Jongmin v Phipps [2014] NTSC 63

PARTIES:	JONGMIN, Timothy v PHIPPS, Ainsley
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 16 of 2014 (21401194)
DELIVERED:	31 December 2014
HEARING DATE:	18 September 2014
JUDGMENT OF:	BARR J
APPEAL FROM:	COURT OF SUMMARY JURISDICTION

CATCHWORDS:

CRIMINAL LAW - Appeal - appellant's application to lead new evidence - impact of sentence on employment - affidavit of supervisor - evidence does not afford ground for allowing appeal - evidence not admitted.

CRIMINAL LAW - Appeal - appellant has previous convictions for drink driving and driving while disqualified - appellant has not established that magistrate did not consider sentencing options other than actual imprisonment - community custody order not an appropriate sentencing disposition - appeal dismissed.

CRIMINAL LAW - Appeal - magistrate drew unfavourable inference not open on the agreed facts - notwithstanding error, sentence justified - appeal dismissed.

Sentencing Act 1995 (NT) s 48E(1), s 48E(1)(a), s 48E(2)(b), s 48E(3), s 48E(5).

Mamarika v Ganley [2013] NTSC 6; *Ross v Toohey* [2006] NTSC 92; *Smith v Torney* (1984) NTR 31, referred to.

REPRESENTATION:

Counsel:

Appellant:	S Wendlandt
Respondent:	J Stuchbery

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

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

Jongmin v Phipps [2014] NTSC 63
No. JA 16 of 2014 (21401194)

BETWEEN:

TIMOTHY JONGMIN
Appellant

AND:

AINSLEY PHIPPS
Respondent

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 31 December 2014)

Appeal against severity of sentence

[1] The appellant appeals against the severity of an aggregate sentence of three months actual imprisonment imposed for drink driving and driving whilst disqualified.

[2] On 12 February 2014 the appellant pleaded guilty to one count of drive while disqualified, one count of drive with medium range of blood alcohol (0.09%), a count of driving an unregistered motor vehicle and a count of driving while without a current compensation contribution. The offending conduct occurred on 7 January 2014 on Daly River Road, Wadeye. The admitted facts, read in court, were as follows:

On 18 December 2012 the defendant, Timothy Jongmin, was disqualified for driving for two years dated from 8 November 2012. On Tuesday 7 January 2014 at about 10.13 pm the defendant was driving a white Toyota Landcruiser with NT Registration 940 941 inbound on the Daly River Road and was apprehended at Airforce Hill, Wadeye.

The defendant was asked when he had his last alcoholic drink and replied, “Peppi is a really long way away”. A roadside breath test was conducted on the defendant to which he provided a positive sample. The defendant was asked where he was driving from, and he said, “Peppi Community”. The defendant was asked where he was driving to, he said, “Home, to Port Keats”. The defendant was asked if the vehicle driven by him was his, and he said yes.

The defendant was asked how much he had to drink, to which he replied, “19 cans of XXXX”. The defendant was asked his reason for driving after drinking, and replied, “Home”. The defendant was then asked what his reasons for driving an unregistered vehicle, to which he replied, “Going home”. The defendant was asked his reason for driving while disqualified and said, “Going home”.

The defendant was placed under arrest for the purpose of breath analysis and placed in the rear of the police van and conveyed to the Wadeye Police Station. It was observed that the defendant smelled of intoxicating liquor and had bloodshot eyes.

A breach analysis was conducted to which the defendant returned a reading of 0.090 grams of alcohol per 210 litres of breath. The defendant was charged and later bailed.

At the time of the offence Daly River Road, Port Keats or Wadeye was a public street open to and used by the public. The traffic was light, conditions were fine and there was no street lighting. The defendant was disqualified from driving at the time of the offence.

[3] The magistrate ascertained from the prosecutor that the vehicle registration had run out on 4 March 2013.

[4] The prosecutor then tendered a document informing the court of the appellant's prior offending. The document confirmed the appellant's date of birth as 21 May 1973. He was first convicted in a court in January 1990 for offences of unlawful entry of a building, criminal damage and stealing. He was still 16 at the time. The appellant had 11 convictions for driving unlicensed, covering the period May 1992 through to June 2012. He had six convictions for drink driving, in the period December 2002 to June 2012. He had two convictions for driving while disqualified, in November 2003 and November 2005. In addition, he had eight convictions for driving an unregistered and/or uninsured motor vehicle. Less relevantly to the appeal, he had several convictions for the unlawful use of a motor vehicle and several convictions for assault or aggravated assault. There were also a number of less serious motor vehicle regulatory offences.

[5] The appellant worked for the Night Patrol in Wadeye. Defence counsel called evidence from Wayne Billett, said to have been the appellant's employer, but who was the Wadeye Night Patrol supervisor.

[6] The evidence of Mr Billett was to the effect that the appellant had worked for the Night Patrol for the previous four years. He was a base level employee and assisted Mr Billett in relation to any violence or anger problems encountered in the Wadeye Community. Mr Billett said that the appellant worked every day, on evening shift starting at 9.00 pm and working through to the morning. When asked to provide his assessment of Mr Jongmin as an employee, Mr Billett replied, "He's really good, he's one

of the best, I've always got on well with him, he works well, I have no problems with him." He went on to say that the appellant was always reliable in terms of his attendance at work. Mr Billett had never had any difficulties with the appellant arriving at work intoxicated or hung over. Mr Billett knew both the appellant and his family and said that he was a man who loved his family.

[7] It may be noted that the police prosecutor informed the court of the utility of the Night Patrol in terms of assisting police with their duties. She informed the court that it is difficult to get people to work a shift from 9.00 in the evening to 3.00 or 4.00 in the morning.

[8] Defence counsel addressed the magistrate, submitting that there were feature of the appellant's history that would "assist in promoting a community custody order as a potential sentence". Counsel addressed on the time which had elapsed since the appellant's previous conviction for driving while disqualified (November 2005) and also the gap in relation to drink driving from 2005 to 2012, evidencing that the appellant was able to exercise self-discipline in that respect. Counsel also referred to the appellant's family commitments and reliability as an employee resulting in a decade of employment. Counsel argued that the appellant demonstrated that he could take responsibility for his drinking and be a reliable employee.

[9] Defence counsel asked the magistrate to obtain an assessment in relation to a community custody order and, subject to the assessment being favourable,

to impose such a sentence. In the alternative, counsel sought a partially suspended sentence of imprisonment.

[10] Defence counsel informed the court that there were currently no surveillance officers available to supervise a home detention order. Therefore, the magistrate was not required to consider home detention as a sentencing option.[1]

[11] In his sentencing remarks, the magistrate said that he would not consider a community custody order. His Honour explained:

> The recent dates of all the offending in 2012, the steady offending over the years, the offending on this occasion and its circumstances all warrant a condign sentence of imprisonment.

[12] A community custody order is in fact a sentence to a term of imprisonment, to be served in the community. Nonetheless, I understand that his Honour intended to say that the offending, in the context of prior offending, called for a sentence of actual imprisonment.

[13] The learned magistrate sentenced the appellant to an aggregate sentence of three months' imprisonment in relation to driving disqualified and driving under the influence. In relation to the remaining charges the appellant was fined $1,500. The appellant was disqualified from driving for 12 months and was made subject to an alcohol interlock device for an additional 12 months.

[1] Cf *Ross v Toohey* [2006] NTSC 92 at [16], [19].

[14] As mentioned in [1] above, this appeal is concerned only with the aggregate sentence of three months. The appellant commenced to serve that sentence and was in prison from 12 February 2014 to 28 February 2014, before being released on appeal bail.

Appeal grounds

[15] The appellant has argued two grounds of appeal:

1. That the learned magistrate did not fully consider the full range of sentencing options before imposing an actual term of imprisonment.

2. That the learned magistrate took into account matters related to the offence that were not part of the agreed facts.

[16] Before I turn to consider the grounds of appeal, I need to deal with the appellant's application to lead evidence on appeal from Wayne Billett in relation to the impact which a sentence of actual imprisonment would have on the appellant's employment as a night patrol employee. The further evidence relied on was contained in an affidavit of Mr Billett sworn 17 July 2014, from which I have extracted the following relevant paragraphs:

> My position requires me to supervise the Night Patrol and provide direction and guidance to the team. I also liaise with other stakeholders such as the Northern Territory Police. I report to the Western Region District Council, formerly the Victoria Daly Shire.
>
> I have known Mr Timothy Jongmin for several years in a professional capacity. He is a member of the Wadeye team and he reports to me.

> I gave evidence at the Wadeye Court of Summary Jurisdiction in support of Timothy Jongmin on 12 February 2014 who pleaded to driving related offences, including driving while disqualified and drink driving. The evidence I gave to the court was that he is a hard-working and committed member of the team.
>
> Upon receiving a three month term of imprisonment, a letter from the Shire was sent to Mr Timothy Jongmin in Berrimah prison. It outlines the Shire's intention to terminate his employment in light of his incarceration.
>
> When I gave evidence at the plea for Mr Timothy Jongmin I did not know that Timothy Jongmin's job would be terminated. I was not asked whether it might happen but I did not know. It was only after Mr Timothy Jongmin was sentenced to a term of imprisonment that I became aware that it was the Shire's intention to terminate his employment.
>
> The Chief Executive Officer makes the decision to terminate employment. If one of my staff is sent to prison, I inform the Chief Executive Officer and other relevant staff.
>
> It was only the term of imprisonment that led to the termination of Mr Timothy Jongmin's employment, not any other reason.
>
> Since being released on appeal bail in late February 2014 Mr Jongmin has returned to his role with Night Parole and continues to be a hard worker.
>
> If Mr Timothy Jongmin is required to serve the three month term of imprisonment it is certain he will lose his position because of it.

[17] The impact of a prison sentence on an offender's employment could be a relevant consideration in sentencing. However, the evidence sought to be relied on by the appellant has several deficiencies. The capacity of Mr Billett to speak authoritatively on behalf of the Western Region District Council is not established; he is the supervisor of the Night Patrol, and any

decision in relation to termination of employment would, on Mr Billett's evidence, be made by the Chief Executive Officer. The letter from the Shire to the appellant referred to in Mr Billett's affidavit is not in evidence. It is not even clear that Mr Billett had seen the letter, as distinct from being informed that the letter had been sent. Although the letter was described as outlining the Council's intention to terminate the appellant's employment, it is unclear whether the letter was a show cause notice, inviting a response from the appellant, or whether it was a first, irrevocable, step in the process of termination. Moreover, Mr Billett does not say whether Council could engage a temporary employee to cover the relatively short period during which the appellant would be in prison. Finally, Mr Billett does not say whether the appellant would be re-employed on his release, preferentially, in light of his previous good work record. It may be noted that the appellant was reinstated after serving 16 days in prison, from 12-28 February.

[18] The deficiencies referred to in the previous paragraph were raised with the appellant's counsel at mentions of the appeal prior to the actual appeal hearing, but no evidence was tendered on the appeal additional to the content extracted above.

[19] Once the preliminary statutory requirements are established for the admission of new evidence on appeal, this court is required to receive the new evidence unless it decides on balance that it "would not afford a ground for allowing the appeal". This is a test of relevance to the issues on the

appeal.[2] In my assessment, however, for the reasons explained in [17], the evidence, if received, would not afford a ground for allowing the appeal and I am so satisfied. I therefore do not admit the new evidence.

Ground 1

[20] In relation to ground 1, it has not been established that the learned magistrate did not consider the full range of sentencing options. Moreover, the sentence imposed was unexceptional. It has not been established (nor was it argued) that the sentence was manifestly excessive. In my opinion, it appropriately emphasized the factor of deterrence, both specific and general.

[21] On the hearing of the appeal it was contended that a community custody order was the most appropriate sentencing disposition, and that his Honour did not properly consider it. A community custody order is available in relation to certain kinds of offences where the court decides to impose a sentence of 12 months or less. A community custody order is a sentence of imprisonment, albeit one which is served in the community. A community custody order establishes a very intensive regime. The statutory conditions of order[3] apply automatically, and include the obligation to report to and receive visits from a probation officer at least twice during each week; to inform a probation officer of any change of address or employment within two clear working days of any change; not to leave the Northern Territory except with permission of a probation officer; and to comply with the

[2] *Smith v Torney* (1984) 29 NTR 31 at 33, per Muirhead J.
[3] Section 48E(1) *Sentencing Act*.

reasonable directions of a probation officer in the use of an approved voice recognition system for the effective monitoring of the offender's activities.

[22] In addition to the restrictions mentioned in the previous paragraph, a sentenced offender under a community custody order must perform 12 hours of community work each week, and the Commissioner of Correctional Services may increase the obligatory number of hours to a maximum of 20 hours per week.[4] The offender must spend "any balance of the hours" each week undertaking a prescribed program, or undergoing counselling or treatment, as directed by the Commissioner.[5] The counselling or treatment must relate to the offender's psychological or psychiatric problems or the offender's misuse of alcohol or drugs.[6] These statutory requirements are an indication that persons who are required to serve their sentence by way of a community custody order are in need of such programs, counselling or treatment.[7]

[23] The administration of a community custody order requires intensive input on the part of any probation officer assigned to supervise the offender. The statutory requirement is that the offender must report to, and receive visits from, a probation officer at least twice during each week the order is in force. A community custody order therefore necessarily involves intensive supervision.

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[4] Section 48E(1)(a) and s 48E(3) *Sentencing Act*.
[5] Section 48E(2)(b) *Sentencing Act.*
[6] Section 48E(5) *Sentencing Act*.
[7] *Mamarika v Ganley* [2013] NTSC 6, [25].

[24] In my opinion, a community custody order would not have been an appropriate sentence. The appellant was a recidivist drink driver but nonetheless someone who had offended sporadically. He had two convictions for driving while disqualified, but those offences were more akin to contempt of court, and did not of themselves indicate psychological or medical problems, or the misuse of alcohol or drugs. Noting that the appellant had a good record of work attendance and performance, established over many years, I have concluded that he did not require intensive therapeutic intervention or parole officer supervision.

[25] Another reason why a community custody order would not have been an appropriate sentence is that the appellant worked each day of the week, on evening shift from 9.00 pm working through to the early morning hours. Having to then perform the mandated 12 hours of community each week, and to also undertake a prescribed program, or undergo counselling or treatment, would be an unreasonable and possibly even oppressive imposition.

[26] It is unfortunate that a home detention order was not available, as mentioned in [10] above. Ground 1 must be rejected.

Ground 2

[27] The second ground of appeal asserts that the magistrate drew inferences unfavourable to the accused in circumstances where other inferences, favourable to the accused, were open, and where the magistrate could not be

satisfied beyond reasonable doubt of the facts inferred. The complaint of the appellant arises from the following passage of his Honour's sentencing remarks:

> Mr Jongmin comes before the Court today with no explanation for his driving. He had been to Peppimenarti which where people from Wadeye go when they wish to drink legally at least and he had drunk there. He had then decided he wants to come home and that was the sole explanation provided at any stage for his driving whilst disqualified, for his driving with a medium range blood alcohol content and for his driving an unregistered and uninsured motor vehicle.
>
> What remains unspecified and unexplained was how he got to Peppimenarti and I'm prepared to assume that he drove the same motor vehicle there knowing full well it was unregistered and uninsured, this was when he was sober, and he consumed he says, 19 cans of alcohol even if they are low strength alcohol it's a prodigious amount to drink. However, at the time that he was picked up by police he was on 0.09, which was barely into the medium range.

[28] Issue is taken with the magistrate's preparedness to assume that the appellant had driven an unregistered and uninsured motor vehicle to Peppimenarti. While the magistrate may have made that comment in relation to sentencing for offences which is not the subject of this appeal, nonetheless, implicit in his Honour's assumption was that the appellant drove while disqualified from Wadeye to Peppimenarti, as well as the journey from Peppimenarti to Wadeye.

[29] In my view, it was not open on the agreed facts for the learned magistrate to infer that the appellant had driven from Wadeye to Peppimenarti. A person other than the appellant could well have driven. It was a reasonable

possibility that someone else had driven. Before his Honour inferred that the appellant must have driven, he needed to be satisfied beyond reasonable doubt, and on the evidence, he could not have been.

[30] Notwithstanding my conclusion in the previous paragraph, I would not allow the appeal on this ground, because the sentence can be fully justified on the basis that the appellant, whilst disqualified, drove from Peppimenarti to Wadeye with a blood alcohol content of 0.09%. I agree with counsel for the respondent that, in the absence of any mitigating factors, the offending is properly to be regarded as a contumelious or contemptuous disregard of the law, particularly given the appellant's record of prior offending.

[31] The appeal must be dismissed.
