Gorey v O'Neill [2015] NTSC 66

PARTIES:	GOREY, Leslie
	v
	O'NEILL, Wayne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	21527285
DELIVERED:	1 October 2015
HEARING DATE:	18 September 2015
JUDGMENT OF:	BARR J
APPEAL FROM:	Court of Summary Jurisdiction

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – breach domestic violence order – appellant restrained from remaining in company of protected person when under influence of alcohol – breach did not involve harm, threat of harm or violence – significant prior record of assault and breaches of domestic violence orders – starting point of four months head sentence at high end of range – not grossly disproportionate to seriousness of the offending conduct – prevention and protection emphasised – appellant failed to demonstrate sentence was manifestly excessive – appeal dismissed.

CRIMINAL LAW – Appeal against sentence – magistrate placed emphasis on the appellant's lengthy antecedent criminal history – history of violence against the protected person – DVO in force to minimise or eliminate risk to protected person – breach of DVO breach of a court order – appellant manifested in his commission a continuing attitude of disobedience of the

law – magistrate emphasised specific deterrence – no error – appeal dismissed.

Domestic and Family Violence Act s 120(1)

Sentencing Act s 5(a)

Hanks v The Queen [2011] VSCA 7; *Veen v The Queen (No 2)* (1988) 164 CLR 465, applied.

Dinsdale v The Queen (2000) 202 CLR 321; *Hoare v The Queen* (1989) 167 CLR 348; *Manakgu v Russell* [2013] NTSC 48; *Pittman v The Queen* [2013] NTCCA 16; *Truong v The Queen* [2015] NTCCA 5, referred to.

Gumurdul v Reinke [2006] NTSC 27; *Griffiths v Cowen* [2015] NTSC 4, followed.

REPRESENTATION:

Counsel:

Appellant:	A Morrisroe
Respondent:	G Dooley

Solicitors:

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

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gorey v O'Neill [2015] NTSC 66
No. 21527285

BETWEEN:

LESLIE GOREY
Appellant

AND:

WAYNE O'NEILL
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 1 October 2015)

[1] The appellant appeals against the severity of a three-month sentence imposed by the Court of Summary Jurisdiction in Alice Springs on 11 June 2015 for an offence contrary to s 120(1) of the *Domestic and Family Violence Act*. The appellant had pleaded guilty to a charge that, being a person against whom a Domestic Violence Order was in force, engaged in conduct that resulted in a contravention of that Domestic Violence Order.

[2] The complaint did not particularise the offending conduct. However, based on the prosecution facts, the conduct was remaining in the company of the protected person when under the influence of alcohol.

[3] The offence carried a maximum penalty of imprisonment of two years. The appellant was sentenced to a term of imprisonment of three months. The sentence took into account a discount of 25 per cent for a very early plea of guilty.

[4] The relevant DVO was made by the Court of Summary Jurisdiction on 1 October 2013. It was to be in force for two years. It was thus in force as at 11 June 2015. The 'protected person' was the appellant's wife, Mary Roberts.

[5] Under the DVO, relevant to alcohol, the appellant was restrained, directly or indirectly from:

1. Approaching, contacting or remaining in the company of the protected person when consuming alcohol or when under the influence of alcohol.

2. Approaching, entering or remaining at any place where the protected person is living working, staying, visiting or located if consuming alcohol or when under the influence of alcohol.

3. Assaulting or attempting or threatening to assault the protected person.

4. Causing damage to property or attempting to threaten to cause damage to property of the protected person.

5. Intimidating or harassing or verbally abusing the protected person.

[6] The prosecution facts in relation to the offending were as follows.[1] On 10 June 2015, the appellant had consumed an unknown amount of alcohol and had become intoxicated. On 11 June, at 12.45 am, police officers stopped a vehicle in which the appellant was a front seat passenger and the protected person the driver. There were three other people in the vehicle. Police checks in relation to licensing matters revealed that the appellant was subject to the DVO. A hand held breath test returned a positive reading. Counsel appearing on the hearing of the appeal agreed that the reading was 0.05 per cent.[2] The appellant was arrested for breach of the DVO and taken to the Alice Springs Watch House. He provided no lawful reason for being in the company of the protected person whilst intoxicated. When he was asked if there were any emergency reason for his breach of the DVO, he said, “I didn’t know that”.

[7] The appellant was 43 years old, and had a very significant record for offences of aggravated assault and conduct in contravention of domestic violence orders or breaches of restraining orders.[3] He had eight prior convictions for DVO contraventions or restraining order breaches, with one offence committed in 2014, two in 2010, one in 2007 and four in 2006. He also had 16 convictions for assaults, one committed in 2013, two in 2010, one in 2007, three in 2006, four in 2004, three in 2003, two in 1997 and one conviction for causing grievous harm in 1990. From 2003 onwards, all of the

[1] Exhibit P2 in the Court of Summary Jurisdiction proceedings.
[2] The agreement on the part of counsel for the respondent was subject to the qualification that the level of accuracy was plus/minus ten percent. The range thus was approximately 0.045% to 0.055%.
[3] Exhibit P1 in the Court of Summary Jurisdiction proceedings; Transcript 11/06/2015, pp. 2 - 3.

assaults and breaches had been against the same victim, the protected person under the DVO made on 1 October 2013.

[8] The appellant had contravened the DVO referred to in [4] on one previous occasion, on 19 December 2014, by being in the company of the protected person when under the influence of alcohol. He had received a prison sentence of four days, imposed on 16 April 2015, just under two months before he re-offended on 11 June 2015.

[9] A review of the appellant's record of prior offending indicates a correlation at times between DVO contraventions and assaults. For example, on 25 July 2006, the appellant failed to comply with a restraining order and committed a male-on-female aggravated assault with the use of a weapon. On 26 July 2006, the appellant failed to comply with a restraining order and committed another male-on-female aggravated assault with the use of a weapon. On 2 November 2010, the appellant engaged in conduct in contravention of a DVO and committed a male-on-female aggravated assault causing harm. On 24 December 2010, the appellant engaged in conduct in contravention of a DVO and committed a male-on-female aggravated assault with the use of a weapon causing harm.

[10] The correlation referred to in [9] does not indicate the extent to which alcohol consumption contributed to the appellant's offending. There was no evidence before the magistrate (or on the hearing of the appeal[4]) as to the

[4] Save for the offending described in [8].

facts and circumstances of the offending giving rise to each of the appellant's previous convictions for assault and DVO contraventions. Nonetheless, the imposition of the 'alcohol non-contact' conditions[5] of the DVO indicate that the Court of Summary Jurisdiction was concerned about the risk which the appellant posed to the protected person when he was affected by the consumption of alcohol.

[11] A review of the appellant's record also shows that the length of the sentences imposed for the offences of aggravated assault was increasing. For the aggravated assault committed on 25 July 2006, he was sentenced to a term of imprisonment of one month. For the aggravated assault committed on 26 July 2006, he was sentenced to a term of imprisonment of one month. For an aggravated assault committed on 16 July 2007, he was sentenced to a term of imprisonment of six months. For the aggravated assault committed on 2 November 2010, he was sentenced to a term of imprisonment of four months. For the aggravated assault committed on 24 December 2010, he was sentenced to a term of imprisonment of seven months. For an aggravated assault committed on 21 September 2013, he was sentenced to a term of imprisonment of eight months. This trend to lengthier sentences suggests that the offending conduct was becoming more serious and/or that the court was seeking to put greater emphasis on specific deterrence.

[5] Sub-paragraphs 1 and 2, in [5] above.

Proceedings in the Court of Summary Jurisdiction

[12] The explanation given to the magistrate for the appellant's offending on 11 June 2015 was that the appellant and the protected person had travelled from Papunya to Alice Springs to attend to banking and other matters in the administration of the estate of the protected person's recently deceased father-in-law. On 10 June, they had sat down with family members and drunk some wine together. The appellant and the protected person had "about one bottle between them", which counsel said would have been a couple of glasses of wine each. The appellant understood that the DVO was no longer in effect.[6]

[13] Shortly afterwards, counsel for the appellant advanced a possible explanation for the appellant's claimed understanding that the DVO had expired. Counsel suggested that past domestic violence orders had been for 12-month periods, whereas the current DVO was for two years. The summary prosecutor then responded as follows:

> I dispute the fact that he had forgotten, due to the fact that he had come in April for the same breach and he would have been told then how long the order was in place, you would imagine.[7]

[14] The prosecutor's submission was in part non-responsive, in that counsel for the appellant had not submitted that the appellant had forgotten that the order was in place, but rather had submitted that he thought it was finished. The prosecutor thus did not directly dispute that the appellant thought that

[6] Consistent with his statement to police: "I didn't know that", when asked about the reason for his breach of the DVO – see [6] above.
[7] Transcript 11/06/2015, p. 6.4.

the period of operation of the DVO was finished, but rather took issue with defence counsel's explanation as to why the appellant may have thought that way.

[15] It has long been the practice that criminal courts accept and act on factual statements advanced by defence counsel from the bar table, unless the prosecution disputes or otherwise questions their accuracy, or unless, in the circumstances of the case, there is some positive reason to doubt their accuracy.[8]

[16] Notwithstanding my observation in [14], the prosecutor's submission was valid to the extent that the appellant's previous contravention of the same DVO had taken place on 19 December 2014, more than 12 months after the making of the DVO on 1 October 2013. It seems logical that, if the appellant had thought that the order was for one year only, he would have been disabused of that misconception when he was sentenced for the December 2014 breach in April 2015. The prosecutor's submission questioned, and raised a positive reason to doubt, that the appellant could reasonably have believed that the DVO was finished.

[17] In the absence of evidence, I consider that the magistrate was not bound to accept defence counsel's statement that the appellant thought, at the time he re-offended, that the DVO was finished.

[8] See, for example, *Gumurdul v Reinke* [2006] NTSC 27 at [48], *Griffiths v Cowen* [2015] NTSC 4 at [15] - [16].

[18] The magistrate's sentencing remarks were, relevantly, as follows:

> The offence to which you have pleaded guilty carries a maximum penalty of two years imprisonment, so it is a serious offence involving a period of gaol as a maximum penalty, or alternatively, a big fine.
>
> I note that you have entered a plea of guilty at the very earliest opportunity and I intend to take that into account. If you and your partner had come into town and attended to your business and gone back home, that would have been the end of the matter. But … you chose to drink with your partner and that is clearly in contravention of the domestic violence order, again.
>
> As was highlighted by the prosecution, so far as your awareness of otherwise of the order being enforced, you were here in April … only a little while ago, for the same sort of trouble. And I am quite certain on that occasion the date of its expiration would have been ventilated in the court proceedings.
>
> The order is quite a lengthy one, being for two years. That can only reflect the horrific domestic violence history between yourself and your partner, Ms Roberts. Your lawyer is quite right, you have been dealt with for all of those matters in the past and I am not to sentence you again today on the basis of that.
>
> But your prior criminal history is a relevant factor in that you do not come to court as a man of prior good character and you have demonstrated over the years that you have had very little regard for domestic violence orders, taking into account the large number of times that you have breached them.
>
> The bottom line with that order is we want Ms Roberts to be safe and we want [you], when you are with her, to be looking after her in a good way. It is certainly in the court's experience that when alcohol becomes involved … particularly in relationships where there is prior domestic violence, there is a very strong likelihood that further trouble will happen.
>
> Luckily, nothing did in this instance and you are before the court for breaching the order and being in her company whilst under the influence of alcohol. I agree with the submission from your legal

representative that the reading is not a very high one and there is no violence involved. You were detected by way of a traffic apprehension, rather than coming to notice of the police for any other reason.

I have regard to all of those matters. But, clearly, the court has a responsibility to ensure that the order is enforced and that Ms Roberts can expect that she will be protected by it. One of the protections under the order is that you are not to be with her when you are under the influence of alcohol and I have a responsibility today to say to you and the broader community that these orders are serious.

And, in particular, dealing with you for this sort of trouble, there is a very strong element of specific deterrence. Any breach by you of such an order, which involves you drinking and being with her, the court can only view as being serious in the light of your overall history of domestic violence towards Ms Roberts.

Because you have come to court today and pleaded guilty at the first available opportunity, I am going to reduce the penalty that I otherwise would have imposed upon you by 25 percent to reflect that. And, as I have tried to bring home to you, Mr Gorey, the order is serious and specific deterrence in your case is a very significant sentencing factor.

I am satisfied, based on the circumstances of the offending and your own personal background, that a period of imprisonment is warranted and for this offence you are convicted and sentenced to three months imprisonment.

Grounds of appeal

[19] The appellant relies on two grounds of appeal:

1. That the magistrate erred in imposing a sentence that was manifestly excessive in all the circumstances.

2. That the magistrate erred in placing too much weight on the appellant's prior convictions rather than the objective seriousness of the offending when determining the sentence.

Arguments on appeal

[20] In relation to the first ground, counsel for the appellant contends that the magistrate's starting point of four months was grossly disproportionate to the objective seriousness of the offending conduct. She argues that there were no threats, harm, intimidation or violence directed at the protected person. The breach did not involve any other related offending. The appellant was a passenger in a vehicle driven by the protected person. The appellant had not caused the protected person fear or distress. The level of intoxication was relatively low, 0.05 per cent. The breach was in all respects low level. The sentence of three months imprisonment for remaining in the company of the protected person while minimally under the influence of alcohol and in the absence of any violence and aggression was unreasonable and plainly unjust.[9]

[21] The second ground argued by counsel for the appellant is that the magistrate placed too great an emphasis on the appellant's prior convictions. Counsel refers in particular to the magistrate's remarks reproduced below:

> … if this had been the first occasion on which he came to court I would totally agree with you that it is a lower end of seriousness … these types of breaches where there is alcohol involved where there is also a very lengthy history of domestic violence cannot realistically, in my view, be viewed as a matter at the lower end of seriousness. Any contact by your client with the protected person when he is under the influence of alcohol and with that history clearly must be viewed as serious.[10]

[9] Appellant's submissions par 10.
[10] These remarks were made in the course of defence counsel's submissions (T5.1), before the magistrate proceeded to the 'sentencing stage' (T6.5).

[22] The submissions of counsel for the respondent emphasize the important preventative role of DVOs in keeping parties apart (even parties who may be together consensually) when one of the parties is intoxicated and, based on past behaviour, thereby presents a significant risk to the other party, the protected person. Counsel for the respondent acknowledges that the magistrate placed considerable emphasis on the appellant's record of prior offending. However, he argues that such emphasis was entirely appropriate because of the need to emphasise the sentencing objective of specific deterrence. The magistrate did not allow the appellant's prior criminal history to impermissibly inflate his assessment of the objective seriousness of the instant offence.[11]

Consideration

[23] A basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances: *Hoare v The Queen.*[12] The principle is reflected in s 5(a) *Sentencing Act*, which requires that punishment of an offender be to an extent which is just in all the circumstances. A relevant subsidiary principle 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, although it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the

[11] Respondent's summary of submissions, p 7, par 2.3.
[12] (1989) 167 CLR 348 at 354.

instant offence, since to do so would be to impose a fresh penalty for past offences: *Veen v The Queen (No 2).*[13] Antecedent criminal history may be relevant 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: *Veen.*[14] In the latter case, factors such as specific deterrence may need greater emphasis.

[24] In *Manakgu v Russell,*[15] I said that a sentencing magistrate would normally assess the objective seriousness of a DVO contravention by considering the offending conduct relative to the various behaviours on the part of the offender which were the subject of restraint under the DVO, and relative to the kinds of conduct which could constitute a DVO contravention. I also expressed my opinion that a magistrate might properly reason that the maximum penalty and indeed the higher range of penalties would apply in the case of physical assaults as well as the more serious instances of offensive, intimidating, threatening, harassing and demeaning conduct.

[25] In the present case, a consideration of the terms of the DVO shows that the appellant was not only restrained from doing things which would cause harm and fear of harm to the protected person, but also restrained from being in situations which might lead to the appellant causing harm or fear of harm, that is, by being with the protected person when he was intoxicated, thereby

[13] (1988) 164 CLR 465 at 477.
[14] (1988) 164 CLR 465 at 477.
[15] [2013] NTSC 48 at [13] et seq.

triggering the risk that he might cause harm or fear of harm to the protected person. Generally speaking, a breach where harm or fear of harm is caused to the protected person is worse than a 'situational' breach. The appellant's breach was a low order 'situational' breach. No harm or fear of harm was caused.

[26] Given the facts referred to in [20], a starting point of four months seems high, even for an offender with the appellant's record of prior offending. However, in considering whether manifest excess is made out, it is necessary to further consider the preventative/protective role of domestic violence orders.

[27] In his sentencing remarks, the magistrate logically linked consumption of alcohol by parties to a relationship where there has been prior domestic violence to the "very strong likelihood that further trouble will happen". Prevention of relationship violence is the reason for imposition of conditions such as conditions 1 and 2 of the DVO. So often parties to a relationship start drinking together 'in a good way' but, as more alcohol is consumed, one party or the other becomes angry, or jealous, or both. The person against whom a DVO has been made loses the ability to assess the need to leave. Sometimes there is verbal provocation by the victim, but often there is not. It is generally hard to tell if there has been any provocation, because of a lack of evidence to enable sufficient insight and understanding. Accusations of infidelity are often made, based on irrational perceptions. Verbal arguments become physically violent arguments,

resulting in injuries, sometimes serious injuries. Frequently, when sentencing an offender who has committed a violent assault on his domestic partner, the courts are informed that the trouble started when parties engaged in an alcohol-fuelled jealous argument. When a person has a history of violence to his domestic partner, and the court determines that it is appropriate to make an alcohol non-contact order, there is a very good reason for it. It is virtually impossible to know if, and at what stage of a drinking session, things will turn nasty, but it is reasonable to assume that they will turn nasty on some occasions, at some stage. Even if the parties start drinking in a good frame of mind towards each other, the consumption of alcohol can change all that, and very quickly. The person against whom a DVO has been made may lose the ability to judge when he (or she) needs to withdraw.

[28] Given the preventative purpose of DVO, the fact that the parties may have been drinking while sitting down 'in a good way', or that the offender has on the particular occasion not been aggressive or threatening or violent to the protected person, does not necessarily result in a lenient sentencing outcome for a recidivist offender.

[29] In *Manakgu v Russell,*[16] I explained that, where the breach of a DVO is a breach of a court order, it is important to consider the extent to which the offending conduct represents a contemptuous response to the court's order. In general, the more egregious the conduct in terms of causing harm or fear

[16] [2013] NTSC 48 at [17].

of harm to the protected person, the greater the probable degree of contempt for the court's order. However, I also pointed out that relevant considerations included how soon the breach has occurred after the making of the court's order. Even a relatively minor breach occurring the day of or shortly after the court's order might be regarded as serious. Each breach will depend on its own facts.

[30] In the present case, the breach occurred well into the second year of the operation of the DVO. However, it occurred less than two months after the appellant had been dealt with by the court for a very similar breach. Moreover, the record of prior offending stood as evidence of the nature and seriousness of the risk which the appellant posed to the protected person by being with her when under the influence of alcohol.

[31] Whether a sentence is manifestly excessive, or not, is a conclusion. It does not depend upon attributing a specific identified error in the reasoning of the sentencing judge.[17] In relying upon the ground of manifest excess, it is incumbent upon the appellant to show that the sentence was not just excessive, but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive.[18] In *Truong v The Queen*,[19] the Court of Appeal referred with approval to the decision of the Victorian

[17] *Dinsdale v The Queen* (2000) 202 CLR 321 at [6], per Gleeson CJ and Hayne J.
[18] See, for example, *Pittman v The Queen* [2013] NTCCA 16, at [25].
[19] [2015] NTCCA 5 at [37], [39].

Court of Appeal in *Hanks v The Queen*,[20] and to the following statement of Bongiorno JA in relation to manifest excess:

> The term 'manifest excess' is usually used when a ground of appeal alleges that a sentence is so egregiously erroneous that the sentencing judge must have made a sentencing error although that error cannot be identified. To succeed on this ground the excess must be obvious, plain, apparent, easily perceived or understood and unmistakable. It must be so far outside the range of a reasonable discretionary judgment as to itself bespeak error.

[32] The maximum sentence for the offence to which the applicant pleaded guilty was a term of imprisonment of 2 years or a fine of 400 penalty units.[21] The magistrate's starting point of four months, one sixth of the maximum custodial sentence, was towards the high end of the range for the appellant's contravention; however, given the maximum penalty of two years, that starting point still left more than enough leeway to appropriately deal with (even recidivist) offenders who might commit more serious contraventions. In my judgment, the magistrate's starting point was not outside the bounds of a sound sentencing discretion. The applicant has not established that the sentence of three months was egregious to the extent that the sentencing judge must have made a sentencing error; or that there was an obvious and unmistakable excess, or that the sentence was so far outside the range of a reasonable discretionary judgment as to itself bespeak error.

[20] *Hanks v The Queen* [2011] VSCA 7, per Bongiorno JA at [22], Redlich JA agreeing.
[21] For 2014/15, a penalty unit was $149. The maximum fine was therefore $59,600.

[33] In relation to the second ground of appeal,[22] I reject the submission that the magistrate placed too great an emphasis on the appellant's prior convictions. I do not consider that the magistrate's remarks reproduced in [21] indicate any misinterpretation of the conduct constituting the contravention. His Honour made it clear in his sentencing remarks that the appellant's breath alcohol reading was not very high; that there was no violence involved; and that the appellant had been detected by a traffic apprehension, rather than coming to the notice of the police for any other reason. The appellant's criminal history was relevant for the reasons explained in [23], as to whether the appellant had "manifested in the commission of the instant offence a continuing attitude of disobedience of the law".[23] The criminal history was relevant to a proper understanding of the nature of the risk which the DVO had been put in place to minimise or eliminate: the very strong likelihood that alcohol would cause trouble in a relationship where there was a history of domestic violence. The criminal history was also relevant to a proper consideration of the need to emphasise specific deterrence in the sentencing of the appellant.

Conclusion

[34] The appeal must be dismissed.

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[22] See [21] above.
[23] *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 477.