Kelly v Winzar [2006] NTSC 59

PARTIES:	KELLY, Keith v WINZAR, Kevin David
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 8 of 2006 (20607311)
DELIVERED:	3 August 2006
HEARING DATE:	20 July 2006
JUDGMENT OF:	Olsson AJ
APPEAL FROM:	Court of Summary Jurisdiction sentence, Mr J Birch SM, 21 March 2006

CATCHWORDS:

APPEAL – JUSTICES

Appeal against sentence – whether sentence manifestly excessive – whether sufficient weight given to appellant's rehabilitation and personal mitigatory factors – whether sentence offended totality principle –

Appeal allowed
Appellant re sentenced

Robertson v Finn (unreported, Supreme Court of the Northern Territory, 24 May 2006), followed

Campbell v Meredith [2005] NTSC 13, followed
Stanischewski v Trenerry [2001] NTSC 50, followed
R v Egan (SCC 20529705, 10 February 2006), distinguished
Janima and Edginton (unreported, Supreme Court of the Northern Territory, 28 August 1995), followed

R v Mills [1998] 4 VR 235, distinguished

R v CJP& Ors [2003] NSWCCA 187, referred to
R v Pitt [2001] NSWCCA 156, referred to

Justices Act (NT)
Traffic Act (NT) s 19(2), 31(1)

REPRESENTATION:

Counsel:

Appellant:	M Spiers
Respondent:	C Roberts

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Ols0608
Number of pages:	7

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Kelly v Winzar [2006] NTSC 59
JA 8 of 2006 (20607311)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

KELLY, Keith
Appellant

AND:

WINZAR, Kevin David
Respondent

CORAM: Olsson AJ

REASONS FOR JUDGMENT

Background

1. This is an appeal against a sentence imposed by a stipendiary magistrate consequent upon the appellant entering pleas of guilty to charges that on 9 March 2006 at Alice Springs he drove a motor vehicle, namely a Ford Falcon, on a public street while having a concentration of alcohol in his blood amounting to 203 mg per hundred millilitres of blood and that, on the same occasion, he also drove the motor vehicle on a public street whilst disqualified from holding a driver's licence.

2. Convictions were recorded in respect of the two offences and the learned magistrate imposed a single aggregate sentence of four months imprisonment. He ordered that this be suspended after service of one month, with an operative period of 14 months. The appellant was also disqualified from driving for a period of five years expiring on 10 March 2011.

3. The appellant complains that the sentence imposed was manifestly excessive in all the circumstances.

The relevant facts

4. At about 2355 hours on 9 March 2006 the appellant was driving a white Ford Falcon sedan in a westerly direction on Tietkens Avenue, Alice Springs. He was stopped by police opposite the North Side Foodland and subjected to a roadside breath test, which proved positive. He was then arrested for the purpose of breath analysis and conveyed to the Alice Springs Watchhouse.

5. The appellant supplied a sample of breath for analysis and recorded a very high reading of 0.203%. Police checks revealed that his licence had been disqualified on 7 June 2005 for a period of 12 months, consequent on his conviction for an earlier offence of driving with a substantial blood alcohol concentration.

6. At the time of the offences there was no other traffic on the road, the streetlights were operating and the weather was fine. There were, however, other persons as passengers in the Ford Falcon.

7. The appellant appeared before the learned magistrate as a single Aboriginal man of 23 years of age. The court was told that he usually lived at Murray Downs Station with his grandfather, for whom he cares. He normally worked on the CDEP program at Murray Downs from Monday to Friday collecting rubbish, grass-cutting, fencing, housing maintenance and other manual tasks. It was said that he was a keen sportsman who played football for Amaroo and had come to Alice Springs at the time of the offences to watch a football match.

8. The learned magistrate was informed that the appellant had a number of prior relevant convictions dating back to early 2002. These included:
    - three separate offences of driving a motor vehicle while unlicensed;
    - driving a vehicle with a blood alcohol concentration of 0.162%;
    - driving a vehicle in a manner dangerous;
    - two other miscellaneous vehicle related offences;
    - bringing liquor into a restricted area; and
    - disorderly behaviour.

9. The offences of driving a vehicle in a manner dangerous and driving with a blood alcohol concentration of 0.162% were committed on the one occasion on 6 May 2005 and attracted an aggregate penalty of a fine of $500, and a licence disqualification of 12 months from 7 June 2005 previously referred to.

10. Counsel for the appellant informed the learned magistrate that, on 9 March 2006, the appellant had been drinking with other people who had put him under some pressure to drive them back home. They had also gone out for some food. The appellant did not feel other than a little bit intoxicated and it was suggested that he did not have a full appreciation of the fact that he was still under licence disqualification. It was stressed that the appellant had never previously served a custodial sentence, had not previously been convicted of driving whilst disqualified and had entered timely pleas.

11. It was urged upon the learned magistrate that the appellant would benefit from a suspended sentence, it being said that he did not have an ongoing drinking problem. It was put to the learned magistrate that the appellant did not normally drink when he was at home and had just been in Alice Springs celebrating with family members.

12. In imposing sentence the learned magistrate stressed the quite high reading of the blood alcohol concentration and pointed out that this indicated a substantial degree of intoxication. Whilst he noted the relatively young age of the appellant and his timely pleas, he nevertheless considered that, because of the prevalence of the offence of driving whilst disqualified and its exacerbation by the degree of intoxication revealed by the breath analysis, a sentence of imprisonment ought to be imposed. After allowing a reduction of one third to reflect the early plea and its associated remorse, the learned magistrate imposed the sentence now appealed against.

Issues arising in relation to the appeal

13. Ms Spiers of counsel for the appellant sought to impugn the sentence imposed on several bases.

14. First, she argued that, having regard to what was said to be allowed as a discount for plea, it was apparent that the learned magistrate must have taken six months imprisonment as his commencement point. Bearing in mind that this was the appellant's first offence of driving whilst disqualified and matters personal to him (including his young age) such a sentence was patently excessive.

15. Moreover, she said, it did not appear from the sentencing remarks of the learned magistrate that he had given any, or at least adequate, consideration to the aspect of the appellant's rehabilitation and personal

mitigatory factors, as these aspects had not rated any significant mention. Indeed, she adverted to what fell from the New South Wales Court of Criminal Appeal in *Regina v CJP and Others [2003] NSWCCA 187* and argued that the brief sentencing remarks expressed by the learned magistrate did not satisfy the conceptual requirement referred to in paragraph 63 of that decision.

16. Ms Spiers drew attention to the point made by Southwood J in the course of his sentencing remarks in *The Queen v Egan (File No. SCC 20529705)* on 10 February 2006 *(*applying *R v Mills [1998] 4 VR 235*) that, in the case of young first offenders, rehabilitation is usually far more important than the factor of general deterrence. She argued that the learned magistrate had, seemingly, not addressed his mind to that aspect.

17. I took her also to submit that the appellant's act of driving was not really contumacious, it *was* his first offence of drive disqualified, he did not have a serious alcohol problem and, in the relevant circumstances, there had been no harm or danger created to other persons. She contended that due regard had not been given to the appellant's obvious contrition and good prospects of rehabilitation, his relatively modest antecedent record and the disadvantages under which he labours by virtue of his Aboriginality (cf *R v Pitt [2001] NSWCCA 156*). She stressed that he had never previously served a custodial sentence and to require him to do so would have an unduly severe impact on him.

18. Ms Spiers drew attention to what she said was an erroneous statement of fact on the part of the learned magistrate, to the effect that it had only been a short time since the appellant's appearance in court in June of last year when he had been disqualified from driving for a period of 12 months, whereas, in fact, 75% of the operative period of that disqualification had elapsed.

19. Finally, she argued that the sentence imposed (including the five-year disqualification period and the practical hardship that would arise from it) was simply too much and offended the totality principle.

Conclusion

20. There can be no doubt that Ms Spiers has said everything that possibly could be said in support of the appeal. However, at the end of the day, I agree with Mr Roberts, of counsel for the respondent, that many of the points sought to be raised cannot withstand serious scrutiny.

21. In my opinion the asserted inadequacy of the sentencing remarks made by the learned magistrate is unjustified. They were relatively brief, but they do not suggest to me that he failed to direct his mind to all of the relevant

issues. To paraphrase the words of Mildren J in the matter of *Janima and Edgington, (unreported, Supreme Court of the Northern Territory, 28 August 1995),* sentencing remarks are not to be analysed as critically as the content of a considered, reserved judgment. An appellate court is entitled, when considering the reasons given, to assume that a magistrate has considered all matters that are necessarily implicit in any conclusion that he or she has reached. In the present case, having regard to the general tenor and flavour of the sentencing remarks read as a whole, I remain unconvinced that this experienced magistrate did not pay due regard to relevant rehabilitative issues.

22. The next point to be made is that this is the second case in these sittings in which it seems to me that an appellant has sought to derive from the case of *Egan* and its genesis in the case of *Mills,* a concept which neither of them propounded -- at least in the terms suggested. Both of those matters related to young *first offenders* and the approach that ought to be adopted in such situations -- specifically bearing in mind the very important factor of rehabilitation which, logically, ought normally to assume ascendancy over considerations of general deterrence.

23. True it is that the relatively young age of an offender will almost always be an important mitigatory factor, but it does not follow that such an aspect alone will always lead to a conclusion that the factor of general deterrence ought to be outweighed. In the present case, the appellant was 23 years of age when the offences were committed, those offences were of a type unfortunately prevalent amongst young persons (including those of Aboriginal background) and the appellant had already amassed a significant number of convictions of either a similar or a motor vehicle related nature. There was very real potential danger to his passengers, having regard to his quite high blood alcohol reading. The time had arrived at which, in his case, considerations of both personal and general deterrence necessarily loomed large.

24. Whilst it is true that the learned magistrate was called upon to sentence the appellant for what was his first offence of drive disqualified, nevertheless he had no less than three previous convictions for driving whilst unlicensed, one prior conviction for driving in a manner dangerous and he was appearing in relation to his second offence of driving with a very high blood alcohol concentration. There was no emergency situation involved and the inevitable conclusion is that the appellant was simply disregarding the requirements of law and acting contumaciously in regard to the prior order of disqualification.

25. Such a situation plainly called for a custodial sentence as to which the dicta in *Stanischewski v Trenerry [2001] NTSC 50* and the comments of Martin CJ in *Campbell v Meredith [2005] NTSC 13* and Angel J in the

matter of *Robertson v Finn (Unreported, Supreme Court of the Northern Territory, 24 May 2006)* are pertinent.

26. Moreover, it must not be forgotten that the impugned sentence was an aggregate sentence that related to two separate and serious offences, albeit that they were committed on the same occasion.

27. I do not accept that the learned magistrate made any erroneous statement of fact in the course of his sentencing remarks. In my view he was plainly directing his attention to the fact that the previous appearance in relation to the first blood alcohol offence had occurred as recently as mid-2005. This was, of course, a relevant consideration, particularly as to the issues of deterrence and rehabilitation.

28. Having made those points, the one aspect of the appeal that has caused me concern, however, is whether the learned magistrate can be said to have manifestly taken a commencement point that was far too high, particularly bearing in mind that the appellant had never before been subject to a custodial sentence.

29. I agree with Ms Spiers that the imposition of an aggregate head sentence of four months imprisonment implies that the learned magistrate must have taken a total sentence of six months imprisonment as his commencement point before applying what was stated by him to be a one third discount for early plea and expressed remorse. The maximum penalty for each of the two offences was imprisonment for 12 months.

30. There can be no doubt that the sentence imposed, coupled as it was with a disqualification for five years, was a very severe penalty, particularly for a person of young age and with a background such as that of the appellant. Even given that the sentence was an aggregate sentence for two offences committed on the same occasion, the commencement point adopted is, on the face of it, considerably in excess of the penalties usually imposed in respect of run-of-the-mill offences of the type under consideration.

31. It appears to me to be manifestly draconian as a first custodial sentence to be imposed on this young offender. These were, regrettably, typical offences of their type and there are no features that mandated condign punishment beyond the norm. Six months imprisonment as a commencement point was, in my opinion, patently disproportionate to the offending given the background of this offender.

32. I consider that Ms Spiers has demonstrated that, in all the circumstances, the sentence imposed was manifestly excessive, despite the inherent seriousness of the offending. The appeal must therefore be allowed and the custodial sentence imposed set aside. In lieu, I substitute an aggregate

sentence of six weeks imprisonment after allowing an appropriate discount for the timely plea.

33. Having regard to the fact that this is a first custodial sentence imposed on the appellant I further order that such sentence be suspended after service of 21 days, credit to be given for any time already spent in custody. I fix an operative period of 12 months from date of release.

_____