Gokel v Althouse [2000] NTSC 99

PARTIES:	GOKEL, Noel John v ALTHOUSE, WILLIAM Michael
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS:	JA 61 & 62 of 2000
DELIVERED:	20 December 2000
HEARING DATES:	1 December 2000
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Appeal – general principles – error in formulating the sentences

Sentencing Act 1995 (NT), s3, sch 2 and s 52
Domestic Violence Act 1992 (NT), s 10, s 10(1A) and s 10(1B)

The Queen v Muir, unreported 1999, NTSC 51, 6 May 1999, applied.

Appeal – general principles – sentence – whether sentence manifestly inadequate – domestic violence order operating at time of serious assault on first and second occasions – offender in breach of bail conditions on the second occasion – whether to quash sentence in lower court.

R v Nagas (1995) 5 NTLR 45, applied.
Oldfield v Chute (1992) 107 FLR 413 at 418, applied.

Whether the offender had a dangerous propensity for violence against the victim

Veen v The Queen (No 2) (1988) 164 CLR 465 at 477, applied.

REPRESENTATION:

Counsel:

Appellant:	Mr P Tiffin
Respondent:	Mr T Berkley

Solicitors:

Appellant:	DPP
Respondent:	NAALAS

Judgment category classification:	B
Judgment ID Number:	mar20033
Number of pages:	12

Mar20033

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

Gokel v Althouse [2000] NTSC 99
No. JA 61 & 62 of 2000

BETWEEN:

NOEL JOHN GOKEL
Appellant

AND:

WILLIAM MICHAEL ALTHOUSE
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 20 December 2000)

[1] Complainant's appeal against sentence. The respondent was convicted and sentenced in the Court of Summary Jurisdiction at Darwin on 25 August 2000 upon pleas of guilty on two charges brought in respect of his conduct towards Ruth Spratt, his estranged defacto wife. They arose out of similar events which occurred on 26 June and 13 July.

[2] The charges in respect of each occasion were of assault with circumstances of aggravation, contrary to s 188 of the Criminal Code Act 1983 (NT) and failure to comply with a restraining order contrary to s 10 of the Domestic Violence Act 1992 (NT) ("breach of the DVO"). For each for the assaults the maximum penalty is five years imprisonment and for the breach of the

DVO not less than seven days and not more than six months imprisonment (s 10(1A)), the respondent having been previously convicted of such an offence.

[3] In each case the assault charges were brought upon information and the breach of the DVO upon complaint.

[4] In relation to the offences on 26 June, his Worship convicted the respondent and imposed an aggregate sentence of six months imprisonment to be suspended after he had served four months. The same sentence was passed in relation to the offences of 13 July. It was then ordered that the two aggregate sentences be served concurrently. The respondent had been in custody for 59 days and it was ordered that the sentences commence from 25 July, that is, one month before they were imposed. His Worship gave reasons for not giving full credit for the time spent in custody and I will come to that later.

[5] It is plain that his Worship erred in formulating the sentences. The power to aggregate is only available where the offender is found guilty of two or more offences joined in the same information, complaint or indictment (Sentencing Act s 52). That was not the case here. Furthermore, the power to aggregate does not apply if one of the offences charged is a property offence, violent offence or sexual offence. By definition the assault offence is a violent offence (Sentencing Act, s 3 and Sch 2).

[6] It is not clear whether his Worship paid regard to the requirements of s 10(1A) of the Domestic Violence Act, but there is nothing in his remarks to show that a sentence of not less than seven days was imposed for each breach of the DVO. (See my remarks regarding s 52 and sentencing for property offences in the *Queen v Muir* (unreported, 1999 NTSC 51 of 6 May 1999), they are of equal application here).

[7] The legislative regime requires close and detailed attention. Some provisions might easily be overlooked. The court may not make any order if its effect would be to release the offender from the requirement to actually serve the term of imprisonment imposed under s 10(1A). (See s 10(1B)). The restraint does not apply only to the mandatory minimum. (Compare the provisions of s 78A and s 78B of the Sentencing Act regarding service of mandatory terms of imprisonment for property offences). There would not seem to be any prohibition on such a sentence being served concurrently with another. (Again, compare the provisions under the property offence provisions and in particular s 78A(6A)).

[8] There is to be added to all of that reference to s 78BA of the Sentencing Act requiring that in this case a conviction must be recorded in respect of each assault charge and an order that the offender serve a term of actual imprisonment be made. Such a sentence may be partly suspended. There does not seem to be any prohibition on such a sentence being served concurrently with another.

[9] It is clear that his Worship erred in aggregating the sentences in respect of each set of events and not making it clear that he had imposed a sentence of not less than seven days imprisonment in respect of each breach of the DVO.

[10] Neither counsel before his Worship drew his attention to the errors at the time of sentencing nor did they take the opportunity of drawing the matter to the court's attention thereafter under the provisions of s 112 of the Sentencing Act. However, I think that even if that were done and the sentencing orders corrected to reflect the requirements of the legislation, the further ground of appeal that the ultimate sentence imposed was manifestly inadequate is made out.

[11] The following are the facts placed before his Worship and accepted by the respondent:

(a) On 25 January 2000 the respondent was subjected to an order under the Domestic Violence Act that he not assault or threaten to assault Ruth Spratt directly or indirectly and not act in any offensive or provocative manner towards her, including calling her bad or hurtful names. At the time of the offences there was no prohibition upon the respondent living together with Ms Spratt.

(b) On the evening of 26 June, at about 8pm, Ms Spratt, her daughter and her daughter's boyfriend were seen by the respondent walking towards a roadway in Darwin whereupon he ran up to her and began yelling at her saying "Slut. You want Ronnie. You want Ronnie." And "Are you

going to Kulaluk to fuck Ronnie?" Ms Spratt fell over whilst climbing a fence and when she attempted to get to her feet the respondent jumped on top of her holding her on the ground. He grabbed her around the throat with both hands and was strangling her. They struggled, the respondent scratched her right cheek and punched her in the side saying, "You want to die? You want to die?" Later when Ms Spratt went to obtain the house keys from her daughter, the respondent saw her, picked up a stick and hit her with the stick in the right thigh and over the head. She fell to the ground and grabbed her head which was bleeding, whereupon the respondent kicked her in the stomach three or four times.

(c) On the second occasion, the respondent went to the house where Ms Spratt was residing at about 10pm and went inside through an unlocked rear door. He locked the door behind him. Ms Spratt discovered him in the kitchen and he accused her of "sleeping around". He became enraged when she denied his allegation, pushed her to the floor, punched her in the face and side of the head which caused her ear to bleed and bruised her face. Ms Spratt screamed out to the respondent to release her, she tried to fight him off and the respondent said: "I don't give a fuck for gaol. I will kill you before I go to gaol". He pulled her up by the hair, pushed her down the hallway to the bedroom, turning off the lights, pushed her backwards onto the bed, straddled her with his legs stopping her from getting up, began to punch her again to the face and tried to strangle her with his hands. Police had been called, and

when the respondent saw and heard them he said to Ms Spratt "If you shout out, I'll kill you right here". He was arrested inside the house.

[12] Although not distinctly isolated before his Worship, it was agreed before this Court that the breach of the DVO in each case was constituted by the verbal threats and the use of bad and hurtful names towards her, whether uttered before, during or after the physical assaults.

[13] In her victim impact statement received by the Court of Summary Jurisdiction, Ms Spratt said of the events of 27 June that she had lumps and cuts to her head, scratches on her neck and described how she felt when the respondent was trying to strangle her. She said her stomach was sore from where she was booted and her thigh was sore from where she was hit with the stick. She was frightened at the time that he was going to kill her and at the time she made a statement, 18 July, she still felt "a bit shaken up". As to the events on 13 July, she described how her right ear was bleeding and sore and her head was sore and she had a big lump on her forehead. She described difficulties she had with her throat. Emotionally she said she was shook up because he was not supposed to be where she was, that she was frightened he would kill her and that she felt really scared. At the time of her statement, a few days after the event, she described how she woke up upon hearing any noise, that she had had disturbing dreams and described the effect of which events had had upon her five year old son, whom she said had formed a fist and said, "I'll bash you like Daddy". None of that

was tested, but it is plain that Ms Spratt suffered physical and emotional harm.

[14] The mere statement of the facts demonstrates the grave seriousness of the offences particularly the physical assaults. The opinion of the Court of Criminal Appeal in matters similar to this is expressed in *Inness Wurramara* (1999) 105 A Crim R 512 commencing at p 520.

[15] On each occasion, the respondent was arrested not long after the events, but declined to answer questions. After the first of the events he was detained until released on bail on 11 July. He committed the second series of offences three days later, not only in breach of the DVO, but of his bail undertakings. He remained in custody until dealt with by his Worship. He had spent a period calculated to be 59 days in gaol on remand in relation to the two events prior to being sentenced.

[16] The respondent has a number of prior convictions, mainly for traffic offences which are of little significance. But, in 1995 he was convicted of failure to abide by the terms of a domestic violence order, fined $500 and at the same time sentenced to two months imprisonment for assault aggravated by the use of a weapon. That sentence was wholly suspended. In 1997 he was convicted of two counts of assault and sentenced to terms of imprisonment of four months and six weeks respectively. All of those offences were perpetrated against Ruth Spratt. He has lost any claims of leniency based upon previous good character.

[17] The two offences committed on each occasion were closely related, but independent of each other. The assaults deserved substantial penalty and each breach of the DVO deserved a separate penalty.

[18] In her plea on behalf of the respondent, counsel said that on both occasions he was very intoxicated and recalled little of the events. She put forward an explanation for his conduct which sought to place some of the responsibility for what occurred upon Ms Spratt. The two of them had been in a defacto relationship for ten years and had two young children. It appears that both drank to excess on occasion and each became violent towards the other. He was 40 years old at the time of the offending, was born in Darwin of Aboriginal descent. A pre-sentence report ordered by his Worship provided family background information which is of little relevance now. The report identifies Ms Spratt as an occasional heavy drinker who behaves badly when drunk. The respondent received formal education to year 10 and has had a variety of jobs as a trade's assistant, engaging in maintenance and gardening for various employers.

[19] The cause of the respondent's behaviour lay in his problems with alcohol. He started drinking beer at the age of 15. That progressed to the stage where a psychologist assessed his drinking as being towards the "high risk and dangerous" end of the drinking continuum carrying with it the expected consequences. After his arrest following the second assault, he decided not to apply for bail because he felt it would be better if he stayed in gaol for a while to "think about my future and keep away from drink".

[20] The author of the pre-sentence report went into some detail as to the respondent's acknowledgement of his drink problem and willingness to undergo counselling. However, the respondent was resolute in rejecting all suggestions of supervision in the community, wanting to "do everything myself".

[21] His counsel informed his Worship, however, of his willingness to undergo counselling in regard to alcohol abuse, anger management and domestic violence. It was submitted that the respondent had accepted responsibility and was on the way to be rehabilitated. He had taken the decision not to resume his relationship with Ms Spratt.

[22] The prosecutor emphasised the aggravating factors, particularly the nature of the assaults, the separate breach of the DVO, and that the second assault was committed whilst he was on bail in relation to the first. He reminded his Worship of the mandatory minimum sentence of seven days under the Domestic Violence Act and of the legislature's requirements that a sentence of imprisonment be imposed for the assaults.

[23] After adjourning to consider the matter, his Worship noted that the relationship between the respondent and Ms Spratt involved drink and violence, the respondent's prior convictions, the need for personal and general deterrence and that the second offence was committed whilst on bail. In his Worship's view, the guilty pleas brought about a reduction in sentence to the order of 25 to 30%, and he noted the respondent's

willingness to find a new direction in life. As to the days already spent in custody, his Worship decided not to give the respondent the benefit of the full period of 59 days then accumulated because of what he described as "the general picture" and the fact that the sentences had been made concurrent. The respondent was effectively in custody for nearly five months, he was released from gaol a week before the appeal was heard. That was not due to any fault on the part of the appellant.

[24] There is no argument as to the principles to be applied upon consideration of a prosecution appeal. The authorities are usefully gathered by the Court of Criminal Appeal in *R v Nagas* (1995) 5 NTLR 45.

[25] Clear errors have been shown in relation to the formulation of the sentences imposed in this case by his Worship's failure to not strictly apply the provisions of the legislation. Further, in my opinion, the sentence was obviously inadequate.

[26] Each assault was a serious example of its type. By no means could either of them be properly regarded as minor, as was the submission put to his Worship. The respondent's prior convictions show that he manifested a continuing attitude and disobedience of the law. That being so, retribution, deterrence and the protection of Ms Spratt, in particular, indicate that a more severe penalty was warranted than if these were his first offences. He had a dangerous propensity for violence against her (*Veen v The Queen (No 2)* (1988) 164 CLR 465 at p 477.

[27] His attitude to the law is further demonstrated by the fact that he was restrained by orders under the Domestic Violence Act on both occasions, and on the second by the conditions upon which he was released on bail. (*Oldfield v Chute* (1992) 107 FLR 413 at 418).

[28] I do not think it was made entirely clear to his Worship that the facts relating to the breach of the domestic violence order were separate and distinct from the assault charges.

[29] The sentences imposed by his Worship are quashed.

[30] The respondent is convicted for all of the offences and sentenced:

- For the assault on 26 June 2000 – 12 months imprisonment.
- For the breach of the domestic violence order on 26 June – 21 days imprisonment.
- For the assault on 13 July 2000 – 14 months imprisonment.
- For the breach of the domestic violence order on 13 July – 28 days imprisonment.

The sentences are concurrent pursuant to s 50 of the Sentencing Act and applying the totality principle I consider that a sentence of 14 months imprisonment is appropriate. The effective sentence of 14 months imprisonment is to take effect as from 59 days prior to 25 August 2000 to

take into account the time spent in custody prior to his being sentenced by his Worship.

[31] Taking into account the double jeopardy attendant upon a prosecution appeal, it is ordered the sentence be suspended as from three months after 25 August 2000. Had it not been for that factor, then a significantly longer period of actual imprisonment would have been required.

[32] I fix the operational period at two years from 25 November 2000, the date of his release from prison.
