Bielefeld v Winzar [2003] NTSC 109

PARTIES:	BIELEFELD, Kevin Bruce
	v
	WINZAR, Kevin David
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 12 of 2003 (20215400)
DELIVERED:	17 November 2003
HEARING DATES:	15 and 17 October 2003
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	C Roberts

Solicitors:

Plaintiff:	NTLA
Defendant:	DPP

Judgment category classification:	B
Judgment ID Number:	Mil03318
Number of pages:	5

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

Bielefeld v Winzar [2003] NTSC 109
No. JA 12 of 2003 (20215400)

BETWEEN:

KEVIN BRUCE BIELEFELD
Appellant

AND:

KEVIN DAVID WINZAR
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 17 November 2003)

[1] This is an appeal against a two year licence disqualification which was imposed upon the appellant by the Court of Summary Jurisdiction upon his entering a plea of guilty to a charge of driving in a public street a motor vehicle where there was a concentration of alcohol in the appellant's blood equal to 80 milligrams or more of alcohol per 100 millilitres of blood, namely, 194 milligrams of alcohol, contrary to s 19(2) of the Traffic Act 1999 (NT).

[2] The facts were that on Thursday 15 August 2002 the appellant was driving a Hyundai Excel sedan along Larapinta Drive. There were three other passengers in the vehicle. At a place about 20 kilometres from Alice

Springs, whilst proceeding along Larapinta Drive towards the town, a tyre blew causing the vehicle to roll over.

[3] The appellant was thrown clear of the vehicle. The other occupants managed to restart the vehicle. Another person started to drive the vehicle back towards Alice Springs. The vehicle reached a position approximately seven kilometres from Alice Springs when it broke down completely.

[4] The appellant had been injured in the original roll over and suffered a very nasty burn to his right thigh which was still being treated as of 19 March 2003 when the appellant was dealt with in the Court of Summary Jurisdiction. In addition the car was extensively damaged and was written off as a result. The vehicle was said to be worth $18,500.

[5] After the vehicle broke down completely, one or other of the passengers was able to walk into town and call an ambulance, as a result of which the appellant was taken to hospital. Whilst waiting for this to occur the appellant was in very severe pain. He was given half a bottle, or a little over half a bottle, of rum to drink for medicinal purposes whilst he was being taken into the town. There was no dispute by the Crown that in fact the appellant had consumed the rum after the accident.

[6] A blood sample was taken at the hospital as a result of which the appellant had a blood alcohol content of 0.194%.

[7] The appellant admitted to the police that he might have had two "Carlton Colds" during the day. The accident happened during the early hours of the morning of 16 August.

[8] The appellant has an intellectual disability which prevented him from being able to read or write, but notwithstanding that he was able to obtain his licence when he was 16 years of age by undergoing a course which made him fit to sit for his licence.

[9] There was no evidence that the accident was caused by or contributed to the appellant's state of intoxication.

[10] The appellant pleaded guilty to the charge because of the provisions of s 22(2) of the Traffic Act which provides:

> "Where, in any proceeding in a court, the court is satisfied that a breath analysis was not carried out on a sample or samples of a person's breath but a blood test was carried out on a sample of that person's blood taken before the expiration of 4 hours after that person entered a hospital after –
>
> (a) the event referred to in section 23(1) or (2); or
>
> (b) the motor vehicle accident referred to in section 25(1),
>
> as a result of which the blood test was carried out, the person shall be deemed, whether or not evidence is given that the person consumed alcohol after the time of the event or accident, to have had, at the time of the event or accident, a concentration of alcohol in his or her blood not less than the concentration ascertained by the test."

[11] The appellant had two prior convictions for exceed .08. The first was on the 27 May 1993 when he had a reading of .107% and the second was on

18 November 1997 when he had a reading of .111%. On each of those occasions he was fined and disqualified for a period of six months.

[12] Because of s 39(1) of the Traffic Act the appellant's licence was by force of the finding of guilt before the learned Magistrate cancelled and disqualified for a period of 18 months. The court, however, had a power to impose a longer period of disqualification "as the court thinks fit".

[13] The learned Magistrate recognised that on the facts before him most of the reason for his high alcohol reading was because of the alcohol which he had drunk after the accident and after he had been driving and said "that is mitigatory of course."

[14] I agree with the learned Magistrate. Although s 22 provides an irrebuttable presumption (see *Territory Insurance Office v Lemmens* (1995) 22 MVR 213 at 216), when it comes to the discretionary power to impose a period of licence disqualification greater than that imposed by the statute a Magistrate is entitled to look at the true facts: see *McDonald v Bell* (1987-1988) 16 MVR 113 at 116 per Phillips J. Although that decision was based upon a somewhat different statutory formulation, it is my opinion that nevertheless the appellant is entitled to draw to the court's attention the true facts. He is entitled to say, that notwithstanding that he was presumed to have a blood alcohol reading of .194% at the time of the accident, he was not then intoxicated and that any alcohol in his blood stream was not a cause of the accident.

[15] No doubt the purpose of s 22 is to prevent drivers from avoiding liability by consuming alcohol after the event, thereby making it impossible for the prosecution to prove that they were driving in excess of the statutory maximum at the relevant time. That purpose is sufficiently achieved if the end result is that the appellant is convicted and any mandatory minimum sentence required to be imposed is imposed whether it is imposed by force of the Act or otherwise. Beyond that the learned Magistrate has a discretion and is not required to be blind to the true facts.

[16] Of course the learned Magistrate did take into account the true facts in this case, but nevertheless imposed a licence disqualification in excess of the minimum. I am unable to see why he exercised his discretion in this way. There was no reason for him to do so and in my opinion in the absence of some good reason he ought not to have done so.

[17] The appeal will therefore be allowed and the period of licence disqualification quashed. In lieu thereof there will be a period of licence disqualification for a period of 18 months to take effect as from 19 March 2003.
