

Hume v Moore [2003] NTSC 84

PARTIES: ROBIN KATE HUME
v
DAVID MOORE

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction

FILE NO: JA 51/03 (20219313)

DELIVERED: 23 July 2003

HEARING DATES: 29 May 2003

JUDGMENT OF: THOMAS J

CATCHWORDS:

CRIMINAL LAW – offences against the person – judgment and punishment – appeal against decision not to suspend sentence – whether magistrate erred in giving insufficient weight to the subjective circumstances of the appellant.

Criminal Code 1983 (NT), s 188(2)

Cramer & Ors v The Queen & Anor [1998] WASCA 300, *R v Griffin* [1997] QCA 115, *Bresnehan v R* (1992) 1 Tas R 234, *Sandell v Korber* [1993] SASC 4295, *Hodgson v Police* [2002] SASC 35, considered.

REPRESENTATION:

Counsel:

Appellant: S Barlow
Respondent: G Dooley

Solicitors:

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

Judgment category classification: C
Judgment ID Number: tho200324
Number of pages: 9

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

Hume v Moore [2003] NTSC 84
No. JA 51/03 (20219313)

BETWEEN:

ROBIN KATE HUME
Appellant

AND:

DAVID MOORE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 23 July 2003)

- [1] This is an appeal from a sentence of a stipendiary magistrate imposed in the Court of Summary Jurisdiction at Darwin on 12 March 2003.
- [2] The appellant was convicted jointly with her co-offender Edward Peckham of the following offence to which they had each entered a plea of guilty.
- [3] That on 1 September 2002 at Berry Springs in the Northern Territory of Australia unlawfully assaulted Kaitlyn Liddy and that the said unlawful assault involved the following circumstances of aggravation:

- (i) That the said Kaitlyn Liddy was under the age of 16 years, namely five years and the said Robin Kate Hume and Edward Peckham were adults.
- (ii) That the said Kaitlyn Liddy was unable to effectually defend herself due to age.
- (iii) That the said Kaitlyn Liddy was threatened with an offensive weapon, namely an electrical cord.

Contrary to s 188(2) of the Criminal Code.

- [4] The facts in support of the charge as read out to the learned stipendiary magistrate are as follows (tp 6 - 8):

“MR MOORE: the defendant in this matter is a 32 [later corrected to 23] year old female and is the mother of the victim a 5-year old female. The co-offender is Eddie Peckham. He is in a de facto relationship with this defendant. At the time of the offences all three resided at a caravan on an isolated block in Berry Springs.

In early September 2002 the defendant and co-offender were inside the caravan when the co-offender told the victim to have an afternoon sleep. The co-offender became angry when the victim did not go to sleep.

HIS WORSHIP: This is Peckham?

MR MOORE: That’s correct sir. And took a nearby extension cord, looped the end of this and struck the victim a number of times while the defendant held the victim by her arms and her shoulders with her back turned towards the co-offender.

The victim started to cry and after the co-offender finished striking the victim, the defendant then took hold of the extension cord and also struck the victim once to her back, back thigh and buttocks region. I’ll rephrase that. Struck her once to the back of her thighs and buttocks area.

The victim was still crying. This caused lineal marks on the victim's buttocks and top of her thighs consistent with the looped section of the cord. Bruising later developed - this is on the right side of her hip. The looped section of the cord split the skin causing a raised scalded welt. In the evening of the same day the co-offender became angry at the victim who was sitting on her bed in the caravan. He clipped her to the side of her head causing her to be pushed into the walled section. The co-offender stated that the victim's head and shoulder made contact with [the] wall.

A short time later the co-offender who was still feeling angry towards the victim, took hold of her hands as she laid on her back on her bed. He held both hands above her head and slapped her chest and abdominal area with his open hand. He did this down to the lower abdominal area using a degree of force that caused extensive bruising. He then let go of her and the victim laid crying on her bed for some time before falling asleep.

The defendant was present at the time sitting in the bedroom section of the caravan.

The following day the defendant informed a relative of the injuries to the victim. This relative then took the victim to Royal Darwin Hospital where she was examined by a paediatrician. Her injuries were photographed and recorded. She was later removed from the care of her mother by FACS and placed in the care of the biological father.

On Tuesday 10 December 2002, the co-offender was arrested at an alcohol rehabilitation facility in Darwin. He was conveyed to the Peter McAulay Centre, participated in a record of interview. He made full and frank admissions to the assault, stating that he had a problem with anger management, however, he denied causing all the injuries noted to the victim's legs stating that the victim's mother, the defendant, had also used the cord on the victim's legs.

He agreed that all the force used by him on the victim was excessive and agreed that he had a drug and alcohol problem that contributed to his anger. Sir, he was charged and - later charged and bailed and [returned] to the rehabilitation program. Sir, on 22 December this defendant participated in a record of interview - - -

HIS WORSHIP: That's the mother?

MR MOORE: That's correct, sir. Sir, when asked why she had hit the victim she stated, the victim had been cheeky and stated that it was to discipline her. She also stated the force she used was not excessive.

In relation to the welt and markings to the victim's thighs and buttocks the defendant stated, that she remembered seeing red

markings following the beating, however she stated the force she used would have not have broken the skin. She stated the force used by Peckham could have been excessive as he lost it sometimes.

She further stated that she believed her actions towards the victim were an acceptable form of discipline. The defendant was informed she may be summonsed. Sir, the victim is now in the permanent care of her father and is being monitored by FACS. The defendant and co-offender are both participating in the FORWAARD program which specialises in alcohol drug abuse. The program is for a 3-month period. ...”

- [5] These facts were agreed. On the basis of these facts the learned stipendiary magistrate found the defendant guilty.
- [6] The co-offender Edward Peckham was found to be the more culpable in the commission of the offence. Mr Peckham was before the Court with prior convictions of violence including assault on a female and assault police. Mr Peckham was 32 years of age at the time of the offence. He was convicted and sentenced to two years imprisonment with a non-parole period of 12 months.
- [7] Ms Hume was 23 years of age at the time of the offence. She was before the court without prior conviction. Ms Hume, the appellant in this matter, was sentenced to nine months imprisonment suspended after three months.
- [8] Ms Hume appeals against the sentence.
- [9] An amended Notice of Appeal was filed on 28 May 2003 setting out the following grounds of appeal:

“1. That the sentence was manifestly excessive in all the circumstances.

2. That the learned Magistrate erred in giving insufficient weight to the subjective circumstances of the appellant.
3. That the learned Magistrate erred by taking into account irrelevant considerations.
4. That the learned Magistrate erred by failing to properly consider the plea of guilty.
5. That the learned Magistrate misdirected himself in relation to his duty to protect children by imposing a custodial sentence.
6. That the learned Magistrate erred by failing to properly consider whether to fully suspend the sentence of imprisonment.”

[10] I shall deal firstly with Ground 2 of the Grounds of Appeal which Mr Barlow for the appellant particularises more fully in his written submissions as follows:

“2. That the learned magistrate erred in giving insufficient weight to the subjective circumstances of the appellant.

An outstanding feature of this case was the good character of the appellant and the efforts she had made since the moment of the offence. In summary they included the following:

- Removing her daughter from the danger of Peckham the next morning upon seeing injury.
- Seeking medical assistance through a relative.
- Assisting police and providing a statement to assist with the prosecution of Peckham.
- Completing the CAAPS Program.
- Attending weekly anger management counselling.
- Positive good character confirmed by numerous references.
- No criminal history.
- Good employment record.
- Educational achievements.
- Childhood of family violence.
- Reputation as a caring and loving mother.
- Loss suffered through removal of her daughter after this incident.

- Early plea of guilty.

The sentencing remarks failed to mention much of this material. The appellant's subjective circumstances were exceptional. A mere four lines of more than one page of sentencing remarks referred to these matters. It is respectfully submitted that insufficient weight was given to these matters and the sentencing process thereby miscarried."

[11] In dealing with these subjective circumstances of the appellant the learned stipendiary magistrate stated at tp 23:

"... I have before me a young lady in her early 20s who is a first offender, who is contrite and who went to the doctors with her daughter. Who was co-operative with police and I have a certain degree of compassion for her, but not as much as I have for that little 5-year old girl. But having said that, she's a person of good character. She pleaded guilty."

[12] I will go to the subjective circumstances of the appellant.

[13] Firstly I should note that it was accepted by the magistrate that Ms Hume was not as culpable as Mr Peckham.

[14] The morning after the incident Ms Hume noticed the child had marks from the injuries inflicted upon her. Ms Hume contacted a relative and arranged for the child to be taken away from the presence of Mr Peckham. She also arranged through this relative for her daughter to be taken to Royal Darwin Hospital where she was examined by a paediatrician. Ms Hume's daughter was removed from her care by officers of Family and Community Services and placed in the care of her biological father. Ms Hume made a statement to police and by this statement provided the prosecuting authorities with the case to be presented against her. Ms Hume entered a plea of guilty at the

first reasonable opportunity and accepted that her part in this offence could not be excused on the basis of it being discipline. Ms Hume was not affected by alcohol at the time of the commission of the offence. However, she accepted there was an alcohol issue in her life and for this reason admitted herself to the six week residential program conducted by the Council for Aboriginal Alcohol Program Services Inc (CAAPS). A letter from the Manager of Treatment Services at CAAPS dated 12 February 2003 was tendered as an exhibit. This letter indicated Ms Hume was maintaining her accommodation to a high standard and had participated in sessions to increase her awareness of drug and alcohol misuse, role of family, recovery, culture and goal setting. The letter stated Ms Hume “is a valuable member of the current client team”. The letter further advised that Ms Hume has also been attending counselling with Danila Dilba Social and Emotional Wellbeing to address anger management and relationship issues.

[15] A number of character references were tendered on behalf of Ms Hume.

These references attest to her having received a good education, that she is a person of positive good character, a contributing member of the Nawyu Nambuyu Community and a person who was good with the young children who had been in her care. The references indicate she had a reputation as a good mother and that this incident was “out of character” for her.

[16] The appellant is before the Court without prior convictions. She has a good employment record, a good level of education and has taken steps herself to seek counselling on alcohol abuse and anger management issues.

- [17] It is the submission of Mr Barlow on behalf of the appellant that in the sentencing process the learned stipendiary magistrate did not give sufficient weight to the personal factors relevant to Ms Hume.
- [18] The submissions made by Mr Dooley on behalf of the Crown is that the Crown did not advocate a term of actual imprisonment for this appellant either when the matter was before the Court of Summary Jurisdiction or before this Court on appeal. The Crown concede that the appellant should succeed on this appeal to the extent that there should be no term of actual imprisonment. Mr Dooley submitted that it appears because the charge involving Ms Hume was heard jointly with the charge involving Mr Peckham, that in having regard to the appalling scenario that were essentially the actions of Mr Peckham, the personal circumstances relevant to Ms Hume were overlooked.
- [19] I have been referred to and had the opportunity to read the following authorities: *Robert John Cramer & Ors v The Queen & Anor* [1998] WASCA 300; *R v Griffin* [1997] QLA 115; *Bruce Reginal Bresnehan v R* (1992) 1 TASR 234; *Kevin John Sandell v Wayne Korber* [1993] SASC 4295; *Hodgson v Police* (2002) decision of Doyle CJ Supreme Court of South Australia delivered 5 February 2002.
- [20] I agree with the submission made by Mr Dooley for the Crown that the offence itself warrants a period of imprisonment. This was a difficult sentencing exercise for the learned stipendiary magistrate who quite

properly took a very serious view of the assault. Mr Peckham, the main perpetrator of the offence, has been sentenced to a term of actual imprisonment. Ms Hume's involvement in the offence was substantially less.

[21] I accept the submissions by both counsel for the appellant and the respondent that the learned stipendiary magistrate did not give sufficient weight to the personal circumstances of the appellant which I have outlined and include her youth, her plea of guilty, her positive good character, lack of prior convictions, the steps she took to subsequently protect her daughter and the steps she has taken towards her own rehabilitation.

[22] I confirm the conviction and sentence of nine months imprisonment imposed by the learned stipendiary magistrate. I vary the order to the extent that the period of imprisonment be suspended forthwith on condition the appellant be of good behaviour for two years. I specify pursuant to s 40(6) of the Sentencing Act a period of two years from the date hereof during which the offender is not to commit another offence punishable by imprisonment if the offender is to avoid being dealt with under s 43 of the Sentencing Act.
