Hales v Dial [2000] NTSC 73

PARTIES:	HALES, Peter William
	v
	DIAL, Leighton John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA3 of 2000
DELIVERED:	6 September 2000
HEARING DATES:	12 July 2000
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL

Criminal law – knowledge of tariff required and whether aggravating factors existed – prosecutor acquiescence – whether inadequate fine imposed – carrying a loaded firearm less than 70cm in a public place, unregistered and unlicensed.

Firearms Act 1997 (NT), s 3(2), s 5, s 78(3) and Sch 5
Firearms Regulations (NT), reg 13

R v Brown, Court of Criminal Appeal of NSW, unreported, 9 June 1999, followed.
Gourley [1999] 2 Cr App R (S) 148, followed

APPEAL

General principles – whether to interfere with discretion of Court Below.

Everett v The Queen (1994) 181 CLR 295, applied.
Allpass (1994) 72 A Crim R 561, applied.
Fletcher-Jones (1994) 75 A Crim R 381, considered.

REPRESENTATION:

Counsel:

Appellant:	J Whitbread
Respondent:	P Cantrill

Solicitors:

Appellant:	DPP
Respondent:	Withnall Maley & Co

Judgment category classification:	B
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Mar20025

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

Hales v Dial [2000] NTSC 73
No. JA3 of 2000

BETWEEN:

PETER WILLIAM HALES
Appellant

AND:

LEIGHTON JOHN DIAL
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 6 September 2000)

[1] Complainant's appeal against sentence by way of an aggregate fine of $600 imposed upon the respondent after his pleas of guilty to each of the following charges:

1. On 8 December 1999, at Palmerston within the boundaries of a Town … carried a loaded firearm, namely, a Marlin Company short-barrel shotgun in a public place, namely, Temple Terrace, contrary to s 78(3) of the Firearms Act.

2. At the same time and place he had in his possession the same firearm that he was not licensed to possess, and

3. At the same time and place he did possess the same firearm that was not registered.

[2] The facts were:

(i) On Wednesday 9 December 1999, the respondent was driving a beige Toyota utility, NT registration 572-510, in bound on the Stuart Highway near Palmerston. Due to a minor traffic matter, the respondent was apprehended on Temple Terrace at about 8.48 am.

(ii) On apprehending the respondent, police spoke with him in relation to the traffic matter and cautioned him. When asked, the respondent gave permission for police to search the vehicle.

(iii) Behind the passenger seat, police located a shotgun which had been shortened to 67cm, that is, 3cm shorter than the minimum for a category D firearm. On inspecting the weapon, it was found to be loaded with 2, 12 gauge buckshot cartridges. The weapon was wrapped in a red towel and blue tarpaulin.

(iv) The firearm was manufactured by Marlin Company with "The Original Goose Gun" printed on the barrel. The respondent did not have a current Northern Territory shooters licence and there are no records of the firearm being registered.

(v) The serial number was ground off the barrel and unreadable to the naked eye. That amounted to an offence under s 74(2) of the Act, but was not charged.

(vi) The respondent said that he only obtained the firearm the previous night when he was interviewed by police, and he was then arrested and later bailed. His counsel informed the Court that he was on his way to return the firearm to the friend because he did not want the firearm to remain at his premises where he was living with others, some of whom were licensed to have firearms and some of whom were not.

(vii) The firearm was less that 70cm in length and was capable of being concealed, accordingly it is classed as a category D firearm under the Firearms Act.

[3] Each of the offences carries a maximum fine of $5,000 or imprisonment for 12 months.

[4] During the course of the argument on appeal, there was some debate about whether a category D firearm is registrable. It is provided in s 3(2) of the Act that a category D firearm is one specified in Sch 5 which, for these purposes, includes a firearm, other than a pistol, which is less than 70cm in length and capable of being concealed on or about the person.

[5] Section 5 of the Act provides for registration of firearms, and those that form category D are not excluded, but by reference to reg 13 of the Firearms Regulations, it can be seen that there are restrictions upon the Commissioner's power to grant a licence authorising the possession or use of such a firearm unless a genuine reason is established as prescribed, and the applicant produces evidence to the Commissioner's satisfaction that there is a genuine need for the applicant to possess or use the firearm.

[6] The applicant was aged 26 at the time of the offence, had spent six and a half years in the regular army, and came to the Northern Territory in about 1994 where he had become engaged in a variety of casual employment.

[7] His Worship sought guidance as to any "tariff" sentences for this type of offending and the prosecutor was unable to assist, nor was a more senior prosecutor who happened to be in court. Counsel then appearing for the respondent said although he had not appeared in relation to a matter similar to that in Count 1, that the "normal unregistered, unlicensed shooter, is normally a tariff between $200 to $600". His Worship enquired as to whether the firearm being a "sawn off shotgun" would aggravate the fine. His Worship enquired of the prosecutor as to whether he had anything to say, and the prosecutor replied "I accept that the figure that Mr Maley is suggesting would be perhaps appropriate".

[8] Without giving any reasons, his Worship proceeded to convict the respondent and imposed an aggregate fine of $600. He also made an order forfeiting the firearm. Time was allowed to pay the fine.

[9] Evidence admitted without objection in the appeal shows that the tariff suggested by Mr Maley was probably very much on the low side, although the information made available may not have been a complete record of sentences for similar offences.

[10] It is not a ground of appeal that his Worship failed to give reasons for the sentence he imposed. It is not open to suggest that he erred in some demonstrable fashion. It appears to have been accepted that the proceedings, having been completed in a very short period of time and the factual material being but of brief compass, his Worship was taken to have had the matters put forward for his consideration in mind. It is obvious from the transcript that his Worship acted upon the advice of Mr Maley, not contested by the prosecutor, as to the range of penalties imposed.

[11] Possession is a common element of all the offences, and the agreed facts are that all the offences arose at the one time and place. The elements going to make up the separate offences are that (a) it was loaded and in a public place, (b) the respondent was not licensed to possess it and (c) it was not registered. There is nothing in common as between those additional

elements. These go to make up quite separate offences having no relationship each to the other.

[12] Given the restriction upon the registration of a class D firearm, it is plain that possession of such a firearm in each of the circumstances giving rise to the charges is a more serious type of the offending generally prescribed. But the gravity of the offending depends, inter alia, upon the purpose of the possession (*R v Brown*, Court of Criminal Appeal, Supreme Court of New South Wales, unreported, 9 June 1999; *Gourley* [1999] 2 Cr App R (S) 148).

[13] I am not affected by the reference to the firearm being a "short-barrel shotgun" not a "sawn-off shotgun. They are emotive phrases giving rise to suggestions of gangsterism which it is not even vaguely suggested was an appropriate association in this case.

[14] Had it not been for the prosecution acquiescence in the suggested range of fines, I would have little hesitation in quashing the fines and substituting a more severe penalty by way of increased aggregate fine or separate fines. An appellate court looks at the case as it was presented to the sentencing tribunal, and ordinary principles of fairness require that the conduct of a prosecutor be taken closely into account (*Everett v The Queen* (1994) 181 CLR 295).

[15] A different stance may be taken on appeal, but the appellate court in the exercise of its discretion is entitled to take into account the course which

was adopted before the sentencing tribunal even where a recognisance imposed was unduly lenient and a custodial sentence would not have been (*Allpass* (1994) 72 A Crim R 561).

[16] In *Fletcher-Jones* (1994) 75 A Crim R 381 a different stance was taken on appeal, but the increase in the custodial sentence appears to have been related to errors of sentencing principle. The appellate court intervened and substantially increased a custodial sentence, where the Crown had acquiesced, upon the ground that "the sentence was demonstrably and seriously inadequate and the degree to which the sentencing Judge fell into error was "substantial"".

[17] I am not satisfied this is a case which justifies the exercise of a discretion so as to increase the penalty bearing in mind the stance taken before his Worship.

[18] The appeal is dismissed.
