Nieva v Hales [2003] NTSC 110

PARTIES:	EDISON MARMITO NIEVA
	v
	PETER HALES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA109/03 (20306227)
DELIVERED:	19 November 2003
HEARING DATES:	25 September 2003
JUDGMENT OF:	THOMAS J

CATCHWORDS:

CRIMINAL LAW - weapons control - judgment and punishment - appeal against decision to impose suspended sentence - whether sentence manifestly excessive
Weapons Control Act 2001 (NT) s 7(1)
Victor Campbell v Paul Francis Tudor-Stack [2003] NTSC 19; *Lionel Anthony Godwin v The Queen* [2003] NTCCA 7, applied.

REPRESENTATION:

Counsel:

Appellant:	S Cox
Respondent:	J Duguid

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	tho200332
Number of pages:	7

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

Nieva v Hales [2003] NTSC 110
No. JA 109/03 (20306227)

BETWEEN:

EDISON MARMITO NIEVA
Appellant

AND:

PETER HALES
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 19 November 2003)

[1] This is an appeal against sentence imposed by the Court of Summary Jurisdiction sitting in Darwin.

[2] On 22 May 2003, the appellant entered a plea of guilty to a single charge that on 26 April 2003, without lawful excuse, he carried a controlled weapon, namely a knife, in a public place, contrary to s 7(1) of the Weapons Control Act.

[3] The maximum penalty for this offence is a fine equivalent to 200 penalty units or imprisonment for 12 months.

[4] The facts in support of the charge are as follows (tp 2):

> "… at approximately 11:55 pm on Saturday 26 April this year the defendant was standing at the intersection of Brigg Street and Mitchell Street in Darwin. Mr Nieva was drinking from bottles of Wild Turkey and cola with a friend.
>
> Police on foot patrol in Brigg Street observed both men drinking and requested they pour the liquor out. Both men complied, reluctantly. Police requested the bona fides of both men and, whilst speaking with Nieva, observed him to be extremely agitated and observed him to be attempting to reach an object apparently concealed in the waistband of the rear of his trousers.
>
> Police searched him and located a Schrade brand lock-knife concealed in the waistband of his trousers. The weapon was seized. He was asked his reason for having the knife. He stated that it was for his personal protection and that everyone has to have something. He further stated it was concealed as he intended conveying it with him into Discovery Nightclub.
>
> He was arrested, he was later bailed. The place where he was, was a public place. There were about 10 to 12 other persons in the area at the time.
>
> The knife was approximately 7 centimetres long when closed and 14 centimetres when opened. It had a stainless steel blade and a black plastic handgrip and locking mechanism. …"

[5] The learned stipendiary magistrate found the appellant guilty of the offence and sentenced him to one-month imprisonment. This period of imprisonment was fully suspended with an operational period of 18 months.

[6] The grounds for appeal are set out in the notice of appeal and are as follows:

> "1. That the Learned Magistrate erred in sentencing the appellant IN THAT: The sentence imposed was manifestly excessive in all the circumstances."

[7] I will now consider this ground of appeal.

[8] The appellants written submissions which consider the ground of appeal states:

"… the Learned Stipendiary Magistrate erred in the exercise of his discretion in the following ways:

(i) by commencing the sentencing process by saying 'you talk me out of immediate gaol' (transcript at 4.4); and

(ii) by failing to give adequate weight to the circumstance of the appellant, namely:-

(a) his youth;

(b) that he was a first offender;

(c) that he had co-operated with police;

(d) he had pleaded guilty at the earliest opportunity;

(e) that personal deterrence had already been effected by his experience in the criminal justice system; and

(f) his excellent prospects for rehabilitation.

As a result of these errors the learned stipendiary magistrate imposed a sentence that was manifestly excessive in the circumstance of both the offence and the appellant."

[9] Ms Cox, on behalf of the appellant, argued that in the circumstances of this case, the appropriate penalty would be a release on a bond pursuant to s 11 of the Sentencing Act. Ms Cox pointed out that the appellant was a man that had only recently turned 18. He was working part time and was considering further studies. English is not his first language. The appellant has no prior convictions. He had cooperated with the police. The plea of guilty had been entered at the first reasonable opportunity.

[10] It was also argued that the appellant had no intention or desire to use the knife but was carrying it because some other young people had said that they would hurt him if he were seen in public.

[11] Whilst I fully support the learned stipendiary magistrate's concerns about this young man carrying a knife, it is relevant to take into account that there

is no evidence of his attempt to use or an intention to use. Ms Cox pointed to the fact that the appellant in this case was most upset and frightened by his involvement in proceedings in the Court of Summary Jurisdiction and that his experience in court would deter him from similar acts in the future.

[12] The Court was provided with details of previous prosecutions under these provisions in the Court of Summary Jurisdiction that had resulted in the imposition of a fine rather than a term of imprisonment. In addition, counsel for the appellant relied on a recent decision on this Court: *Victor Campbell v Paul Francis Tudor–Stack* [2003] NTSC 19. This is a decision of Martin CJ in which a man carried a scythe and a knife in a public place. The offender in this instance was similarly a person who held fears that he would be assaulted. The offender was a 30 year old male who had no convictions in the previous five years. The Court of Summary Jurisdiction in this instance imposed a fine of $2,500 which was subsequently varied by Martin CJ to an amount of $1,000 dollars. In this case the court was informed by counsel for the respondent that the usual penalty for a first offence on these charges was a fine ranging between $400 and $800. The offender in these proceedings had also spent around 18 hours in custody.

[13] Ms Cox for the appellant, argued that the personal circumstances of the appellant and the circumstance of the offence both combine to make the sentencing decision of the learned stipendiary magistrate unreasonable or plainly unjust. In support of the application that the sentence given to the appellant was manifestly excessive, Ms Cox submitted that a suspended

sentence of imprisonment for a young person, with no prior convictions for violence or other offences, was on its face an obviously manifestly excessive sentence.

[14] In reply, counsel for the respondent, Mr Dugiud, stated that it is not possible to find specific errors in relation to the proceedings in the Court of Summary Jurisdiction. He argued that the learned stipendiary magistrate did take into account relevant factors such as an early plea of guilty, full admissions, the age of the offender and lack of prior convictions.

[15] Mr Dugiud submitted on behalf of the respondent, that although on the face of the transcript the magistrate and the prosecutor both seem to take into account an uncharged and potentially aggravating circumstance; that the offence occurred at night time, it was possible to find that consideration of this factor did not lead to a sentence that was manifestly excessive.

[16] Mr Dugiud also argued that whilst the offender was not apprehended on licensed premises with the weapon, it was his intention to go into the nightclub with the weapon, a factor which legitimately caused the learned stipendiary magistrate serious concern.

[17] The law dealing with review of sentencing dispositions was recently restated in the Court of Criminal Appeal in *Lionel Anthony Godwin v The Queen* [2003] NTCCA 7 par 56 states:

> "… In the absence of identified error, an appellant seeking to establish that a sentence was manifestly excessive must show that the

> sentence was not just arguably excessive but that it was so very obviously excessive that it was 'unreasonable or plainly unjust': *Raggett, Douglas & Miller* (1990) 50 A Crim R 41 at 47; *Salmon v Chute & Anor* (1994) 94 NTLR 1. The presumption is that there is no error in the sentence. It is not enough that this Court would have imposed a less or different sentence."

[18] It is not necessary for an appellant to demonstrate a particular or discrete error for a court of review to consider that a sentence was manifestly excessive.

[19] This Court and the Court of Summary Jurisdiction have denounced the use and carrying of weapons in public places. Martin CJ in the decision *of Victor Campbell v Paul Francis Tudor-Stack* [2003] NTSC 19:

> "[9] … knives and other cutting instruments of all shapes and sizes have featured largely in cases involving serious injury and death. Those events quite often occur in circumstances that escalate from a relatively minor skirmish to serious wounding or fatal results. It is apparent that the Parliament has sought to meet the danger to the community which can arise as a result of the simple possession of various types of weapons described in the Weapons Control Act, without lawful excuse."

[20] I agree that the carrying of offensive weapons is a serious offence that can warrant a sentence of imprisonment. However, the circumstances of each case should be examined to ascertain the seriousness of the offending. Again, Martin CJ in *Campbell v Tudor Stack* (supra) provides guidance on this issue:

> "[22] The seriousness of the offending in each case may be judged by reference to the article in question, the circumstances about it which brings it within the definition in the particular case, coupled with the degree of damage, injury or fear which weapons of that particular type could cause, viewed objectively. It is also relevant to take into

account the specific intention referred to in the definition, if relevant."

[21] In the instance before us, the offensive weapon, a knife, was undoubtedly one that was of a type that was intended to be outlawed under this legislation. It is also the type of weapon that could cause serious fear and damage to members of the public.

[22] However, at the time that police discovered this particular weapon it was not being used by the appellant in a threatening manner, nor was the appellant harming members of the public. The intention of the appellant, whilst not a defence, does not amount to an intention to deliberately use or threaten to use the knife that was hidden in his trousers.

[23] Turning to the circumstances of the offender. I consider that the appellants lack of prior convictions, his youth, good prospects for rehabilitation, his cooperation with police and his early plea of guilty, when combined with the circumstances of the offending, are factors which demonstrate that the learned stipendiary magistrate erred in the exercise of his discretion by imposing a sentence that was manifestly excessive. I allow the appeal.

[24] The order that I make is that the order made in the Court of Summary Jurisdiction is set aside and in lieu thereof I record a conviction for the offence and impose a fine of $400.

———————————————