Thomas v Hales [2000] NTSC 77

PARTIES:	ANGUS THOMAS
	v
	PETER HALES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 44/2000 (20004539)
DELIVERED:	19 September 2000
HEARING DATES:	9 August 2000
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL – APPEAL FROM MAGISTRATE

Appeal – appeal from Magistrate – grounds of appeal – sentence manifestly excessive – attaching weight to defendant's previous criminal history – level of seriousness of offending – mitigating factors - plea of guilty – cooperation with the authorities – subjective circumstances – special leniency – procedural fairness – accumulating sentence – principle of totality – sentence not manifestly excessive – appeal dismissed

Criminal Code 1983 (NT); *Sentencing Act 1995* (NT) s 5 (1) (h) and (j) and s 5 (2) (e).

Punch v The Queen (1993) 1 WAR 486; (1993) 67 A Crim R 46; *Llewellyn v Marshall* (1995) 79 A Crim R 49, *Maynard v O'Brien* (1991) 78 NTR 16; cited.

Veen v The Queen [No. 2] (1988) 164 CLR 465; *Kelly v The Queen* (CCA (NT) 30 June 2000, unreported); *R v Davey* (1980) 50 FLR 57; *R v Storey* [1998] VR 349; *Mill v The Queen* (1988) 166 CLR 59; referred to.

REPRESENTATION:

Counsel:

Appellant:	J Condon
Respondent:	P Tiffin

Solicitors:

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

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

Thomas v Hales [2000] NTSC 77
No. JA 44/2000 (20004539)

BETWEEN:

ANGUS THOMAS
Appellant

AND:

PETER HALES
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 19 September 2000)

[1] This is an appeal from a sentence imposed by a stipendiary magistrate in Darwin.

[2] On 1 June 2000 the appellant was sentenced to imprisonment in respect of two offences which were:

1. The appellant was convicted in respect of an offence which occurred on 15 February 2000. This followed a plea of guilty by the appellant to an offence of unlawful assault upon Donna Maree Smith with two circumstances of aggravation being (i) that Donna Maree Smith suffered bodily harm and (ii) that the said Donna Maree Smith was a female and the said Angus Thomas was a male.

The learned stipendiary magistrate imposed a sentence of one year and nine months imprisonment.

2. The appellant was further sentenced in respect of an offence which occurred on 29 February 2000. The appellant was convicted following a plea of guilty to a charge that he unlawfully assaulted Anne Satherley and that the assault involved two circumstances of aggravation (i) that Anne Satherley suffered bodily harm and (ii) that the said Anne Satherley was a female and the said Angus Thomas was a male.

[3] The learned stipendiary magistrate imposed a sentence of one year and 11 months imprisonment cumulative upon the sentence imposed for the first offence.

[4] This was a total period of three years and eight months imprisonment effective from 29 February 2000. The learned stipendiary magistrate fixed a non parole period of two years and eight months.

[5] The amended grounds of appeal are as follows:

> "1. That the sentence was manifestly excessive.
> 2. That the learned Magistrate erred in attaching undue weight to the defendant's previous criminal history.
> 3. That the learned Magistrate erred in his view as to the level of seriousness of the offending.
> 4. That the learned Magistrate erred in failing to take sufficient account of the mitigating factors in the Appellant's favour, namely that the Appellant pleaded guilty and co-operated with the authorities.

5. That the Learned Magistrate failed to take into consideration the subjective circumstances of the Appellant that called for special leniency.

6. That the Learned Magistrate erred in drawing inferences regarding the Appellant's intention/motive for the assaults without according procedural fairness to the Appellant.

7. That the learned Magistrate erred in accumulating the sentence.

8. That the learned Magistrate erred in not taking sufficient account of the principle of totality."

[6] The facts found by the learned stipendiary magistrate are as follows (t/p 18 – 19):

> "The offences were each of them very serious. The first offence occurred on 15th February only a few days after you got out of gaol. You'd got drunk and you noticed a lady walking on the bicycle path near the footbridge at Rapid Creek. You approached her from behind, you grabbed her by the neck and she tried to get free, but was unable to. What saved her from whatever you had in mind, was that another man was present, somewhere further down the bicycle track and when she cried out, then he began to come to her assistance, you saw him coming, you having by then, knocked your victim, slipped to the ground, you left her alone and ran off, treading on [her] leg, either deliberately or accidentally as you went. She was pretty sore from all of that, as she mentions in her victim impact statement, later she suffered a further physical condition, she seems possibly to Crohn's disease and has been very ill since then, but even more significantly she has had lasting effects from that assault upon her. I'll return to them in a minute.
>
> You were not caught by the police or anyone else that day and you remained at liberty for a further 2 weeks. On 29th February, you'd been drinking at Minmarama and for some reason you were told to leave Minmarama, I guess you were already showing signs of being out of control there, to some degree. But you obeyed, did what you were told, left Minmarama, wandered off in the direction of the bus stop on Dick Ward Drive and there, your second victim, Ms Saperley (?) was getting off a bus, you followed her as she took a track through the long grass towards Ludmilla and you grabbed her on that track, forced her to the ground and kept banging her face down onto the track in an effort to subdue her and stop her struggling. What stopped that assault, was a passing motorist had seen what was going on, stopped, got out and caused you to run away. You having run

away, meandered back to Minmarama park and that's where the police arrested you later that night.

Both of the assaults took place in broad daylight, both of them took place when you were drunk."

[7] His Worship then proceeded to deal with the effects upon the appellant's two victims.

[8] With respect to Ms Satherley he noted that she had suffered a black eye with bad bruising about the left eye and the bruises took two weeks to go away. Ms Satherley was stiff and sore in the body for about three weeks afterward. Ms Satherley had suffered a stroke some time before the assault and had five cerebral aneurisms clipped in her head. She had stated in her victim impact statement "when he was knocking me about I was thinking that every breath might be my last". The victim impact statement prepared by Ms Satherley also referred to her fear of going outside her house on her own and a fear of being alone in her own home.

[9] Donna Smith also prepared a victim impact statement which the learned stipendiary magistrate referred to, noting in particular that Ms Smith now wants to leave Darwin. She is not sleeping and as a consequence of the assault she suffers a fear of aboriginal people. This is a new and frightening reaction for her. In her victim impact statement, Ms Smith stated the most difficult aspect of the attack to cope with had been the triggering of an attack of Chron's disease. Ms Smith described the effects of Chron's disease which can be triggered by stress and the debilitating side effects of the medication.

[10] His Worship referred to the reports from Dr Hill in relation to Ms Satherley and Dr Fitzsimmons in relation to Ms Smith.

[11] The learned stipendiary magistrate noted that these were serious offences terrifying for the individual victims and the sort of offences that strike fear in the community particularly for women in the community. Whilst commenting that they were bad assaults the learned stipendiary magistrate commented they could be a lot worse. He noted that no weapon was used in either case and that there was no act of indecency committed during the course of either of the assaults. The learned stipendiary magistrate also made reference to the fact the assaults were both committed within the range of help for the victims. His Worship commented that the assaults were both committed in broad daylight and were both poorly thought out from a criminal's point of view.

[12] The learned stipendiary magistrate then proceeded to consider factors relevant to the appellant. He noted the appellant's record of prior convictions as follows (t/p 20 – 21):

> "…. You've been convicted of assault in this court on 8th November 1995, 12 months imprisonment. You were convicted in the Supreme Court in October November 1996 of assault and gross indecency offences. They had been committed in 1995 and sentenced to bear (sic) to 3 years and 1 month imprisonment altogether. And you've been convicted in this court for offences committed in 1998 on 11th November 1998 breaching your parole further aggravated assault, a further 6 months. You've spent most of the last 5 years in goal and these latest offences were committed only a few days, 4 days after your latest release from goal. Quite obviously the risk of your re-offending is high and no-one can dispute that. …."

[13] Counsel for the appellant, Ms Condon, in respect of grounds 1, 2 and 3 argues that the sentence was manifestly excessive having regard to the objective seriousness of the offences. Further it was argued, the learned stipendiary magistrate erred in attaching undue weight to the appellant's previous criminal history.

[14] "A prior criminal record, alone or combined with other" 'unfavourable factors'" may result in the offender receiving a sentence which is the same as that which is proportional to the "objective circumstances" of the offence – the upper limits of the sentence which may properly be imposed – but no more (see generally *Punch v The Queen* (1993) 9 WAR 486 at 493 – 496; (1993) 67 A Crim R 46 at 52 – 55 per Murray J, *Llewellyn v Marshall* (1995) 79 A Crim R 49 Kearney J at 53).

[15] The maximum penalty for each of these offences is five years imprisonment. The learned stipendiary magistrate was entitled to have regard to the maximum penalty provided for the offence under the Criminal Code Act 1983 (NT) even though the limit of the jurisdiction for sentences imposed in the Court of Summary Jurisdiction is 2 years for each offence (*Maynard v O'Brien* (1991) 78 NTR 16 at 21). The penalties imposed for each of these offences are a little over one third of the maximum penalty provided for the offences.

[16] The assaults were serious, the learned stipendiary magistrate correctly assessed them on their objective facts as "bad assaults". The learned

stipendiary magistrate was entitled to take into account as he did the prior criminal record of the appellant. I am not persuaded that he attached too great a weight to the prior criminal record in arriving at the sentence he imposed. Counsel for the appellant states the magistrate's comment that the appellant was a person of "fearsome violence" is not sustained on the evidence of the appellant's antecedents. I do not accept this submission. The learned stipendiary magistrate was referring to three prior convictions for offences of violence within the previous five years noting that the appellant had spent most of the last five years in gaol and committed the first of the offences only four days after being released from gaol. The learned stipendiary magistrate's concerns for the protection of the community were, in my opinion, well founded.

[17] Counsel for the appellant argues the learned stipendiary magistrate imposed a period of imprisonment with the "preventative detention model in mind" and submits the learned stipendiary magistrate fell into error when he stated in the course of his sentencing remarks "I would still be bound to punish you severely for these serious assaults and send you back to gaol for a fair while. That would be done by me, not just to punish you but also to protect the community". It is the submission on behalf of the appellant that the magistrate sentenced the appellant to a period of imprisonment with the "preventive detention model" in mind and also referred to remarks made by the learned stipendiary magistrate during the course of the submissions on

the plea (t/p 11) "… then one's looking at a preventive sentence and that's a fairly horrible prospect …".

[18] I do not agree that the learned stipendiary magistrate did in fact impose a sentence of imprisonment that was in the "preventative detention model" as disapproved in *Veen v The Queen* [No 2] (1988) 164 CLR 465.

[19] The remarks complained of were made by the learned stipendiary magistrate in the context of considering a pre sentence report and the paucity of alternative arrangements that could be made within the appellant's community. The learned stipendiary magistrate was making the point that even if such alternative placement were available he would still be bound to impose an appropriate period of imprisonment to reflect the seriousness of the offences and the aspect of deterrence in sentencing.

[20] I am not persuaded this reflects any error in sentencing principles.

[21] For these reasons, grounds 1, 2 and 3 of this appeal are dismissed.

Ground 4: "That the learned Magistrate erred in failing to take sufficient account of the mitigating factors in the Appellant's favour, namely that the Appellant pleaded guilty and co-operated with the authorities."

[22] The appellant is entitled to a discount for his plea of guilty (*R v Donnelly* [1998] 1 VR 645, *Kelly v The Queen* (CCA (NT) 30 June 2000, unreported). See also s 5(1)(h) and (j) of the Sentencing Act 1995 (NT). In *Kelly v The Queen* (supra) at p 13 par 26, the court said:

> "In our opinion, an early plea has significant value going beyond the demonstration of remorse; it promotes the speedy disposition of justice and avoids the waste of valuable court time and other resources that is inherent in a late plea. …"

[23] In this matter the appellant made admissions to both offences when he was questioned by police on 1 March 2000. The appellant entered a plea of guilty at an early stage of the proceedings. The date the plea of guilty was entered being 17 May 2000.

[24] Counsel for the appellant in her submissions, pointed out that in the course of his reasons for decision the learned stipendiary magistrate made no mention of the fact the appellant had pleaded guilty and made admissions in respect of both offences. The learned stipendiary magistrate delivered his decision in this matter prior to the decision of the Court of Criminal Appeal in *Kelly v The Queen* (supra) in which the court said (p 14):

> "In our opinion, it is desirable that a sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor, but we do not consider it is possible to lay down any tariff. The weight to be given to a plea will vary according to the circumstances."

[25] The learned stipendiary magistrate was delivering an ex-tempore decision. Whilst it would have been preferable for him to make reference to an allowance being made for the plea of guilty and the cooperation with the authorities, I do not consider his failure to mention these matters means the learned stipendiary magistrate did not turn his mind to those aspects in

arriving at a final sentence. In *R v Davey* (1980) 50 FLR 57 Muirhead J at 66:

> "A judge's remarks on sentence will seldom reveal all the matters he takes into consideration. Foremost should be his anxiety to protect the public, but judicial assessment of the prisoner, the prisoner's family and background, his opportunities, his demeanour, his remorse and the precipitating factors causing the offence, all play their part. Remarks on sentence should not be reviewed on appeal as though they are a reserved judgment. They are frequently made ex tempore and in conversational manner, but generally only after anxious thoughts."

[26] The allowance of a discount for a plea of guilty and cooperation with the authorities has been a fundamental principle of sentencing for many years. It is specifically provided for in s 5(2)(h) and (j) of the Sentencing Act. The learned stipendiary magistrate is no doubt well aware of this principle and he was obviously well aware that the appellant had entered a plea of guilty and had previously made full admissions to the authorities. It would be artificial to assume that because the magistrate did not specifically refer to them in his reasons for decision, that he had overlooked such a fundamental principle. The actual sentences that he imposed for serious offences, being well under the maximum penalty, and well within the appropriate penalty for such offences, on the scale of seriousness, would indicate he had given the appropriate discount to the appellant in respect of both of the offences.

[27] I would dismiss this ground of appeal.

Ground 5: "That the learned Magistrate failed to take into consideration the subjective circumstances of the Appellant that called for special leniency."

[28] Counsel for the appellant submits that in the course of his reasons for sentence the learned stipendiary magistrate made no reference to either this appellant's physical impairment or limited intellectual function and accordingly there is no indication that the learned stipendiary magistrate turned his mind to consideration of those factors in mitigation. Counsel for the appellant submits this failure to acknowledge these factors and accord them a weight in the sentencing process demonstrates an error on the part of the learned stipendiary magistrate.

[29] The pre sentence report dated 8 October and the psychological report prepared by Mr Peter Mals dated 7 October 1998 were before the learned stipendiary magistrate. These reports outline the impairments to the appellants hearing and his limited intellectual capacity.

[30] Section 5(2)(e) of the Sentencing Act requires the court when imposing a sentence to take into account; "the offenders character, age and intellectual ability". The learned stipendiary magistrate did not make specific reference to the appellant's impaired hearing or his limited intellectual capacity. However, the learned stipendiary magistrate did make reference to both the pre sentence report and the psychological report of Mr Mals. His Worship had clearly read and considered these reports, he stated (t/p 21):

> "… The psychological report from Mr Mals that was prepared back in 1998 and sets out in great and helpful detail, as a professional assessment of those risks and really comes to the same sort of conclusions that amateur like myself would come to, that is that you are a big risk, that you need to get away from alcohol, but you need to be out bush, you need not get Darwin, and even then you might re-offend."

[31] His Worship also made reference to the pre sentence report noting in particular that there were no members of the appellant's family able to offer care and supervision of the appellant.

[32] In his reasons for sentence the learned stipendiary magistrate makes reference to the fact that the appellant was drunk at the time he committed both these offences. I am satisfied the learned stipendiary magistrate was well aware of the matters in the pre sentence report and the psychological report including matters relevant to the appellant's hearing impairment and limited intellectual capacity. I am satisfied he took the contents of these reports into consideration. In my opinion, his Worship quite correctly found in the circumstances of these offences the protection of the community was the paramount consideration.

[33] In the circumstances of these offences, both of which were serious and committed by the appellant at a time when he was intoxicated, I am not persuaded that the magistrate has fallen into error such that this Court should interfere with his sentencing discretion.

[34] I would dismiss this ground of appeal.

Ground 6: "That the Learned Magistrate erred in drawing inferences regarding the Appellant's intention/motive for the assaults without according procedural fairness to the Appellant."

[35] Counsel for the appellant referred to two medical reports which were tendered without objection from defence counsel at the hearing before the learned stipendiary magistrate. These reports were Exhibit 3 and 4. Exhibit 3, the report from Dr Fitzsimmons, refers to the attacker upon Ms Smith as being "a sex offender". Exhibit 4, the report from Cavenagh Medical Centre concerning Ms Satherley, makes reference to an attempted sexual assault. These reports were tendered without any objection. I do not consider the magistrate can now be criticised for himself not indicating those comments should be deleted. It is clear from his reasons for sentence which I will refer to shortly, that the learned stipendiary magistrate was well aware he was not sentencing the appellant for a sexual offence.

[36] Counsel for the appellant refers to certain comments made by his Worship which the appellant contends indicated the learned stipendiary magistrate was sentencing the appellant on inferences that the sentencing magistrate was not entitled to draw.

[37] The first comment complained of (t/p 19) were the words: "… what saved her from whatever you had in mind. …".

This comment was made during the learned stipendiary magistrate's finding of facts concerning Ms Smith and in the context of the presence of another

person further down the bicycle track. Taken in context this is, in my opinion, a very neutral statement by his Worship indicating that the victim was spared anything further occurring because of the presence on the bicycle track of another person which caused the appellant to run off.

[38] The second comment which is the subject of complaint appears also at t/p 19:

> "… A perfectly reasonable fear quite apart from the other fears that a woman would have in that situation".

This comment is made in the context of the learned stipendiary magistrate addressing the issue of the effect upon Ms Satherley of the assault.

[39] Counsel for the appellant complains that in making this comment the learned stipendiary magistrate was speculating on the question of the appellant's intention. I do not accept the argument that his Worship was speculating on the appellant's intention. The comment was directed toward the feelings and reactions of the victim and was, in my opinion, doing no more than empathising with the position of Ms Satherley and commenting on her reaction to the offence.

[40] The third comment which is referred to by counsel for the appellant under this ground of appeal is at t/p 19-20:

> "Both women, have I think, assumed, probably correctly that your reasons for assaulting them was some kind of desire to rape them and that would be my assumption as well, it would be certainly be since being reported to the doctors in each case has been the woman's interpretation of the events."

The concern raised in respect of this comment is that the learned stipendiary magistrate has moved from speculation to a finding and an adoption by the magistrate that there was a "desire to rape them"

[41] I do not accept the construction placed by counsel for the appellant on this comment. Read in the context of his remarks on sentence, this comment is an acknowledgment by the learned stipendiary magistrate that both women apprehended the assault upon them as being a sexual assault and both women conveyed this apprehension to their respective doctors. Their fears were not ultimately born out. However, it is not unreasonable for any woman attacked in the way these women were, by the appellant, to have in their mind at the time, that the purpose of the attack upon them was a sexual purpose. In my opinion, the learned stipendiary magistrate was doing no more than accepting that this was a normal and understandable reaction by the women and caused them a certain stress and fear at the time. The words and "that would be my assumption as well" - mean in the context of these remarks if the magistrate were in the position of the women involved. It is not a finding by the magistrate that it was the appellant's intent to commit a sexual offence or that any offence of a sexual nature was committed.

[42] The fact that the learned stipendiary magistrate was well aware he was not dealing with the appellant for any offence of a sexual nature is born out in the fourth comment made by the magistrate which is also subject of complaint by the appellant. This comment appears at t/p 20:

> "Your effort to assault the women, if that was your intention, didn't get as far as being attempts to have carnal knowledge or to have sexual intercourse and you've been properly charged with aggravated assault causing bodily harm."

[43] Counsel for the appellant submits that all four comments by the learned stipendiary magistrate detailed above indicate that he considered the medical reports and the reference to a sexual attack as highly relevant to the question of sentence. The argument for the appellant is that his Worship fell into error in using that material to draw inferences that were unfavourable to the defendant without inviting defence counsel to address him with respect to those aspects of the report.

[44] I am not persuaded that this was a situation which contravenes the principle expressed in *R v Storey* [1998] 1 VR 349 at 367 as asserted by counsel for the appellant. It was not a situation where the magistrate fell into error for failing to ask counsel for the defence to address him with respect to the reports and in particular the reference to sexual attack. The magistrate did not make a finding adverse to the appellant that it was a sexual attack or that the appellant intended a sexual attack, in fact, quite the reverse. The magistrate clearly indicated that he was not sentencing the appellant for a sexual assault or making any findings as to the appellant's intention and that on the admitted facts the appellant had been properly charged with aggravated assaults causing bodily harm.

[45] I would dismiss this ground of appeal.

Ground 7 and 8: "That the learned Magistrate erred in accumulating the sentence and erred in not taking sufficient account of the principle of totality."

[46] It is the submission of counsel for the appellant that the learned stipendiary magistrate failed to apply the totality principle with respect to the aggregate sentence. It is the appellant's submission that the total here was a sentence of imprisonment of three years, eight months for two aggravated assaults and that such a sentence does not reflect the totality of the criminal behaviour.

[47] "It is always necessary for a Court to take a last look at the total just to see whether it looks wrong" D.A. Thomas, Principles of Sentencing 2nd ed (1979) 56 – 7 "the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive" D.A. Thomas (supra).

[48] The High Court discussed the principle of totality in *Mill v The Queen* (1988) 166 CLR 59 Wilson, Deane, Dawson, Toohey and Gaudron JJ at 62 - 63:

> "The totality principle is a recognized principle of sentencing formulated to assist a court when sentencing an offender for a number of offences. It is described succinctly in Thomas, *Principles of Sentencing*, 2nd ed. (1979), pp. 56 – 57, as follows (omitting references):
>
> > "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The

> principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong['']; 'when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."
>
> See also Ruby, *Sentencing*, 3rd ed. (1987), pp. 38 – 41. Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed. Where practicable, the former is to be preferred."

[49] The learned stipendiary magistrate did not make the sentences concurrent nor did he refer to the principles of totality. In the exercise of his discretion his Worship made the sentences for the offences cumulative to arrive at a total head sentence of three years and eight months.

[50] Whilst this is in the higher range of an appropriate sentence for these offences I am not able to find that it is manifestly excessive or that there was an error such as to justify this Court interfering with the magistrate's discretion and the sentence he imposed.

[51] I would dismiss this ground of appeal.

[52] The order of this Court is that the appeal be dismissed.

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