Gordon v Hales [2006] NTSC 22

PARTIES:	GORDON, Pepperina
	v
	HALES, Peter William
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 1 of 2006 (20312908)
DELIVERED:	31 March 2006
HEARING DATES:	15 March 2006
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

MAGISTRATES – Appeal against sentence - whether sentence manifestly excessive - whether appropriate to have recorded conviction - whether criteria expressed in s 8(1) of Sentencing Act given due consideration - whether irrelevant consideration taken into account - appeal allowed.

Domestic Violence Act s 4; Sentencing Act s 8(1)

Davis v Hayward No JA 64/1996 (reproduced at [1997] 1 NTSC 203); *Hesseen v Burgoyne* [2003] NTSC 47, applied

Pillage v Coyne (2000) 113 A Crim R 27; Piva v Brinkworth (1992) 59 SASR 92, considered

REPRESENTATION:

Counsel:

Appellant:	P Dwyer
Respondent:	E Armitage

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Ols 0603
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Pepperina v Hales [2006] NTSC 22
No. JA 1 of 2006 (20312908)

BETWEEN:

PEPPERINA GORDON
Appellant

AND:

PETER WILLIAM HALES
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 31 March 2006)

Introduction

[1] This is an appeal against an order of the Chief Magistrate made on 4 January 2006, whereby he recorded a conviction against the appellant for an offence of, on 17 June 2003 at Darwin, having failed to comply with the terms of a restraining order issued in accordance with the Domestic Violence Act.

[2] Having received submissions from the prosecutor and counsel for the appellant, the learned Chief Magistrate elected to record a conviction, but discharged the appellant without further penalty. He ordered her to pay a victim's levy of $40.

[3] The appellant appeals against that disposition on the ground that it is said that the learned Chief Magistrate erred in recording a conviction, having regard to the provisions of s 8(1) of the Sentencing Act.

Relevant narrative history

[4] This was a somewhat stale matter.

[5] It is not clear from the file when the appellant was charged with the offence to which I have referred. I infer that she was, at some stage, summoned to appear before the Court of Summary Jurisdiction at Darwin in respect of it.

[6] The file endorsements indicate that she failed to appear when the matter was listed on 25 November 2003. A warrant for her apprehension was issued. She was eventually arrested on the warrant on 3 January 2006 and held in custody overnight prior to her appearance before the Court of Summary Jurisdiction. It is not clear why she failed to appear in 2003. No information seems to have been given to the learned Chief Magistrate in that regard.

[7] When the matter came before the Court on 4 January 2006, the appellant was represented by counsel (Mr McGorey) and she pleaded guilty.

[8] The learned Chief Magistrate was then informed of the relevant factual history, which I now summarise.

[9] It was common ground that the appellant, an aboriginal woman now 35 years of age, had been in a de facto relationship with an aboriginal male known as David Rusty White for about six months in 2002.

[10] Although the precise history giving rise to that situation was not before the learned Chief Magistrate, he was informed that a restraining order had been made against the appellant pursuant to the provisions of s 4 of the Domestic Violence Act. It was served on the appellant on 4 October 2002 and remained current until 4 October 2003.

[11] That order stipulated that the appellant was not to approach or remain in a place where White was staying or living or working. It further provided that she was not to approach him directly or indirectly, was not to contact him directly or indirectly, was not to assault or threaten to assault him or damage or threaten to damage property in his possession, and was not to act in an offensive or provocative manner towards him.

[12] It was said that, on the evening of Tuesday 17 June 2003, the appellant was drinking alcohol with friends at Bagot Community. She became heavily intoxicated.

[13] The court was informed that, at about 11.00 pm on that evening, the appellant observed White enter House 2 at Bagot Community, with another female. The appellant thereupon approached that house and stood in its front yard, calling out to White. An altercation then occurred between the appellant and White.

[14] The prosecutor informed the court that, in the course of the altercation, White picked up a red milk crate and struck the defendant on the head with it three times. He then hit her on the back several times with the same crate. As a consequence, the appellant fell to the ground. She tried to block the crate from hitting her body by putting her left arm in front of her body. That action resulted in her left arm being struck by the crate, after which White then decamped from the area.

[15] Police attended shortly after that occurrence and the appellant was conveyed to the Royal Darwin Hospital for treatment to injuries sustained as a result of having been struck by the crate. She received several stitches to the head. Her head was swollen and bruised as a result of the incident.

[16] She was subsequently interviewed by the police. When asked whether she was aware of the existence of a restraining order between White and herself she replied in the affirmative. She agreed that she was aware that the order required her not to go near him.

[17] When asked by the police how she got to House 2, she responded to the effect, "I went there, I went to his flat". She was asked why she went to House 2. She replied, "Well like he's been with another woman, another lady. That's why I got upset".

[18] The learned Chief Magistrate was informed by the prosecutor that the appellant had no antecedent record and was the mother of three children.

[19] Mr McGorey said that the appellant had previously been involved in what proved to be a violent relationship with White and that such violence had been the reason why the relationship ended and the domestic violence order had been issued.

[20] Following the breakdown of the relationship, the appellant resided at the Bagot Community. White also resided in the same community. The appellant did not specifically seek him out, by going to the community on the occasion in question. The incident that is the subject of the present proceedings occurred some six months after the breakdown of the relationship.

[21] In the normal course of living at the community, the appellant was sitting drinking with friends there. Whilst so doing she saw White returning to his home nearby. She had not seen him for quite a while and she noted that he was with another woman. In her intoxicated state she became upset, approached White's house and yelled some things out to him. It was intimated to the learned Chief Magistrate that the appellant then appreciated that what she did was wrong.

[22] It was as a consequence of what she had called out that she was attacked by White with the milk carton crate. Mr McGorey stressed that the appellant did not strike any blow at White and he was very much the aggressor. As a consequence of White’s assaults the appellant sustained significant injuries and was in hospital for some time.

[23] It was put to the learned Chief Magistrate that the appellant's breach of the law was out of character and that, in the two and half years since the incident, she had not further offended or come to the attention of the police. Particularly having regard to her excellent record Mr McGorey urged upon the learned Chief Magistrate that it would be appropriate to consider a non-conviction disposition.

[24] Mr McGorey concluded his submissions in these terms:

> "Well, you can't submit that this is a sort of battered woman type of situation totally, but there has been a lot of prevalence of violence from the victim in the matter towards her and I think that is borne out by the facts and what occurred on that evening; and Your Honour it would be, I would submit, a shame and I ask the court consider that for someone who has no priors to receive a conviction when there is a significant possibility that she might go through the rest of her life with no other convictions and this would be just an aberration on that record".

[25] Inter alia, the prosecutor responded to the following effect:

> "I'd be saying that this particular matter your Worship is a technical breach of the low-end and it's a bit sad that she actually got struck. So I would be arguing for a minimum penalty of disposition. It is appropriate in the circumstances your Worship".

[26] In dealing with the matter the learned Chief Magistrate had this to say:

> "Well, a couple of things have gone wrong here.
>
> Firstly, the events of the night and you knew there was an order that you weren't allowed to go near this man and that was an order of the Court which you presumably agreed to and it obviously flowed from some difficulties between you and he at a previous time at least so

far as the order is concerned, that you must have been to some extent at fault.

So this is not the first time that there's been a problem between you and you at least have been, it would seem, a contributor to that problem. The second thing is, that after getting into that trouble and being given a summons by the police to attend court you failed to attend court and then you had to be arrested yesterday to come back before the court.

If you were able [sic] to come in November 2003 when you were summonsed to appear then you should have made arrangements to come at a later date or rung your lawyer and told him that you'd come in at another time. You didn't bother to do that.

It seems to me in the circumstances that it's proper and appropriate that a conviction be imposed in relation to the offence because it's serious not to obey the order of the Court. That's right, that's the reason why.

If you were being molested by a man now and I made an order against the man not to trouble you, then I'd be tough on him too. I take into account a number of matters, particularly that you are now a mature lady with no previous record and you have been in custody overnight, in other words, you spent for all intents and purposes a day in gaol.

In those circumstances it seems to me that's a sufficient penalty in addition to the finding of guilt. So that you are found guilty, you're convicted of the offence but you will be discharged without further penalty, but there'll be a victim's levy of $40 which I'm obliged to impose."

[27] It will be noted that the learned Chief Magistrate made no specific mention of the reason why he would not be prepared to accede to Mr McGorey's submission that no conviction ought to be recorded. As appears from page five of the relevant transcript, he merely seems to have rejected such a proposal out of hand.

The basis of the appeal

[28] In essence, the appellant's argument is that the impugned disposition failed to pay due regard to the provisions of s 8(1) of the Sentencing Act. That section stipulates that:

> "(1) In deciding whether or not to record a conviction, a court shall have regard to the circumstances of the case including -
>
> (a) the character, antecedents, age, health or mental condition of the offender;
>
> (b) the extent, if any, to which the offence is of a trivial nature; or
>
> (c) the extent, if any, to which the offence was committed under extenuating circumstances."

[29] Counsel for the appellant took, as her starting point, what fell from the Chief Justice in the case of *Hesseen v Burgoyne* [2003] NTSC 47. The learned Chief Justice there held that the exercise of judicial discretion as to whether or not to record a conviction is reviewable on appeal. He went on to say:

> "Judicial minds may well differ as to the significance to be placed upon any one or more of the enumerated factors in s8 as well as the other circumstances of the case, and in ultimately deciding whether or not to record a conviction the sentencer is exercising a judicial discretion. An appellate court will only interfere if there is some reason for regarding that the discretion conferred upon the Magistrate was improperly exercised and the Magistrate fell into error (Mason v Pryce (1988) 34 A Crim R). It may not be obvious how the sentencer fell into error, but if the sentence is unreasonable or plainly unjust, the appellate court may interfere (House v The King (1936) 55 CLR 499; Dinsdale v The Queen (2000) 202 CLR 321)."

[30] It was submitted on behalf of the appellant that an objective consideration of the factors referred to in s 8 of the Sentencing Act pointed overwhelmingly in favour of the proposition that a conviction ought not to be recorded against her; and that there was simply no perceivable reason why that proposition should have been rejected. The reasons expressed by the learned magistrate indicate that he simply focused on two specific aspects of the situation, namely the inherent seriousness of a breach of a domestic violence order and also the earlier failure of the appellant to appear in 2003, although his cryptic comment at one point suggests that he paid particular regard to the former.

[31] As to this counsel pointed to the fact that the appellant was a 35-year-old aboriginal woman who came before the court with no previous convictions, it had been conceded by the prosecutor that the appellant's conduct was a technical offence at the low-end of the scale and merited a minimum disposition, and that the offending behaviour was not only plainly minor in its nature but the appellant had also been subjected to a vicious attack by her former de facto husband. She had suffered considerably from her physical injuries, a factor that was not even recognised by the learned Chief Magistrate.

[32] It was also stressed that the appellant had made full admissions to the police and had entered a plea of guilty on her first appearance. Furthermore, in the two and a half years that had elapsed since the offence, she had demonstrated rehabilitation by not coming to the attention of the police.

Accordingly, it is said that her prospects for rehabilitation and maintaining a crime free situation were excellent and ought, specifically, to have been considered in relation to determining whether or not a conviction should be recorded. The probability of her re-offending was, it was said, slight.

[33] It was submitted that the failure of the learned Chief Magistrate to refer to the factors set out in s 8, strengthens the appellant's argument that he fell into error in failing to identify and consider *all* relevant issues. As to this reliance was placed upon the following dictum of Martin CJ in *Davis v Hayward* No JA 64/1996 (reproduced at [1997] 1 NTSC 203):

> "… it would have been helpful, I think, had specific attention being drawn to s 8 of the Sentencing Act and an examination made of the provisions otherwise contained therein directing the matters to which the Court shall have regard in deciding whether or not to record a conviction. It may have assisted to have closely identified the issues which called for consideration……
>
> … His Worship erred in the way he approached the sentencing of the appellant by placing too much weight on matters which he regarded called for the imposition of punishment befitting what he perceived to be the circumstances of the offence, and not giving sufficient attention to the circumstances of the offender, and the extenuating circumstances in which the offence was committed."

[34] Counsel for the respondent drew attention to the authorities that require the existence of demonstrable error to justify interference on appeal with the exercise of a sentencing discretion. She argued that the ultimate sentencing disposition adopted by the learned Chief Magistrate was at the bottom end of the range. It could not properly be said to fall *outside* of a range of reasonable and appropriate sentencing outcomes on the relevant facts.

[35] Ms Armitage, for the respondent, urged upon me that there was nothing to indicate that the learned Chief Magistrate had not taken into account, in the course of a busy list, of what had been put to him. She contended that, having regard to the reasoning in authorities such as *Pillage v Coyne (*2000) 113 A Crim R 27 and *Piva v Brinkworth* (1992) 59 SASR 92, he was well entitled to take the view that the inherent seriousness of the offence was such as to merit the recording of a conviction.

[36] As to this, she drew attention to the fact that the Domestic Violence Act was important social legislation, any breach of which tended to negate the very purpose for which domestic violence orders are made. It followed that the objective seriousness of the appellant's conduct warranted the sentencing disposition actually adopted. It was the appellant who, by her actions, had precipitated the violence that ensued.

[37] She submitted that, on a fair reading of the reasons expressed by the learned Chief Magistrate, he did not inappropriately take into account the previous failure of the appellant to attend court. The reference to that was really coupled to his subsequent finding that he took into account the fact that the appellant had been arrested and retained in custody overnight – and thereby, as he put it, "spent for all intents and purposes a day in gaol". This merely bore on the sentencing disposition ultimately arrived at after the recording of a conviction and the fact that the appellant had been sufficiently punished.

[38] Ms Armitage contended that, bearing in mind the foregoing considerations, no error had been demonstrated by the appellant.

Conclusion

[39] A major difficulty that I have with the submissions made by Ms Armitage is that I find myself unable to accept the construction that she seeks to place on the sentencing remarks expressed by the learned Chief Magistrate.

[40] It seems to me that the only reasonable interpretation that can be placed on those reasons is that he based his decision to record a conviction on two principal matters, namely, first, what appeared to be a deliberate breach of the domestic violence order and the inherent seriousness of *any* such breach and, secondly, the appellant's failure to attend Court in 2003. In fact, he devoted no less than two out of the six short paragraphs of his sentencing remarks to the latter topic.

[41] Having announced that he was recording a conviction, he then separately and subsequently adverted to the appellant's good record and that she had spent a day in gaol as justifying a non imposition of any further penalty.

[42] It is significant that, in relation to the decision to record a conviction, he made no mention of the relevant s 8(1) considerations, specifically the prior good character of the appellant, the minor part that she had played in the overall incident and the important circumstance that she had been seriously assaulted and injured by White.

[43] Nor does he appear to have reflected on, or give due weight to, the fact that, in the two and a half years since the offence incident, the appellant had led a blameless existence. She had amply demonstrated rehabilitation and it was obvious that the likelihood of any re-offending was minimal.

[44] It seems to me, with respect, that, in approaching this matter, the learned Chief Magistrate may well have allowed his consideration of what was put to him to be diverted by what was, for present purposes, an irrelevant concern. He appears to have been preoccupied by the failure of the appellant to appear before the Court when originally summoned and to have allowed that aspect to assume some prominence in his thinking. Of course, the reason for that non-appearance did not ever emerge and there may have been a quite plausible explanation for it. Whether that be so or not, it was scarcely pertinent to a proper evaluation of the objective facts relevant to the potential application of s 8(1), in all the circumstances.

[45] Given the foregoing situation, I am compelled to the conclusion that error in the sentencing process has been demonstrated by the appellant, in that the decision to record a conviction was, at least in part, the product of the taking into account of an irrelevant consideration and also that it does not appear that due consideration was given to important s 8(1) factors that, in reality, strongly indicated the desirability of an approach under that section.

[46] Quite frankly, one would have thought that, if ever there was a situation that cried aloud for the application of those statutory provisions this was it,

having regard to the very powerful factors identified by counsel for the appellant. Accordingly, I allow the appeal and set aside the conviction recorded.

[47] I assume that no further consequential order will be required. However, I will hear counsel in that regard.