*Michael v Eaton* [2010] NTSC 56

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| PARTIES: | MICHAEL, Peter |
| | v |
| | EATON, Donald |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 7 of 2010 (21012795) |
| DELIVERED: | 10 August 2010 |
| HEARING DATES: | 10 August 2010 |
| JUDGMENT OF: | MARTIN (BR) CJ |
| APPEAL FROM: | Mr Neill SM |

**CATCHWORDS:**

CRIMINAL LAW – SENTENCING – ROAD TRAFFIC OFFENCES – DRIVING WHILE DISQUALIFIED
Appeal against severity of sentence – whether Magistrate erred in using maximum penalty as starting point – circumstances of offence not in worst category – sentence manifestly excessive – appeal allowed – sentence set aside.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | M O'Reilly |
| Respondent: | I McMinn |

*Solicitors:*

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| Appellant: | Central Australian Aboriginal Legal Aid Service Inc |
| Respondent: | Office of the Director of Public Prosecutions |

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

*Michael v Eaton* [2010] NTSC 56
No. JA 7 of 2010 (21012795)

BETWEEN:

**PETER MICHAEL**
Appellant

AND:

**DONALD EATON**
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered *ex tempore* 10 August 2010)

**Introduction**

[1] This is an appeal against a sentence of nine months imprisonment imposed for the offence of driving while disqualified from holding or obtaining a driver's licence. The sole ground of appeal was that the sentence was manifestly excessive.

[2] For the reasons that follow, the appeal is allowed.

**Facts**

[3] The circumstances of the offending were typical of the type of offence that comes before the Court of Summary Jurisdiction. The appellant has an appalling record of offending against the road traffic laws and on

15 October 2009, for an offence of driving while disqualified and other road traffic offences, he was disqualified for a period of five years. On the morning of Saturday 17 April 2010, having stayed overnight at a camp and intending to return to his home in Kintore, the appellant drove his wife's car to pick up another driver and was stopped randomly. There was nothing in his driving that attracted the attention of police. When asked for his licence, the appellant falsely informed the police that his licence was with family at the Larrapinta Valley Camp.

[4] The appellant is a 55 year old Warlpiri man who is married with three children and five grandchildren. He and his wife live at Kintore. Somewhat unusually for cases of this type the appellant has a good working history, having worked over many years as a mechanic, painter, plumber and builder of houses. He has also worked on night patrols.

[5] Unfortunately, as is so common in these cases, the appellant has a very bad driving record dating back to 1974 when he first drove unlicensed. In addition to many other road traffic offences, including driving with excessive alcohol, prior to this occasion the appellant had committed six previous offences of driving while disqualified and two offences of driving while unlicensed. The first offence of driving while disqualified was committed in 1983, and in 1991, for the second offence of driving while disqualified, a sentence of two months imprisonment was imposed. For a few years the appellant managed to avoid driving while affected by alcohol

and other road traffic offences until he failed to supply a sample of his breath in 1994.

[6] On 7 January 1997 the appellant was convicted of driving while disqualified and a sentence of two months imprisonment was imposed and suspended upon home detention for six months. Within a few days the appellant breached the home detention and on 13 January 1997 the sentence of two months imprisonment was ordered to be served.

[7] On 20 October 2000 the appellant drove while unlicensed but he was not dealt with until 4 May 2007 when he was sentenced for a number of other offences committed in 2000, 2001 and 2007.

[8] On 8 February 2008 the appellant drove while disqualified. He repeated that offence 11 days later on 19 February 2008. On both occasions he was driving with an excess level of alcohol. For the offending on 8 February 2008 an aggregate sentence of two months imprisonment was imposed together with a licence disqualification for five years. For the offending on 19 February 2008 an aggregate sentence of three months imprisonment was imposed, together with a five year disqualification. The record does not disclose whether the sentences of imprisonment were to be served concurrently or cumulatively.

[9] The appellant's next group of offences against the road traffic laws were committed on 14 October 2009. The appellant again drove while disqualified and with an alcohol level of 0.135 percent. The aggregate

penalty was imprisonment for six months together with a disqualification for five years. The appellant served the sentence of six months imprisonment, commencing 14 October 2009 and was released only a few days before he committed the offence under consideration.

**Magistrate's Reasons**

[10] The learned Magistrate, Mr Neill SM, gave brief ex tempore reasons. After referring to the previous convictions for driving while disqualified, his Honour said:

> "Usually we see young people coming before the Courts many times. Then they grow up; they learn their lesson. They don't do this so much. For some reason you're still doing this; still driving while disqualified.
>
> Your lawyer has pointed out that this time you were not drunk at the same time. That's good. That's the first time you were not drunk when you were driving while disqualified.
>
> I can see no option but to give you the maximum penalty, because today's the – you've pleaded guilty at the earliest opportunity. I'll discount that by 25 percent."

**Discussion**

[11] Counsel for the appellant emphasised that there was no allegation of bad driving and the offending was not compounded by the consumption of alcohol. The driving was over a short distance and occurred, as counsel put it, because the appellant made a poor decision to drive in order to find an appropriate driver to transport his family member back to Kintore. It was

submitted that the appellant was "not simply or completely dismissive of the fact of his disqualification".

[12] Previous penalties have not deterred the appellant. He had only been out of gaol for a few days having served a sentence for the very same offence. Contrary to submissions by counsel, in my view, the appellant's conduct was dismissive of the fact of his disqualification. In addition, notwithstanding that he is a good family man and has a good work record, the time has well and truly passed when the appellant was entitled to any mitigation whatsoever by reason of his personal circumstances.

[13] Although the appellant was not entitled to any leniency, the appropriate sentence had to be fixed according to the gravity of the particular offending. The appellant cannot be punished again for his previous offending by increasing what would otherwise be the appropriate sentence for the particular offence.

[14] The maximum penalty was imprisonment for 12 months. The Magistrate stated that this was his starting point. His Honour reduced the sentence by 25 percent in recognition of the plea of guilty thereby arriving at the sentence of nine months imprisonment. It is well settled that the maximum penalty is reserved for offending that falls within the worst category of offending of the particular type.

[15] In this regard fine distinctions are to be avoided, but it is plain that the appellant's offending did not fall within the worst category of offences of

driving while disqualified. For example, he was not setting out to drive a long distance in circumstances where licensed sober drivers were available to drive. The appellant was driving only a short distance for the purpose of finding a licensed driver to convey him and his family back to Kintore.

[16] Having regard to the current range of sentences, the Crown has conceded that this sentence was outside that current range, and that the appellant has succeeded in demonstrating that the sentence was manifestly excessive. That concession was properly made.

**Conclusion**

[17] It is not surprising that the Magistrate took a dim view of the appellant's offending conduct, but his Honour erred in using the maximum penalty as his starting point. Notwithstanding the appellant's appalling driving record and prior offences of driving while disqualified, the circumstances of the particular offence did not place it in the worst category of offending of this type.

[18] In these circumstances the Magistrate erred as to the appropriate starting point and imposed a manifestly excessive sentence. For these reasons the appeal is allowed and the sentence of nine months imprisonment is set aside. In substitution, after allowing a reduction of 25 percent, in order to reflect the appellant's plea of guilty, I impose a sentence of six months imprisonment commencing 17 April 2010.

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