Thomas v Henderson [2001] NTSC 54

PARTIES:	THOMAS, Peter Mark Johns v HENDERSON, Paul Charles
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 11 of 2000
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JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL

Justices – appeal against sentence – driving whilst disqualified – driving without due care – failure to provide sufficient sample of breath – breach of suspended sentence – whether sentence manifestly inadequate – totality principle – restoration of suspended sentence – whether sentences ought to be served cumulatively or concurrently – use of prior convictions in sentencing – further period of disqualification from driving – meaning of "further period" – commencement of period of disqualification.

Justices Act 1928 (NT)
Traffic Act 1987 (NT), s 31, s 39(1), s 40
Sentencing Act 1995 (NT), s 43, s 58

The Queen v Tait (1979) 46 FLR 386; *Mill v The Queen* (1988) 166 CLR 59; *Postiglione v The Queen* (1997) 189 CLR 295; *Veen (No 2)* (1988) 164 CLR 465, followed.

Raggett (1990) 50 A Crim R 41; *R v ANZAC* (1987) 50 NTR 6; *R v Nagas* (1995) 5 NTLR 45, referred to.
H (1997) 95 A Crim R 46, applied.
Ryder v Dredge and Winzar, Angel J, unreported 8 December 1998; *Gokel v Rogers*, Angel J, unreported 17 November 2000; *Gokel v Hammond*, Thomas J, unreported 1 March 2001, cited.

REPRESENTATION:

Counsel:

Appellant:	R Wild QC
Respondent:	S Johns

Solicitors:

Appellant:	DPP
Respondent:	NAALAS

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

Thomas v Henderson [2001] NTSC 54
No. JA 11 of 2000

BETWEEN:

PETER MARK JOHNS THOMAS
Appellant

AND:

PAUL CHARLES HENDERSON
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 28 June 2001)

[1] Complainant's appeal against sentence. The respondent appeared in the Court of Summary Jurisdiction at Darwin on 14 December 2000 and pleaded guilty to the following charges:

[2] On 6 December 2000 at Darwin in the Northern Territory of Australia:

1. being a person who was disqualified from holding a driver's licence, drove on a motor vehicle, namely a Ford Falcon sedan NT 462-181, on a public street, namely East Point Road, contrary to s 31(1) of the Traffic Act;

2. drove a vehicle, namely a Ford Falcon sedan NT 462-181,.on a road, namely East Point Road, without due care, contrary to reg 18 of the Traffic Regulations;

3. being required under the Traffic Act to submit to a breath analysis, failed to provide, in accordance with the directions of the person carrying out the breath analysis, a sample of breath sufficient for completion of the breath analysis, contrary to s 20(1) of the Traffic Act.

[3] The facts admitted before his Worship were:

[4] At about 5pm on December 6 the defendant was driving inbound on East Point Road near Lake Alexander. He failed to negotiate a slight bend in the road near Peewees Restaurant and ended up driving into a drainage ditch at the side of the road. Police attended. The defendant was in the vicinity of the driver's side door and when asked if he was driving the vehicle, he denied all knowledge of it. The vehicle was recovered. There was no damage caused to it, and it was later driven by another person. Enquiries reveal that the defendant had been the driver of the vehicle at the time that it went into the ditch. He was then subjected to a roadside breath test, and as a result, conveyed to the Berrimah Watchhouse for the purpose of conducting a breath analysis. At the Watchhouse, he was instructed twice on how to supply a sample of breath, but on each occasion failed to supply a sufficient sample.

[5] He told police that he had been drinking at the Bagot Community and was travelling to the barbecue area at Lake Alexandra to pick up relatives. He had been disqualified from holding a driver's licence on 27 July 1995 for nine and a half years for drink driving related offences. There were two adult passengers in the vehicle on this occasion.

[6] On 25 January 2001 the respondent was sentenced to 7 months imprisonment for driving while disqualified, and 6 months imprisonment for failure to supply a sufficient sample of his breath, the two sentences to be served concurrently. He was fined $400 for driving without due care. The Court ordered that he be disqualified from holding a drivers licence for a period of six and a half years from that date.

[7] At the time of being sentenced the respondent admitted having breached a suspended sentence imposed in respect of six charges on 28 January 2000. They are summarised in the appellant's submissions in the following table.

File No	Offence	Offence Committed	Sentence
9514377	Drive CAB 80mg/100ml-150mg or more	26/07/95	6 months from 14/1/00
9524755 (1)	Drive CAB 80mg/100ml-150mg or more	26/07/95	7 months cumulative to count 1 on 9514377
9524755 (3)	Drive disqualified	20/12/95	

9819747 (2)	Drive disqualified	11/09/98	3 months cumulative to count 3 of 9524755
20001037 (1)	Fail to provide sufficient sample	14/01/00	6 months cumulative to count 2 of 9819747
20001037 (4)	Drive disqualified	14/01/00	

[8] The period of imprisonment totalled 22 months and an order was made that the sentence be suspended after 10 months. A period of 2 years was specified as that during which the respondent was not to commit another offence punishable by imprisonment. He was released from prison on 13 November 2000. His worship ordered that the suspended sentence of 12 months imprisonment be restored and served concurrently with the sentences he had just imposed for the offences. In the result, the effective term of imprisonment ordered to be served for the offences and restored sentence was 12 months.

[9] The grounds of appeal are that the learned Magistrate:

1. erred in failing to accumulate any or all of the term of 12 months imprisonment restored upon the terms of imprisonment imposed for the offences. (I note that in fact 5 months of the restored sentence was accumulated on the effective 7 months term of imprisonment for the offences);

2. erred in that he failed to give proper consideration to the extensive prior convictions of the respondent for like offences;

and that the sentences then imposed were manifestly inadequate in all the circumstances after taking into account the totality principle.

[10] The principles that apply to a Crown appeal are well understood. They are conveniently summarised by the Full Court of the Federal Court of Australia in *The Queen v Tait* (1979) 46 FLR 386 at 388 as follows:

> "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 … ".

[11] In *Raggett* (1990) 50 A Crim R 41 at 47 Kearney J said of a Crown appeal based upon the ground that the sentence was manifestly inadequate:

> "In general, then, to establish the existence of the necessary (unidentified) error the Crown must show that the sentences are not just arguably inadequate but so very obviously inadequate that they are unreasonable or plainly unjust."

[12] See also *R v ANZAC* (1987) 50 NTR 6 at 11-12; *R v Nagas* (1995) 5 NTLR 45 at 50-52.

[13] The respondent particularly draws attention to the following passage from the later case:

> "Sentencing being a matter of discretion, there is a strong presumption that the sentences imposed are correct. In order for this Court to interfere, the Crown must demonstrate that the sentences are so very obviously inadequate that they are unreasonable or plainly unjust; the learned sentencing Judge must be shown by the Crown to have either made a demonstrable error or have imposed a sentence that is so very obviously inadequate that it is manifestly unreasonable or plainly unjust, that is, the sentence must be clearly and obviously, and not just arguably, inadequate. It must be so disproportionate to the sentence which the circumstances required to indicate an error of principle."

[14] The Court hearing an application for breach of a suspended sentence has discretion to restore in whole or part the period held in suspense (Sentencing Act s 43(5)). Whether or not a restored sentence is to be served concurrently with a term of imprisonment previously imposed on the offender by that Court or cumulatively, is also a discretionary matter. The restored sentence is to be served concurrently unless the Court otherwise orders (s 43(6)).

[15] The respondent has an extensive prior criminal history, predominately convictions for driving and alcohol related offences. The offences presently being considered constituted his eleventh drink driving related offence in 18 years and his seventh drive disqualified offence in 17 years.

[16] The respondent demonstrated unwillingness to reform. On his plea, defence counsel said:

> "It is quite obvious that my client has got a drinking problem and a problem abiding by court orders … Objectively speaking, Sir, it is very difficult to put before the Court matters in mitigation for Mr Henderson given this is his eleventh time of drink driving and

> driving disqualified type offence, and upon his own admission that he has problems and then not being able to resist from driving."

[17] I make no comment upon the legislature's direction that restored sentences be served concurrently unless the court otherwise orders. The Victorian Act originally provided likewise, but I note from the comment of Callaway J in *H* (1997) 95 A Crim R 46 at 49 that it was then contemplated that cumulation, unless the court otherwise ordered, was to be enacted. The submissions of counsel for the respondent here show that that amendment has come into operation.

[18] The learned sentencing Judge in that case ordered that a restored suspended sentence be serviced cumulatively on a sentence imposed for a later offence. The original and later offences were for sexual assaults upon the same child, the appellant's stepdaughter. The appellant committed the later offence about three and a half months after his release from prison having completed the immediate custodial element of the original sentence. A ground of appeal to the Court of Appeal in Victoria was that his Honour the sentencing Judge erred in making the cumulation order. To that his Honour Chief Justice Phillips said at p 49:

> "In my opinion not only was the step of cumulation upon an existing sentence open to the learned judge in all the circumstances, but he would have been failing in his duty had he not ordered cumulation. A more self evident case for cumulation is difficult to imagine."

Callaway and Batt JJA agreed.

[19] Here the offending which led to the imposition of the partly suspended sentence was replicated in the offending which led to the restoring of the sentence. Only a matter of days passed before the respondent offended again in like manner. The offences are serious with particular reference to the safety of the public on the roads. Breaching a court disqualifying order is treated as a grave breach of the law for the reasons given in the many cases dealing with the point (see the discussion in *Police v Cadd* (1997) 69 SASR 150 and my reasons in *Hales v Garbe*, unreported, 30 June 2000 and the many Territory cases there referred to).

[20] Not to order otherwise than concurrency in a case such as this is to sanction the breach, the offender and others of like disposition will understand that the threat of further imprisonment which a suspended sentence carries is not as real as it would seem. The opportunity given for rehabilitation in the community can be abused with relative impunity.

[21] His Worship was well aware of the circumstances relating to the breach. He described it as:

> "… outstanding that this man can go to goal for ten months on several charges … come out within a month or two (sic) and do exactly the same thing … From all the reports he is not an unintelligent man, he refuses to give up the grog, and apparently when he drinks he drives. He can't separate the two things apparently."

[22] His Worship had before him a pre-sentence report particularly directed to the respondent's abuse of alcohol. He had disclosed to the psychologist that

if he had money and was in proximity to a source of alcohol supply, he would buy it and once started, continued to drink until the money or the alcohol was finished. In the opinion of the psychologist, the respondent was at the "high risk and dangerous" end of the drinking continuum, with the attendant effects upon himself and others. Attempts at alcohol rehabilitation had not been successful. There is an obvious need to protect the community from the consequences of this behaviour particularly by doing as much as the court can do to prohibit his driving.

[23] After denouncing the respondent's further offending, his Worship made the orders under review. The net effect is that the respondent has but five months of the restored sentence of 12 months to serve.

[24] Counsel for the respondent in comprehensive submissions argues that the principle of totality must be applied, and so it should (*Mill v The Queen* (1988) 166 CLR 59 at 63 and *Postiglione v The Queen* (1997) 189 CLR 295 at 308). The effective sentence must bear due proportion to the total content of the criminality of the offender, taking into account the degree of gravity to be assigned to each offence.

[25] I note that the maximum prison sentence prescribed for each of the offences of driving whilst disqualified and failure to provide a sufficient sample of breath is 12 months, and for driving without due care, 6 months. In addition, the respondent was liable to be ordered to serve 12 months on the suspended sentence.

[26] Although the respondent contended otherwise, I regard the offences of driving whilst disqualified and of failure to provide a sufficient sample of breath as quite separate and distinct from each other. The act of driving whilst disqualified was completed before the police arrived, and the failure to supply a sufficient sample of breath occurred later at a different place and comprised quite different conduct. I do not regard those two offences as having been interdependent or so closely connected such as sometimes attracts concurrent sentences. What caused the respondent to drive without due care is not disclosed, but he was penalised by way of fine, and since I do not propose to disturb that penalty, the question of concurrency in the serving of the prison sentence for that does not arise.

[27] The breach of the suspended sentence, although occasioned by the offending, stands in a different category again. That the occasion of the breach was the same type of offence as brought about the suspended sentence seriously aggravates the breach.

[28] Grounds 2 and 3 of the appeal may be conveniently dealt with together. The circumstances of the offences have been sufficiently described. There is no mitigating circumstance attaching to the driving whilst disqualified. It was a bad case, the respondent showed by his disclosures to police, that he had driven some considerable distance along public roads in Darwin for a matter of personal convenience and after he had been drinking alcohol.

[29] As to the offender, he was a 39 year old Aboriginal man who had been born in Newcastle Waters. He purported as having had three major relationships and had been with his current partner for six years. Two daughters from the second relationship resided with their mother at Tennant Creek. He was residing at Ramingining, away from his country and his mother, circumstances brought about by his abuse of alcohol. It does not seem that he had had much by way of employment and at the time of the offending was in receipt of unemployment benefits.

[30] The respondent's prior criminal record has been briefly described. Closer consideration shows he commenced this type of conduct in 1982 with regular convictions until 1990. They included as well two for driving without due care and another for dangerous driving. There then followed a break of ten years until the convictions in January 2000, but they were for offences committed in 1995, 1998 and 2000.

[31] It is apt to repeat the guidance provided by the High Court in relation to the use to which prior convictions may be put in the sentencing process in *Veen (No 2)* (1988) 164 CLR 465 at 477-8:

> "There are two subsidiary principles which should be mentioned. The first is that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v Ottewell* [1970] AC 642, at 650. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant

> offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties."

[32] It is clear, as his counsel pointed out on appeal, that his Worship was well aware of the respondent's record. His detailed submissions on the facts and law correctly emphasise that his Worship considered each offence and the breach application separately, arriving at what he considered to be the appropriate penalty in each case and then turned to the question of totality, making the orders accordingly.

[33] The submission on behalf of the respondent includes:

> "the respondent has been sentenced to 12 months imprisonment for driving offences. That is greater than the period he was ordered to serve after his last appearance for similar offending on a greater scale."

[34] That may be so, but the original sentence which was partly suspended was for 22 months imprisonment, and the total period for which the respondent was ordered to be imprisoned on this occasion was not just for driving offences.

[35] The respondent is entitled to the benefit for his plea. Little should be allowed for cooperation with the police. I consider an allowance of the order of 15% from the normal sentence for the offences should be allowed on this account bearing in mind the strength of the prosecution case. Like considerations do not apply to the restoration of the suspended sentence.

[36] I consider that the appellant has made good the grounds of the appeal. The whole of the suspended sentence should have been restored and ordered to be served cumulatively upon the sentence for the offences. His Worship erred in this exercise of his discretion. The order for partial concurrency was not appropriate to the circumstances of this case.

[37] As to the sentence for driving whilst disqualified and failure to provide a sufficient sample, taking into account particularly the respondent's record of prior convictions in the way permitted by the decision in *Veen,* the provisions of s 58 of the Sentencing Act and the decision of Angel J in *Ryder v Dredge and Winzar,* unreported 8 December 1998 that no sentence could be imposed of between 8 and 12 months, I consider sentences to imprisonment of 7 months and 6 months respectively disclose no appellable error. (I note that the difficulties highlighted by his Honour arising from s 58 are due to come to an end at the end of this month). For the reasons already given, I do not think that those sentences ought to have been ordered to be served concurrently, although it would be open to order a degree of concurrency to take into account the totality principle. In this case I also

bear in mind that it is a "Crown" appeal. Little was said about the penalty for driving without due care, and I will not disturb it.

[38] The order that that part of the sentence of 22 months suspended be restored is affirmed, and I would order that it be served cumulatively upon the effective sentence for the offences. However, again, bearing in mind the double jeopardy attendant upon the appeal, I would ameliorate the effect of such an order by substituting instead partial concurrency.

[39] The appeal against the sentences imposed by his Worship is dismissed. However, the order that those sentences be served wholly concurrently is quashed. Order that the sentence of 6 months commence 3 months prior to the expiry of the sentence for 7 months. The restored sentence of 12 months is to commence 6 months prior to the expiry of the sentence of 10 months. The effective term of imprisonment imposed on this appeal is 16 months. The sentence of 7 months is to commence from 6 December 2000.

[40] The question of the further disqualification of the respondent from holding a driver's licence was also agitated. The respondent had been so disqualified on 28 January 2000 for a period of nine and a half years to date from 27 July 1995. Why that period was backdated is unclear, but the date coincides with the date of the commission of the first of the offences being dealt with on that occasion. It is possible that the respondent had been disqualified from driving (not from holding a driver's licence) from July 1995 by operation of s 20A of the Traffic Act. If that be so, it does not appear that the provisions

of s 39(3A) were taken into account. In any event, the period of disqualification from holding a driver's licence was not due to expire until 27 January 2005. The period of disqualification ordered by his Worship on this occasion of six and a half years from 25 January 2001 effectively extended the period of disqualification to 25 July 2007. A period of only 18 months.

[41] Pursuant to s 31 of the Traffic Act where a person is found guilty of driving a motor vehicle whilst disqualified from holding a licence, the Court may disqualify that person from holding a licence for such further period as it thinks fit. In my opinion, the words "further period" show that what is intended is that the period of disqualification to be imposed after the person has been found guilty of the offence is to commence from the time when the original period of disqualification would expire. (*Gokel v Rogers*, Angel J, unreported 17 November 2000 and *Gokel v Hammond*, Thomas J, unreported 1 March 2001.) His Worship did not so order in this case.

[42] The offence of failure to provide a sufficient sample of breath is prescribed in s20(1) of the Traffic Act. Where a Court finds a person guilty of an offence against that section, the person's licence is by force of the finding cancelled, and the person is disqualified from holding a licence, where there is a conviction for a second or subsequent offence, for 18 months or such longer period as the court thinks fit (s 39(1) and Schedule 1). However, since the finding relates to an offence against s 20 and was committed within three years after committing the earlier offence under s 20, the

person's licence is by force of the finding cancelled for such period being not less than five years as is fixed by the court and the person is disqualified from holding a licence for that period (s 39(1)(e)). The respondent did not hold a licence when he was convicted of the offence under s 20 and thus the provisions of s 39 do not apply to him since it commences upon an assumption that the person is licensed. Section 40, however, provides that where a person who does not hold a licence is found guilty of any offence under the Traffic Act and where, by force of the being found guilty the person's licence would or may, if the person held one, be cancelled, that person shall be disqualified from holding a licence for the period provided by the section to which the offence relates, or is otherwise ordered by the court in accordance with that section. That brings s 39 into operation in the circumstances of this case and the court was entitled to disqualify him from holding a licence for not less than 5 years. I note that s 98 of the Sentencing Act also relates to cancellation of a driver's licence and disqualification from obtaining one, but I consider that the provisions of the Traffic Act, being special provisions designed for the purposes of penalty under that Act, are those which apply in this case.

[43] The period of disqualification, then, is to commence upon the person being found guilty because s 39(1) provides that it is by force of that finding that the licence is cancelled or the person disqualified for the period prescribed, or such longer period as the court thinks fit. Section 40 enables the Court to otherwise order, but, only in accordance with s 39. Accordingly it does not

seem to me that it is within the power of the court under these provisions to order that that period of disqualification commence at a time other than at the time when the person is found guilty of the offence. That calls in question the order made in January 2000 as the order was to take effect from 27 July 1995 (the date of the earliest offence) not as at the date the finding of guilt was made. If for that reason the order for disqualification then made was beyond the power of the court, then, nevertheless, the statutory disqualification would take effect.

[44] In the view I take, and bearing in mind the terms in which his Worship expressed himself, the disqualification of six and a half years takes effect according to its tenor. There was no ground of appeal directly related to this question and it was not covered in the appellant's lines of submissions. As I have said, it was debated to some extent with the respondent reserving his position. I decline to make any order in respect of the disqualification order made by his Worship as the issue is not properly raised on the appeal.
