Hales v Williams [2004] NTSC 41

PARTIES:	PETER WILLIAM HALES
	v
	RALTON WILLIAMS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 28 of 2004 (20305800)
DELIVERED:	12 August 2004
HEARING DATES:	4 August 2004
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	A. Nobbs
Respondent:	S. Barlow

Solicitors:

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

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

Hales v Williams [2004] NTSC 41
No JA 28 of 2004 (20305800)

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:

PETER WILLIAM HALES
Appellant

AND:

RALTON WILLIAMS
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 12 August 2004)

[1] This is a Crown appeal against sentence. The issue to be determined is whether a conviction for contravening or failing to comply with a restraining order under s 10 of the Domestic Violence Act that preceded the 1997 and 1998 amendments to the penalty provisions of the section is a second or subsequent offence for the purposes of the section.

[2] At all relevant times s 10(1) of the Domestic Violence Act was in the following terms:

> "A person against whom a restraining order is in force who has been served with a copy of the order or the order as varied and who contravenes or fails to comply with the order is, subject to subsection (3), guilty of a regulatory offence."

[3] In its original form the Act provided a penalty of "$2,000 or imprisonment for 6 months" for a "first or second offence". Section 10 was amended with effect from 1 January 1997 by inserting s 10(1A) which was in the following terms:

> "Notwithstanding the Sentencing Act, where a person is found guilty of a second or subsequent offence against subsection (1), the Court shall sentence the person to imprisonment for not less than 7 days but not more than 6 months and shall not make any other order if its effect would be to release the offender from the requirement to actually serve the term of imprisonment."

[4] The section was further amended by amending Act 90 of 1998 to provide:

> "(1A) Despite the Sentencing Act, where a person is found guilty of a second or subsequent offence against subsection (1), the Court must sentence the person to imprisonment for not less than 7 days but not more than 6 months.
>
> (1B) Despite the Sentencing Act, the Court must not make any other order in respect of a person referred to in subsection (1A) if its effect would be to release the person from the requirement to actually serve the term of imprisonment imposed under that section."

[5] On 24 February 1995 the respondent was found guilty of a breach of a domestic violence order. A conviction was recorded but no further penalty was imposed.

[6] On 6 February 2002 a further domestic violence order was made against the respondent which included terms that the defendant not approach Lisa Michelle Cooper directly or indirectly or contact Ms Cooper directly or indirectly.

[7] That order was served on the respondent on 9 April 2002. Some eight months later, on 11 December 2002, the respondent made telephone contact with Ms Cooper and asked her to revoke the restraining order because it interfered with his wish to obtain employment as a security agent. As a consequence of that contact the respondent was charged with breaching the domestic violence order and the matter proceeded by way of a contested hearing on 2 March 2004 in the Court of Summary Jurisdiction. The learned magistrate found the respondent guilty and in the course of sentencing made the following remarks:

> "Apparently you had good reason to make that telephone call, you had invested in a security agents course, and the very fact of the telephone call breaches the restraining order. There is some indication that a few of your words amounted to an inferential and slight threat but other than that there is nothing to suggest that you would have gone any further and there is nothing to suggest that you did go any further."

[8] The learned magistrate convicted the respondent and imposed a fine of $400. In so doing he declined to regard the conviction from 1995 as a prior

offence for the purposes of the penalty provisions of s 10. His Worship did not consider himself bound by the requirement of the section as amended to "sentence the person to imprisonment for not less than 7 days but not more than 6 months". On appeal there is no challenge to the conviction, but the appellant complains that his Worship failed to comply with the requirements of s 10(1A) of the Domestic Violence Act by not imposing at least the minimum mandatory period of imprisonment provided for under its terms. The learned magistrate did not give reasons for choosing to proceed as he did.

[9] Statutory provisions imposing mandatory minimum sentences are, by their nature, capable of producing results that are unjust, because the regime requires a court to impose a sentence of a particular kind regardless of the circumstances of the breach of the statutory provision and regardless of the circumstances of the offender. This point has been made time and again in decisions of various courts: *Trenerry v Bradley* (1997) 6 NTLR 175, *Palling v Corfield* (1970) 123 CLR 52 at 58, *Cobiac v Liddy* (1969) 119 CLR 257 at 269. The effect of such provisions is to remove from the armoury of the court the power to exercise leniency where appropriate and, significantly, may require the court to impose a sentence which would, in other circumstances, be regarded as plainly unjust. However the policy behind, and the nature of, the punishment regime is for the decision of the Parliament. The power of the court is limited to construing and applying the words used.

[10] It is the submission of the appellant that the sentence imposed by his Worship was not available in law given the previous admitted conviction of the respondent for an offence against s 10(1) of the Act and the penalty provisions contained in s 10(1A) of the Act.

[11] The appellant noted that s 10(1), which created the offence of which the respondent was found guilty, had remained unamended from 1 January 1994 through to the time of the offending in 2002 and the time of the sentence being imposed in 2004. The offence remained the same throughout. However it was acknowledged that during the same period the penalty provisions had changed from the penalty for a second offence being "$2,000 or imprisonment for 6 months" to the mandatory provisions that now apply to a second offence.

[12] The amendments to the penalty provisions occurred in 1997 and 1998, long before the offending in December 2002. The amended penalty provisions were in place at the time the relevant domestic violence order was confirmed, at the time the respondent breached the order and at the time the respondent was convicted and sentenced for breaching the order. On all those occasions the mandatory sentencing regime was in place and, the appellant submitted, had application to the respondent.

[13] On the other hand the respondent submitted that the earlier conviction was not to be taken into account and that his Worship was correct to ignore it. The submission was twofold.

[14] Firstly it was said that the criminal law is presumed to apply in a way that is not retrospective. There is nothing in the Domestic Violence Act or in the amending legislation that would reverse the presumption. It was submitted that the amendment is retrospective in effect because it attaches consequences to the earlier conviction that would not otherwise apply. The respondent submitted that, but for the amendment, a person committing a second offence (such as the respondent in this case) would be entitled to come before the court with the benefit of a presumption that any penalty to be imposed is to be proportional to the offending: s 5(1)(a) of the Sentencing Act, *Veen (No 1)* (1979) 143 CLR 458; *Veen (No 2)* (1988) 164 CLR 465 at 472 and *Baumer v R* (1988) 166 CLR 51 at 58, and that imprisonment is to be a sentence of last resort (presumably relying on the common law principle). It was submitted that, because of the mandatory nature of the new regime, those presumptions are removed. They are replaced by a requirement that a term of imprisonment of at least seven days shall be imposed, whatever may be the circumstances of the offending and of the offender.

[15] The second submission, which to an extent mirrors the first, was that for such consequences to be placed upon conduct that precedes the amending legislation there must be clear and unambiguous terminology employed by the legislature. General terminology such as is present in this case will not suffice. By way of example, counsel made reference to the terms of s 78BA

of the Sentencing Act which deals with penalties to be imposed for certain identified "violent offences". The section is in the following terms:

> "(1) Where a court finds an offender guilty of a violent offence and the offender has one or more times before (whether prior to or after this section commencing) been found guilty of a violent offence, the court must record a conviction and must order that the offender serve –
>
> (a) a term of actual imprisonment; or
>
> (b) a term of imprisonment that is suspended by it partly but not wholly.
>
> (2) Nothing in subsection (1) is to be taken to affect the power of a court to make any other order authorised by or under this or any other Act in addition to an order under subsection (1)."

[16] It can be seen that the inclusion of the words "whether prior to or after this section commencing" makes the position as to the retrospective operation of the provisions abundantly clear. By way of contrast, the section with which this case is concerned makes no distinction between convictions occurring before and after the legislation in its amended form took effect.

[17] A similar problem of statutory interpretation was dealt with by the Court of Criminal Appeal in *McMillan v Pryce* (1997) 115 NTR 19. There the court considered the construction of s 78A of the Sentencing Act which dealt with the then recently introduced mandatory minimum sentencing regime regarding property offences. The legislation took effect from 8 March 1997. One question posed for the court was:

> "Whether on a true construction of s 78A of the Sentencing Act, the words 'before been found guilty of a property offence' may include an offence committed before 8 March 1997 and for which the defendant was found guilty before 8 March 1997?"

[18] In a majority decision the court answered the question in the negative. The majority relied upon the wording of the amended section but then provided the following additional reason for finding as it did:

> "Further, the question of construction falls to be considered in the light of the principles discussed in *Trenerry v Bradley*. Section 78A of the Sentencing Act provides for a minimum mandatory sentencing regime. The Act does not, by unmistakable and unambiguous language, make it plain that offences against the sections referred to in the Schedule which were committed prior to 8 March 1997 were intended to be regarded as coming within the ambit of the general words in the expression 'been found guilty of a property offence'. Consequently that expression should be interpreted in favour of the liberty of the subject, unless the effect would be to deprive the expression of all meaning. Clearly the interpretation contended for by the applicant does not have that result."

[19] In *Coco v The Queen* (1993-1994) 179 CLR 427 Mason CJ, Brennan, Gaudron and McHugh JJ said (at 437-4):

> "The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights."

[20] The respondent to this appeal relies upon the force of the observations of the court set out above. In the present case, it is clear that the legislature intended to interfere with the right to a proportional penalty as identified by the respondent. The issue is whether it intended that the interference was to apply in circumstances where a conviction was recorded prior to the amendment coming into effect. It was necessary for the legislature to employ "unmistakable and unambiguous language" if that was the intention. It did not do so.

[21] In *McMillan v Pryce* Angel J took a different view from that of the majority. In his opinion the Sentencing Act drew no line "between previous convictions before and previous convictions after 8 March 1997". He expressed the view that a person being sentenced under the new amendments was not being punished for having done an act which at the time of commission of the offence was prescribed by a different sentencing regime. Rather, the amendments brought into play an offender's history in the event that he offended after 8 March 1997. His Honour therefore concluded that the section had no retrospective operation.

[22] Given that the circumstances in this matter are effectively the same as confronted the court in *McMillan v Pryce,* and given the abrogation or curtailment of the right of a second offender (such as the respondent in this case) to the presumption that the sentence to be imposed will be just and proportional to the offending, I think it appropriate that I follow the majority decision in that case. I interpret the provision in favour of the

liberty of the subject. There is no basis upon which to distinguish the present case from the circumstances applicable in that case.

[23] In the circumstances I find that the learned magistrate did not err in his approach to the sentencing of the respondent. There is no merit in the further submission of the appellant that the sentence was manifestly inadequate.

[24] The appeal is dismissed.

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