Small v Nash & Ors [2001] NTSC 34

PARTIES:	LESLIE SMALL
	v
	MARK NASH and KEVIN DAVID WINZAR and BRYAN MICHAEL GOBLE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION exercising Territory jurisdiction
FILE NO:	JA35 of 2001 (20015063), JA36 of 2001 (20020851), JA45 of 2001 (20016712)
DELIVERED:	16 May 2001
HEARING DATES:	2 May 2001
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL - APPEAL AGAINST SENTENCE

Appeal from Court of Summary Jurisdiction – appeal against sentence – principle of totality - sentence itself not excessive as to manifest such error

Traffic Act 1987 (NT); *Sentencing Act 1995* (NT), s 43(6)

Hales v Garb [2000] NTSC 49, referred to,

R v Raggett (1990) 50 A Crim R 41; *R v Tait* (1979) 46 FLR 386, applied

REPRESENTATION:

Counsel:

Appellant:	S O'Connell
Respondents:	C Roberts

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondents:	Office of the Director of Public Prosecutions

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

Small v Nash & Ors [2001] NTSC 34
No. JA35/2001, JA36/2001, JA45/2001

BETWEEN:

LESLIE SMALL
Appellant

AND:

MARK NASH
and
KEVIN DAVID WINZAR
and
BRYAN MICHAEL GOBLE
Respondents

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 16 May 2001)

[1] This is an appeal from a sentence imposed on the appellant in the Court of Summary Jurisdiction at Alice Springs on 29 December 2000.

[2] On this date the appellant was convicted and sentenced on the following offences:

> "1. File 20015063
>
> (i) Count 1 drive while disqualified, six months imprisonment.
>
> (ii) Count 2 exceed .08, six months imprisonment, cumulative upon Count 1.
>
> 2. File 20016712

(i) Count 1, exceed .08, six months imprisonment cumulative upon file 20015063.

(ii) Count 2, drive while disqualified, six months imprisonment cumulative upon Count 1.

3. File 20020851

(i) Count 1, fail to supply sufficient sample of breath, six months imprisonment cumulative upon Count 2 (file 20016712).

(ii) Count 3, drive while disqualified, six months imprisonment cumulative upon Count 1.

(iii) Count 3, unregistered, uninsured, convicted and fined $1,000 plus $40 victim's levy (no time to pay).

(iv) Count 7, criminal damage, convicted and sentenced to 14 days imprisonment to commence at the expiration of the 8 months on 9908355.

4. Files 900021 and 9908355

(i) Breach of a suspended sentence was proved and the defendant was sentenced to serve 8 months imprisonment to commence on 22 December 2000."

Overall, a sentence of three years, eight months and 14 days was declared with a non parole period of two years.

[3] The appellant was disqualified from driving a motor vehicle for 10 years. This period of disqualification is partly concurrent with the disqualification period of five years imposed on 16 April 1999.

[4] The grounds of appeal stated on the Notice of Appeal are:

"(a) That the aggregate period of imprisonment was, in all the circumstances, manifestly excessive.

(b) That the Learned Magistrate erred in failing to apply the principle of totality."

[5] The appellant pleaded guilty to each of the offences. The agreed facts as presented to his Worship by the prosecutor in the Court of Summary Jurisdiction are as follows (t/p 2 - 4):

> "... at 10pm on Saturday 9 September 2000 police on patrol in Kinjarra Drive, Ali Curung where they had occasion to stop a Ford Falcon station wagon. The driver was spoken to. The defendant smelt of liquor. He was requested to undergo a roadside breath test. It proved positive. He was arrested for the purpose of a breath analysis and conveyed to the police station where he underwent this breath analysis where a reading of .228 was obtained. He was arrested and checks showed that the defendant was disqualified.
>
> The defendant was disqualified from driving on 16 April 1999 for a period of 5 years. They are the facts in relation to that file, Your Worship.
>
> HIS WORSHIP: Are they admitted.
>
> MR O'CONNELL: Yes, sir.
>
> HIS WORSHIP: Yes.
>
> MR HOSKING: Your Worship, at 3 pm on Saturday 14 October 2000 the defendant drove a Mitsubishi Sigma station wagon south along the airstrip road in Ali Curung. The vehicle was apprehended by police. The defendant submitted to a roadside breath test which returned a positive reading, arrested and conveyed to the police station for the purpose of a breath analysis. A breath analysis gave a reading of .194, again, checks showed the defendant to be disqualified as of 16 April. Asked his reasons for driving he replied: 'I just come in for the sports weekend.' They are the facts in relation to that file.
>
> HIS WORSHIP: Yes.
>
> MR HOSKING: And, Your Worship, on Friday 22 December 2000 at 4.50 pm the defendant was the driver of a Ford Fairlane sedan. No registration plates were displayed. The vehicle was travelling – the defendant was travelling south along the Stuart Highway, about 5 kilometres north of the Ali Curung turnoff. The defendant saw the police sedan, stopped the vehicle still in the south-bound lane. The defendant then slid from the driver's seat into the middle of the rear passenger seat, where he sat between two male passengers. These actions were observed by police.
>
> The defendant stepped from the vehicle when requested by police to do so. The defendant was directed to the rear of the vehicle and off

the road. The defendant was submitted to a roadside breath test. He failed on two occasions to give a sufficient sample. The defendant's breath and person smelt of liquor. His eyes were bloodshot. He was unsteady on his feet. He had to be assisted to stand. He was arrested for the purpose of a breath analysis. He had to be restrained and escorted to the rear of the sedan.

The defendant resisted police by refusing to get into the sedan. He would not bend his head. He held on to the sides of the car door. He made his legs go stiff. He refused to move. he was trying to push the police officers away with his hands. The defendant was eventually pushed in to the rear seat. The defendant kicked the police vehicle passenger rear sedan window several times, causing the glass to shatter. He then attempted to climb out of the vehicle, was pushed back in and taken to the Ali Curung Police Station. Here the defendant failed on two occasions to supply sufficient sample of breath for the breath analysis.

He was placed in the cells after being searched. He offered no explanation as to why he was driving after drinking or why he was driving disqualified. Again, a computer check showed the defendant to be disqualified as of 16 April 1999 for a period of 5 years. And the vehicle's registration had expired on 27 September 2000. There were three passengers in the vehicle at the time. ...."

[6] In addition to these matters the appellant was found to be in breach of a suspended sentence of 20 months imprisonment suspended after he had served 12 months for a period of two years. This suspended sentence had been imposed by the Court of Summary Jurisdiction on 16 April 1999 and he was released from prison after serving 12 months.

[7] In addition to the sentence of imprisonment imposed on 16 April 1999, Mr Small was disqualified from driving a motor vehicle for a period of five years.

[8] The learned stipendiary magistrate noted the prior convictions on the appellant's record and noted the appellant had 11 prior convictions for drink driving offences and nine prior convictions for driving whilst disqualified.

Ground (b): That the Learned Magistrate erred in failing to apply the principle of totality.

[9] In his reasons for sentence the learned stipendiary magistrate did not make a reference to the principle of totality. He did however explain why the sentences were cumulative and not concurrent when he stated (t/p 4):

> "…. Each of the offences sentences ought to be served consecutively otherwise a person charged with drink driving could believe that he was allowed any number of free goes for similar offending before the times comes for sentence. He'll be sentenced to 6 months for each of the offences of drink driving and driving while disqualified, each to be served consecutively."

[10] With respect to other offences I note his Worship did aggregate the fines in respect of the offence of drive unregistered and uninsured and he convicted the appellant without proceeding to penalty for the offence of resist arrest.

[11] The offences of drink driving and drive disqualified each carried a maximum penalty of 12 months imprisonment. The learned stipendiary magistrate sentenced the appellant to well below the maximum penalty provided under the provisions of the Traffic Act 1987 (NT). Two of the drink driving offences involved high readings of alcohol. The third drink driving offence was a refusal to supply sample of breath. The three offences of drive disqualified were serious. Drive disqualified is an offence which warrants a

gaol sentence even for a first offence (*Hales v Garb* [2000] NTSC 49, delivered 30 June 2000). In this case the appellant had nine prior convictions for drive disqualified and could not expect any degree of leniency.

[12] I am not able to discern any error in the way in which his Worship constructed the sentences. For the reasons stated by the learned stipendiary magistrate they were cumulative. They were each well below the maximum penalty applicable for the offence. The principle of totality was in effect applied even if no direct reference was made by the learned stipendiary magistrate to that principle.

Ground (a): That the aggregate period of imprisonment was, in all the circumstances, manifestly excessive.

[13] The principles to be applied in considering whether a sentence is manifestly excessive have been set out in *R v Raggett* (1990) 50 A Crim R 41 at 46 and *R v Tait* (1979) 46 FLR 386 at 388:

> "An appellate court does not interfere with the sentence imposed merely because it is of the view that that sentence is insufficient or excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings, or the sentence itself may be so excessive or inadequate as to manifest such error (see generally, *Skinner v The King*; *R v Withers*; *Whittaker v The King; Griffiths v The Queen*."

[14] In the course of his remarks on sentence the learned stipendiary magistrate stated (t/p 3):

> "His father ought to have known full well that the defendant was not free to help him and in any event the defendant should have said so and refused to help him. There was no suggestion of a genuine emergency. The father had access to a telephone. No excuse at all was given for the two earlier episodes. One must suppose that the defendant simply chose to act as if the court order had never happened. This is, therefore, a classic case of defiance of the order and the law and something close the maximum penalty is called for in each.
>
> Indeed, he is hereby warned that for any further offences of driving while disqualified he will probably get the maximum penalty, without any justification such as in the present offences. This is all the more so because on each occasion the defendant was driving the vehicle while drunk. He is a danger to anyone else using the road. On the last occasion, last Friday, for example, he was so drunk he couldn't stand up without assistance and he was driving along the Stuart Highway.
>
> Anyone else using that road at that time was in danger of losing their life because of this drunken idiot. …."

The facts and circumstances of the offending justified these comments.

[15] The learned stipendiary magistrate had indicated when submissions were made to him on 27 December 2001, that he would give a discount for the plea of guilty. His Worship stated "The plea of guilty at the earliest date for the offences on 22 December is something which entitled him to a significant discount."

[16] He took into account the appellant had committed the last two sets of offences whilst on bail. The appellant was at the same time under the conditions of a suspended gaol sentence.

[17] With respect to the period of eight months imprisonment being the balance of the suspended sentence, Mr O'Connell, counsel for the appellant,

submitted that s 43(6) of the Sentencing Act 1995 (NT) favours concurrency. Section 43(6) of the Sentencing Act provides as follows:

> "(6) Where a court orders an offender to serve a term of imprisonment that had been held in suspense, the term shall, unless the court otherwise orders, be served -
>
> (a) immediately; and
>
> (b) concurrently with any other term of imprisonment previously imposed on the offender by that or any other court."

[18] I do not read this as meaning the legislation favours concurrency of a suspended sentence. The legislation does make clear that if nothing is said on the issue then the term will be served immediately and concurrent with any other time of imprisonment.

[19] The learned stipendiary magistrate specifically made this period cumulative upon the other sentences. In doing so I am not persuaded he was in error.

[20] A sentence of 44 months imprisonment for those offences may well be at the high end of the range. However, driving with a high level of blood alcohol and whilst under disqualification the appellant is a potential danger to other road users. They are serious offences which, as his record indicates, the appellant has continued to commit.

[21] In imposing sentence the learned stipendiary magistrate was entitled to pay significant regard to the aspect of general and specific deterrence.

[22] The appellant has not demonstrated that the learned stipendiary magistrate was in error in acting on a wrong principle or in wrongly assessing some

salient feature of the evidence or shown that the sentence itself was so excessive as to manifest such error.

[23] Accordingly, the appeal is dismissed.

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