Thompson v Thomas [2003] NTSC 108

PARTIES:	THOMPSON, Warren
	v
	THOMAS, Peter Mark
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 13/2003 (20206582)
DELIVERED:	12 November 2003
HEARING DATES:	15 October 2003
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Appellant:	E Sinoch
Respondent:	C Roberts

Solicitors:

Appellant:	Collier & Deane
Respondent:	DPP

Judgment category classification:	C
Judgment ID Number:	Mil03317
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Thompson v Thomas [2003] NTSC 108
No. JA 13 of 2003 (20206582)

BETWEEN:

WARREN THOMPSON
Appellant

AND:

PETER MARK THOMAS
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 12 November 2003)

[1] This is an appeal against sentence. The appellant was charged with having driven a motor vehicle on a public street whilst having a concentration of alcohol in his blood equal to 80 milligrams or more of alcohol per 100 millilitres of blood, namely 104 milligrams of alcohol, contrary to s 19(2) of the Traffic Act 1999 (NT). To that charge he pleaded guilty. It was submitted on his behalf at the hearing of his plea that in all the circumstances of the case the learned Magistrate ought not to record a conviction.

[2] The appellant was 22 years of age, recently married and in regular employment. His employer gave evidence as to his positive good character

and his excellent work history. He had no prior convictions. The circumstances of the offending were somewhat unusual in that the offence occurred prior to his marriage. His wife (then girlfriend) came from Darwin and the appellant was living in Alice Springs. She left Alice Springs to return to her parents home in Darwin because she was homesick. The appellant left Alice Springs temporarily to pursue her. She had arranged with her employer, the Top End Hotel in Mitchell Street, to take on the appellant as a staff member.

[3] On the night in question the appellant drove with his wife-to-be to the employer's premises only to find that in fact those arrangements had fallen through and there was no job for him on that evening. She, however, had a shift there from 8pm until 4am and because they were staying with his future parents-in-law at Acacia Hills, a distance of some 60 kilometres from the city, he determined that he would wait for her whilst she completed her shift. Whilst waiting for her he drank seven glasses of Jim Beam and coke over a period of several hours. He was driving along Wishart Road, Palmerston on his way back to Acacia Hills when he was pulled over for a roadside breath test and subjected to a breath analysis. This was at 4.28am. There were no other vehicles on the road and there is no suggestion that his driving was erratic.

[4] The learned Magistrate said that his approach when considering a no conviction disposition for this offence was to look for 20 years or more of

good driving and a reading of under .2. As the appellant did not fit within that description he rejected the application not to record a conviction.

[5] It was submitted on behalf of the appellant that the learned Magistrate erred in law in failing to take into account the relevant considerations required by s 8 of the Sentencing Act 1995 (NT).

[6] The nature of the exercise of the discretion conferred by s 8 of the Sentencing Act has been considered by this Court on a number of occasions but it is sufficient to refer to a decision of B F Martin CJ in *Hesseen v Burgoyne* (2003) NTSC 47 delivered on 9 May 2003. As his Honour there pointed out s 8 requires that the court have regard to all of the circumstances of the case and not just the enumerated matters in s 8(1)(a)(b) and (c) in deciding whether or not to record a conviction.

[7] It is plain that in this case the learned Magistrate, by restricting himself to cases where there had been a lengthy period of driving experience, approached the exercise of his discretion on a wrong basis. Furthermore, it is plain that the learned Magistrate did not pay regard to all of the circumstances of the case including the somewhat unusual circumstances under which the appellant found himself to be over the limit.

[8] The discretion having miscarried, the question then is whether or not in all of the circumstances of the case including the enumerated matters set out in s 8 I consider the proper course ought to have been not to have recorded a conviction.

[9] In this case the appellant is a young man of positive good character with no prior convictions and who it may be said has made a positive contribution to society, both through his dedication to his work and his efforts at self improvement. He has an interest in motor sports and has won a number of trophies and was in fact the junior Northern Territory go-kart champion.

[10] After he was breath tested he gave a breath analysis reading of .104 but was allowed to go without being placed under arrest. He anticipated receiving a summons, but instead a warrant was issued for his arrest and he was later taken into custody, brought before the court and bailed to appear before the learned Magistrate.

[11] I do not think that the offence is of a trivial nature, but on the other hand nor is it a serious infraction of the law. It is a mere .02% over the .08 limit. That limit has been set by the parliament no doubt with a view to ensuring safety on the roads but in this case there was no evidence that the appellant was so affected as to be a danger to anyone, and the roads at that time of the day were deserted. Moreover, it is important to recall that the appellant did not go out seeking to have a good time but was stuck in Darwin waiting for his wife's shift to finish when he decided to have a few drinks to while away the time. I think in these circumstances the offence was committed under extenuating circumstances. As B F Martin CJ said in *Hesseen v Burgoyne supra* at par [15] extenuating circumstances are those circumstances which:

> "lessen the seeming magnitude of guilt or, in other words, which tend to diminish the offender's culpability. To be extenuating the

> circumstances must be such as to excuse to some degree the commission of the offence charged and it is the extent of those circumstances to which the court is to have regard."

[12] One of the reasons for granting a power to the courts not to record a conviction is because of the consequences that the recording of a conviction often has. It was said by Thomas and White JJ in *Briese* (1997) 92 A Crim R 75 at 79, a decision of the Court of Criminal Appeal of Queensland:

> "…the beneficial nature of such an order to the offender needs to be kept in view. It is reasonable to think that this power has been given to the courts because it has been realised that social prejudice against conviction of a criminal offence may in some circumstances be so grave that the offender will be continually punished in the future well after appropriate punishment has been received. This potential oppression may stand in the way of rehabilitation, and it may be thought to be a reasonable tool that has been given to the courts to avoid undue oppression.
>
> The existence of a conviction sometimes involves direct disadvantage under the law …".

[13] Section 8(2) of the Sentencing Act says:

> "Except as otherwise provided by this or any other Act, a finding of guilt without the recording of a conviction shall not be taken to be a conviction for any purpose."

[14] It is difficult to see that there will be any significant disadvantage to the appellant if a conviction is not recorded. It would certainly not have affected the loss of the appellant's licence in this case as that is a direct consequence of a finding of guilt rather than of a conviction: see s 39(1). It is clear also that if the appellant were to offend again the failure to record a conviction would not prevent the appellant falling foul of the mandatory

minimum period of licence disqualification for example, or the higher maximum penalties applicable for a second or subsequent offence against the provisions of the Act: see s 8(3)(b)(iii) of the Sentencing Act. It is therefore not easy to see precisely what advantage to the appellant there would be if the discretion were to be exercised in his favour, but that is not to say that there would be no advantage to him.

[15] In all the circumstances I think this is a proper case where there should be a finding of guilt without the recording of a conviction.

[16] The appeal will be allowed and the recording of a conviction will be quashed. The other sentencing orders imposed by the learned Magistrate not appealed against will remain in force.
