Sams v Sims [2013] NTSC 18

PARTIES:	SAMS, Jodie Marie
	v
	SIMS, Erica Ann
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 1 of 2013 (21242264)
DELIVERED:	17 APRIL 2013
HEARING DATES:	27 MARCH 2013
JUDGMENT OF:	KELLY J
APPEAL FROM:	G CAVANAGH SM

REPRESENTATION:

Counsel:

Appellant:	K Roussos
Respondent:	D Morters

Solicitors:

Appellant:	LBLLB Louise Bennett Criminal Lawyer
Respondent:	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 DARWIN

Sams v Sims [2013] NTSC 18
No. JA 1 of 2013 (21242264)

BETWEEN:

JODIE MARIE SAMS
Appellant

AND:

ERICA ANN SIMS
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 17 April 2013)

[1] On 18 December 2012, the appellant pleaded guilty in the Court of Summary Jurisdiction to one count of driving on a road with a high range breath alcohol content.

[2] The agreed facts placed before the Court of Summary Jurisdiction in relation to this offence are that at about 1:12 am on Sunday 11 November 2012, the appellant was the driver of a Toyota Corolla NT registration 942 935 in the car park of the Beachfront Hotel, Nightcliff. The appellant was stopped by police and subjected to a roadside breath test, which she refused. She was arrested for the purpose of a breath analysis and conveyed to the Darwin Watchhouse. At the Watchhouse the breath analysis returned a reading of

.195 grams of alcohol per 210 litres of breath. When asked where she was driving to, the appellant replied, "I was moving the car to here." She was asked how many drinks she had consumed and she replied, "Too many." At the time of the offence, the Beachfront Hotel car park was a dry, sealed public car park open to and in use by the public. It was night time, the weather was fine, and traffic conditions light.

[3] The learned magistrate convicted the appellant, fined her $500 with a $40 levy and noted the mandatory disqualification from driving in the Northern Territory for 12 months, backdated to 11 November 2012.

[4] The appellant appeals to this Court against the recording of a conviction. The grounds of appeal are first that the learned magistrate erred by not affording the appellant natural justice. Secondly, the appellant complains that the learned magistrate made a number of errors of law in exercising his discretion to record a conviction, namely:

(a) that the learned magistrate erred in law in restricting himself to cases where there had been a lengthy period of driving experience with a low reading;

(b) that the learned magistrate erred in law by not taking into account relevant extenuating features of the offence and the offender; and

(c) that the learned magistrate erred in law in disregarding the significant additional penalty that recording a conviction would impose on the appellant.

Discretionary considerations

[5] Taking these grounds of appeal in reverse order, I do not think that the learned magistrate erred in law in exercising his discretion to record a conviction. In giving his reasons for recording a conviction the learned magistrate said:

> "… Despite her good character, it is inevitable in this court, except in very rare occasions for people to have a conviction recorded, so it sends out a real message to people who drink and get behind the wheel of a car that there would be a record made of what they did by way of a conviction.
>
> That is the standard, almost inevitable practice of this court. Occasionally I have recorded a non-conviction for someone like a 65-yeard (sic) old driver who has been driving for 45 years with a good war record of someone like that with a low reading. This was a high reading. This lady was drunk and should not have got behind that wheel. She is an intelligent lady, I am sure she knew that.
>
> Balancing all the criteria set out in the relevant section of the Sentencing Act concerning whether to record a conviction or not, given the prevalence of this kind of offending, the need to send out a continuing message as to how serious the courts see this kind of offending that a conviction is necessarily and the arguments that would go towards a non-conviction do not outweigh, in my view, the arguments for a conviction."

[6] First, it is said that the learned magistrate somehow improperly restricted himself. I do not think that this is the case. His Honour did not say that the discretion not to record a conviction could only be exercised where there

had been a lengthy period of driving experience with a low reading. Rather he said that it was very rare for people not to have a conviction recorded in drink driving matters. His reference to a 65 year old driver who had been driving for 45 years with a good record was simply an example of a case in which, in the magistrate's view, it would be appropriate not to record a conviction. Similarly, in saying, "This was a high reading," the learned magistrate did not say and did not imply that the discretion not to record a conviction could never be exercised in favour of a person who had a high reading.

[7] Nor do I think the learned magistrate erred by not taking into account extenuating features of the offence and the offender. He clearly did take these matters into account. Before passing sentence he said, "I accept that you weren't going to drive on the road but behind the wheel of a car in a public car park where there is likely to be pedestrians, especially drunk pedestrians, so it was dangerous." He also accepted that she was a hard working devoted mother, had been devastated, and had learnt a lesson from being charged. These are the matters that were urged upon him by counsel for the appellant.

[8] Nor do I think it can be said that the learned magistrate failed to take into account the significant additional penalty that recording a conviction would impose on the appellant. Immediately before passing sentence he had read a long letter from the appellant which set out in detail those matters said by

the appellant to amount to a substantial additional penalty. It is inconceivable that he failed to take these matters into account.

[9] It is not to be assumed that the failure to mention a sentencing principle means that it has been overlooked.[1] In particular, magistrates are working under pressures which mean that they are simply unable to give the kind of detailed reasons which might be expected of a court delivering a reserved judgment, and sentencing remarks delivered in such circumstances should not be subjected to the same degree of critical analysis as the words in a considered reserved judgment.[2] An appellate court is entitled to assume that a magistrate has considered all matters which are necessarily implicit in any conclusions which he has reached.[3]

Failure to accord natural justice

[10] The substance of this ground of appeal is that, according to the appellant, the learned magistrate failed to accord counsel for the appellant an opportunity to properly address him on the reasons why a conviction ought not be recorded in the appellant's case. The relevant portions of the transcript are as follows.

[11] Ms Bennett, who appeared for the appellant, made some brief submissions about the appellant's age and lack of prior offending and the fact that the appellant had not been driving on the road but in a car park and that she had

[1] *Van Toorenburg v Westphall* [2011] NTSC 31 at [23].

[2] *Jambajimba v Dredge* (1985) 33 NTR 19, at [22] per Muirhead ACJ.

[3] *Bartusevicvs v Fisher* (1973) 8 SASR 601.

no intention of driving on any public road. She then tendered a bundle of documents consisting of a long letter by the appellant setting out her circumstances and the circumstances of the offending as well as a number of references. In doing so Ms Bennett said:

> "Other than, your Honour, I would be asking for your Honour to consider in the circumstances of this case, not convicting Ms Sams. Of course she must attract a disqualification and fine that your Honour will impose."

[12] There followed a short discussion about whether or not the appellant had received an immediate disqualification notice at the end of which the learned magistrate disqualified the appellant from driving in the Northern Territory for the minimum period, which is 12 months, backdated to 11 November 2012. He then said in reference to the bundle of documents which had been tendered:

> "I will just read those."

[13] Presumably he then read the documents and then began the process of sentencing the appellant. During that process Ms Bennett attempted to interrupt and was prevented from saying anything by the learned magistrate. The exchange between them was as follows.

> "HIS HONOUR: ... Well I accept that you weren't going to drive on the roads, but behind the wheel of a car in a public car park where there is likely to be pedestrians, especially drunk pedestrians, so it was dangerous.
>
> MS BENNETT: Your Honour ---

HIS HONOUR: No, I'm not – excuse me. It is not a conversation.

MS BENNETT: Sorry.

HIS HONOUR: But I do accept that you are a hard working, devoted mother and that you have been devastated and learnt a lesson about this. Taking all those matters into account and what your lawyer has had to say, you are convicted and fined $500 with a $40 levy and you are disqualified from driving in the Northern Territory, as I have said, for the minimum period which is 12 months, backdated to 11 November 2012.

Anything else, Ms Bennett?

MS BENNETT: Perhaps if your Honour could explain the court process for the decision to convict her – the reasons for the conviction being recorded, your Honour?"

[14] His Honour then went on to give his reasons for recording a conviction. It is somewhat difficult to know what to make of all this. The learned magistrate refused to hear further from Ms Bennett after he had started sentencing the appellant, and he did not ask if she had any further submissions to make after reading the tendered material and before beginning to pronounce sentence. On the other hand, Ms Bennett did not clearly indicate to the learned magistrate that she had further submissions to make in relation to whether a conviction should be recorded.

[15] The appellant relied on the judgment of Martin (BF) CJ in *Wilson v Hill*:[4]

> "[T]he Court ought to have invited further submissions once it determined that it was not intended to exercise the powers under s 4.[5] The appellant had an expectation that he might avoid conviction, but nevertheless have to pay pecuniary penalties or perform community service. Once it was plain to his Worship that that expectation could not be met (either because it was not an available sentencing option, or because the circumstances did not fit within the provision, or even if they did, the Court was of the opinion that it was not an appropriate case to exercise the discretion), and his Worship was considering imposing substantial penalties he should have said so and invited further submissions. The penalties available under the criminal justice system in the Territory are very wide both as to the type and range, and they had to be applied against a background of these three disparate and serious offences in respect of the particular offender, who presented with features upon which he could rightfully base a claim for mitigation." (emphasis added)

[16] Although I have some sympathy for the learned magistrate conducting a busy list, particularly where counsel did not make it abundantly clear that she had further submissions to make, I nevertheless think the same principles apply. Counsel for the appellant had indicated that she was asking the magistrate to consider not recording a conviction. If the learned magistrate was minded to reject that submission, in my view it was incumbent upon him to signal his intention to counsel and invite counsel to make submissions in relation to the matter. I therefore consider that Ground 1 of the appeal has been made out.

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[4] [1995] NTJ 52

[5] What counsel for the appellant in that case had sought was an order for the conditional release of his client without conviction, under s 4 of the *Criminal Law (Conditional Release of Offenders) Act*.

[17] Under s 177 of the *Justices Act* I may affirm, quash, or vary the conviction, order, or adjudication appealed from,[6] substitute or make any conviction, order, or adjudication which ought to have been made in the first instance,[7] remit the case for hearing or for further hearing before the Court of Summary Jurisdiction,[8] or, notwithstanding that I am of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if I consider that no substantial miscarriage of justice has actually occurred.[9]

[18] These are not matters that usually come before the Supreme Court and there is no data base of prior decisions of the Court of Summary Jurisdiction to which I can refer. It therefore seems to me that the most practical disposition of this matter would be to set aside the conviction and remit the matter to a differently constituted Court of Summary Jurisdiction to determine the question of whether or not a conviction should be recorded after hearing submissions on that question from counsel.

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6 Section 177(2)(c)

7 Section 177(2)(c)

8 Section 177(2)(d)

9 Section 177(2)(f)