Hales v Garbe [2000] NTSC 49

PARTIES:	HALES, Peter William
	v
	GARBE, Andrew Robert
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 1 of 2000
DELIVERED:	30 June 2000
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JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

CRIMINAL LAW

Appeal against sentence – driving whilst disqualified - whether manifestly inadequate.

Appeal by prosecutor – whether exceptional circumstance so as to put contentions that were not in the Court of Summary Jurisdiction.

R v Wilton (1981) 28 SASR 362 and 367-368, applied.
Everett v The Queen (1994) 181 CLR 295 at 302, referred to.
Ebateringa v Boldiston (1988) 8 MVR 413, applied.
Oldfield v Chute (1992) 107 FLR 413, applied.
Arnold v Trenerry (1997) 118 NTR 1, referred to.
Johnston v Wilkinson (1983) 11 A Crim R 140, applied.

Appeal – general principles – interference with discretion of Court Below

R v Nagas (1995) 5 NTLR 45 at 52, referred to.

R v Ah Sam unreported, 15 March 1995, applied.

Traffic Act 1949 (NT), s 16(2)(b), s 31, s 39, s 40 and Sch I
Sentencing Act 1995 (NT), s 18

REPRESENTATION:

Counsel:

Appellant:	I Rowbottam
Respondent:	D Elliot

Solicitors:

Appellant:	DPP
Respondent:	Diana Elliot

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

Hales v Garbe [2000] NTSC 49
No. JA 1 of 2000

BETWEEN:

PETER WILLIAM HALES
Appellant

AND:

ANDREW ROBERT GARBE
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 30 June 2000)

[1] Appeal by the prosecutor against the sentence imposed on the respondent in the Court of Summary Jurisdiction sitting at Darwin on 14 December 1999. On that occasion the respondent pleaded guilty for that on 30 October 1999 he drove a motor vehicle upon a public street whilst having a concentration of alcohol in his blood of 134 milligrams of alcohol per 100 millilitres of blood (.134%), and further, that he was then disqualified from holding a driver's licence.

[2] The maximum penalties for those offences are, for exceeding .08, $2,000 or imprisonment for 12 months, this being the respondent's second conviction

for such an offence, and for driving whilst disqualified, 12 months imprisonment or a fine of $2,000 (*Sentencing Act* 1995 (NT), s 16(2)(b)).

[3] A finding of guilt of a second offence of driving with a concentration of alcohol in the blood of .08 or more, but less than .15, carries with it automatic disqualification from holding a licence for a period of 12 months by operation of the statute (*Traffic Act* 1949 (NT), s 39, s 40 and Schedule 1). Where a disqualified driver is found guilty of driving a motor vehicle on a public street, the court may disqualify the person from holding a licence for such further period as it thinks fit (s 31). That is, a further period than the period of disqualification previously imposed.

[4] The facts in this case, as accepted upon the plea, were that at 4.47am on 30 October, the defendant was driving a motor vehicle along Temple Terrace at Palmerston. The police noticed that the front left hand tyre was flat and he was asked to pull over. When he alighted, he had to steady himself on the side of the car and he was observed to smell of liquor. A roadside test was undertaken, which proved positive, and a breath analysis taken at the Police Centre indicated the concentration of alcohol in the blood with which he was charged. A check of records indicated that he had been disqualified from driving for 12 months on 4 December 1998. When asked why he had been driving whilst disqualified he said that he knew it was an offence and he was going home to sleep.

[5] His Worship imposed an aggregate fine of $700 and disqualified the respondent from driving for 12 months. Given that the appellant was automatically disqualified for 12 months upon being found guilty of the .08 offence, it is not clear what his Worship intended by ordering disqualification for 12 months. However, it is not suggested that the effect of the automatic disqualification and order was to disqualify the appellant for a period of two years. His Worship declined to impose a sentence of imprisonment in relation to the charge of driving whilst disqualified, even if suspended. The appellant says that the penalties were manifestly inadequate.

[6] The power to impose one fine in respect of more than one offence allowed under s 18 of the *Sentencing Act* is not unfettered. It is only available where the offences are (a) founded or the same facts, or (b) are part of a series of offences of the same or a similar character (compare s 52 regarding aggregate sentences of imprisonment). The offences of driving whilst having a concentration of alcohol in the blood beyond the prescribed limit (.05%, see s 19(6)) and driving whilst disqualified do not meet either test. Although driving is a common denominator, the other facts are patently different. The offences are not the same or similar in character. One involved driving a motor vehicle whilst being in a particular physical condition, and the other whilst not having a licence to do so. One poses a threat to the public and the other is disobedience of an order of a court, or to the will of the Parliament, expressed in the legislation. See the judgment of

Asche CJ of this Court in *Ebateringa v Boldiston* (1988) 8 MVR 413. Although not specifically made a ground of appeal, the fine of $700 cannot stand. Whether the imposition of separate fines amounting to the same amount would be appropriate remains to be seen.

[7] The respondent's prior criminal record was before the court as were the previous proceedings on appeal to this court. They disclose that he was convicted on 4 December 1998 for offences committed on 7 November 1998 when he permitted another person to drive an unregistered motor vehicle, and in respect of which the required compensation contribution had not been made. The respondent was a passenger. The reason the vehicle was being driven by that other person was because the respondent had been drinking alcohol. Warned by the police not to drive the vehicle, he was apprehended driving it about twenty five minutes later, and his breath analysis returned a reading of .156%. He was fined a total of $600 and disqualified from holding a driver's licence for 12 months. The offences, the subject of these appeals, were committed about five weeks prior to the expiry of that period.

[8] His Worship enquired generally of the prosecutor regarding the outcome of appeals to this court against inadequate sentences arising from driving whilst disqualified. It was suggested that they had been withdrawn. It is unclear whether his Worship was referring to the penalties or the period of orders for disqualification, or both.

[9] The matters put on behalf of the respondent on this occasion were that he had commenced work at 10am on the previous day and worked through until 2.30am. He had driven to work in the car and commenced to drive home, a distance of some kilometres (further breaches of the disqualification ordered, but not charged). He stopped at premises licensed to sell alcohol until 4am and was apprehended as he resumed his journey, after about one and a half hours. His excuse for driving was that he needed to go to work to earn income and there was no alternative transport. He had completed a course of instruction which he was required to undertake consequent upon the earlier conviction for exceeding .08, in preparation of a foreshadowed application for a new licence to drive. A boilermaker by trade, he had had difficulty maintaining that employment because he did not have a driver's licence and had been employed as a "cross between a labourer and a builder's assistant". He was single and 24 years of age.

[10] The transcript shows that his Worship interrupted counsel for the respondent when she embarked upon a plea that the respondent not be imprisoned. He said: "I'm not going to impose even a conditional sentence". That was a decision, not an intimation inviting submission. The prosecutor had no opportunity to address his Worship on the question of sentence prior to that, and, on the face of the transcript, none appears to have been available before his Worship proceeded to impose the sentence. This constitutes an exceptional circumstance which permits the prosecutor on this appeal to put contentions which were not in the Court of Summary Jurisdiction (*R v*

Wilton (1981) 28 SASR 362 at pp 367 – 368 approved by the High Court in *Everett v The Queen* (1994) 181 CLR 295 at p 302. The learned Magistrate immediately indicated that since the respondent was very close to the end of the 12 month period of disqualification when he committed the offence, he would not sentence him to imprisonment, suspended or not.

[11] The appellant argues that his Worship thus fell into error. The imposition of a fine for an offence of driving whilst disqualified is said to be manifestly inadequate and contrary to established law in relation to penalty for that offence.

[12] Since at least 1976, Territory Judges have consistently maintained that the usual disposition of an offender who drives whilst disqualified is by way of a sentence to imprisonment, even for a first offence. I need not go into detail, the authorities are usefully collected by Mildren J in *Oldfield v Chute* (1992) 107 FLR 413, affirmed later by his Honour as recently as in *Arnold v Trenerry* (1997) 118 NTR 1 at p7. The reference to the "usual" rule indicates that there may be circumstances which give rise to exceptions to the rule (see the reference to "exceptional circumstances" in some of the cases). Clearly, it would be an abnegation of fundamental principles of criminal justice for a court invested with discretion to deny the discretion and proceed as if a sentence to imprisonment was mandatory in all cases where a person drove whilst disqualified.

[13] However, the discretion is to be guided by relevant considerations, one of which consistently emphasized, is that this particular offence challenges the authority of the courts and the law they administer.

[14] This is not a case in which any exceptional circumstance exists. (For examples, see *Johnston v Wilkinson* (1983) 11 A Crim R 140 at p 144 per Johnston J). His Honour there points out that a disqualification only arises if there has first been a fairly serious offence committed. Here, the offence which brought the respondent to the attention of police was the same offence in respect of which he was previously disqualified. He had not only driven the motor vehicle for his own convenience, which disqualification is designed to inhibit, but drank alcohol in excess of the prescribed limit in the course of the journey. That is an aggravation of the offence of driving whilst disqualified.

[15] Should the court intervene? In *R v Nagas* (1995) 5 NTLR 45 at p 52, the Court of Criminal Appeal re-affirmed what was said in the course of the unreported decision in *R v Ah Sam*, unreported, 15 March 1995:

> "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. In this regard it is sufficient to refer to

Griffiths (1977) 137 CLR 293, *Tait & Bartley* (1979) 24 ALR 473, *Anzac* (1987) 50 NTR 6 and *Everett* (1994) 124 ALR 529".

[16] I am satisfied that the appellant has demonstrated that the unspecified financial penalty is obviously inadequate. The fact that the respondent had completed about 90% of the disqualification period without conviction provides some mitigation, but the penalty is nevertheless so disproportionate to the offence that an error of principle is indicated.

[17] These two errors being shown, the sentence of an aggregate fine of $700 imposed by the Court of Summary Jurisdiction for the two offences is quashed.

[18] For driving a motor vehicle with a blood alcohol concentration in excess of .08, namely .134, the respondent is fined $700 and is subject to the levy imposed under the *Crimes (Victims Assistance) Act* 1982 (NT). I will hear counsel as to a time to pay and the period of imprisonment in default of payment.

[19] For driving whilst disqualified, the appellant is sentenced to imprisonment for a term of four months, which, in all the circumstances, including that it arises from a prosecution appeal, is suspended forthwith. I fix the period during which the respondent is not to commit another offence punishable by imprisonment, to avoid being dealt with under s 43 of the *Sentencing Act*, at 18 months from today.

[20] The order that the respondent be further disqualified from obtaining a driver's licence for a period of 12 months from 14 December 1999 is affirmed. I would have invited submissions as to authority by which a period of disqualification, arising from the finding of guilty for driving whilst disqualified, could be imposed so as to accumulate upon the period of automatic disqualification upon the second finding of guilt for exceeding .08%, had the issue been squarely raised.
