partially suspended sentence".

[6] The respondent has conceded that an aggregate sentence is not available in the circumstances of this matter and that the appeal must therefore be allowed. Section 52 of the Sentencing Act is in the following terms:

> "(1) Where an offender is found guilty of 2 or more offences joined in the same information, complaint or indictment, the court may impose one term of imprisonment in respect of both or all of those offences but the term of imprisonment shall not exceed the maximum term of imprisonment that could be imposed if a separate term were imposed in respect of each offence.
>
> (2) A court shall not impose one term of imprisonment under subsection (1) where one of the offences in respect of which the term of imprisonment would be imposed is an offence against s 192(3) of the Criminal Code.

> (3) Subsection (1) does not apply if one of the offences in the information, complaint or indictment is a violent offence or a sexual offence."

[7] The offence of assault with circumstances of aggravation which is provided for in s 188(2)(m) of the Criminal Code is a "violent offence" for the purposes of the Sentencing Act. As the section provides, where one of the offences in the information is a "violent offence" then the provisions of s 52(1) do not apply and the court may not impose an aggregate sentence: *McKay v The Queen* (2001) 11 NTLR 14.

[8] It follows from the above that the appeal must be allowed. However, the respondent submits that although the appeal must be allowed the Court ought not interfere with the total effective sentence of 12 months imprisonment suspended after 3 weeks because it does not lack proportion to the total criminality and properly suits the personal circumstances of the appellant. This Court, it is submitted, should impose sentences which achieve the same result as that intended below.

[9] In submitting that the learned magistrate erred in failing to properly apply the discount for the appellant's plea of guilty, it was put that he had entered a guilty plea on his first appearance in court. Indeed, as I have observed, the offence was committed on 8 October 2002 and he was sentenced on 9 October 2002. In dealing with this aspect of the matter his Worship said:

> "The plea has been entered at the very earliest opportunity, and I agree that the maximum discount should be given in cases such as this and to give maximum value to the discount, as I intend to apply

> or impose a partly suspended sentence, I intend to give the discount against the unsuspended part."

[10] His Worship determined that the underlying cause of the offending was the drinking problem experienced by the appellant. He noted that there had been failed attempts to effect rehabilitation and that the appellant was, at least, acknowledging his problem. His Worship determined that a fully suspended term of imprisonment would not pay sufficient regard to the need for deterrence and that an actual period of imprisonment was required. He determined that an aggregate term of imprisonment for 12 months was appropriate. He went on to say that he had intended to suspend that sentence after the appellant had served a period of 4 weeks imprisonment but, in the circumstances of the early plea of guilty, he directed that the sentence be suspended after a period of 3 weeks. He then imposed conditions on the suspension, including close supervision and directions relating to the undertaking of alcohol rehabilitation treatment.

[11] In *Kelly v The Queen* (2000) 10 NTLR 39 the Court of Criminal Appeal considered the issue of discounts for pleas of guilty. The court indicated that it is desirable that a sentencing court "should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor". The court noted that it was not possible to lay down any tariff and the weight to be given to a plea would vary according to the circumstances. The court observed that it may be appropriate in certain circumstances to give effect to the value of the plea by other means than

reducing the head sentence, such as imposing a partially suspended sentence or home detention. In the present case, in my view, the learned sentencing magistrate adopted the approach of giving recognition to the plea in imposing a suspended sentence and also by reducing the unsuspended part of the sentence by 25%. I am unable to see that his Worship erred in proceeding as he did. However, I need not adopt the same approach in the re-sentencing process. I propose to apply a discount to the head sentence to reflect credit for the plea.

[12] Having considered the matters placed before the learned sentencing magistrate and having considered his sentencing remarks I agree with his conclusion that the objective severity of the offences required an actual term of imprisonment and also that the total effective sentence of 12 months imprisonment in respect of both offences was an appropriate total head sentence before discount for the plea of guilty and considering all of the circumstances.

[13] The offending was serious. The charge of assault involved two assaults, being a punch to the jaw and the threat with the knife. The circumstances placed before his Worship revealed a very frightening experience for the victim and for other people in the shopping centre. Similarly the charge of going armed in public, which involved rushing about with the knife in or near the Coles supermarket at 10 am on a Tuesday morning, constituted a serious example of the offence.

[14] The appellant has a criminal history stretching back to January 1990. That history does not include any offences of violence but does include offences where the appellant has been sentenced to imprisonment and, on one occasion, a sentence of 12 months imprisonment imposed under the previous mandatory sentencing regime. At the time of committing this offence the appellant had been out of gaol for just 2 months following the serving of a period of imprisonment of 12 months.

[15] There are positive aspects to the appellant's position and these have been emphasised by Mr Barlow on appeal. The appellant entered an early plea of guilty and that followed his full and frank admissions to the offending. It can be accepted that he felt remorse and he also recognised that alcohol was a problem for him. His prospects for rehabilitation may be regarded as positive, although past failures are matters of concern.

[16] There was a clear need for aspects of both general and specific deterrence to be given prominence in the sentencing process.

[17] In my view a sentence of imprisonment for a period of 10 months in respect of the assault and a sentence of imprisonment of 5 months in respect of the offence of going armed in public would be appropriate. The offences occurred at roughly the same time and in similar circumstances. The knife was a part of the offending on each occasion. In those circumstances a degree of overlap can be seen in the circumstances of each offence. However the offences are different. The assault was directly related to

Mr Martin and the offence of going armed in public had the additional element of causing fear to other persons who were of reasonable firmness and courage. The appellant chased the victim through Coles causing such fear to people going about their lawful business in a shopping centre on a Tuesday morning. Whilst part of the sentences may be made concurrent, it seems to me that they should also be partially cumulative.

[18] As I have already indicated, I regard a sentence of 12 months imprisonment as properly reflecting the appropriate penalty in relation to all of the offending that occurred on this morning. I propose to make 3 months of the sentence of imprisonment imposed in relation to the offence of going armed in public concurrent with the sentence for aggravated assault. The effect is that the appellant will be sentenced to imprisonment for a period of 12 months dated from the date he entered prison, being 8 October 2002. I have considered the totality principle and regard that sentence as appropriate in all the circumstances. However, I am prepared to further discount that sentence by three months to reflect the plea of guilty. The head sentence will therefore be imprisonment for a period of nine months.

[19] To reflect the positive aspects of the appellant's circumstances, including his contrition and remorse, his early plea of guilty and his prospects of rehabilitation, I propose to follow the approach adopted by his Worship and largely for the reasons expressed by his Worship. Had I been considering this matter at first instance rather than on appeal, I would have been inclined to impose a longer term of actual imprisonment before release. I direct that

the sentence be suspended after the appellant has served a period of imprisonment of 3 weeks. I understand from Mr Barlow that the appellant has in fact served that period. As a condition of his release he will place himself under the supervision of the Director of Correctional Services for a period of 12 months. He is to obey the directions of the Director or his delegate. Such directions may include as to the undertaking of alcohol and other rehabilitation courses including residential courses. I set a period of 3 years as the operational period for the purposes of s 40(6) and s 43 of the Sentencing Act.

[20] The appeal is allowed and the appellant sentenced accordingly.

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