Patterson v Balchin; Patterson v Davis [2007] NTSC 19

PARTIES:	PATTERSON, SHANNON
	v
	BALCHIN, VIVIEN
	AND:
	PATTERSON, SHANNON
	v
	DAVIS, STUART
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 5/07 (20618596) JA 6/07 (20619817)
DELIVERED:	22 MARCH 2007
HEARING DATE:	19 MARCH 2007
JUDGMENT OF:	ANGEL J
APPEAL FROM:	DARWIN COURT OF SUMMARY JURISDICTION

CATCHWORDS:

Appeal against sentence – drive while disqualified – drive while exceed .08 – manifestly excessive – totality – medical condition – culpability – home detention

Traffic Act (NT) s19(3)(b), s31(1)
Sentencing Act (NT) s44

Markarian v R (2005) 215 ALR 231*; Cranssen v R* (1936) 55 CLR 509 – applied

Lynch v Dixon (2004) 148 A Crim R 472; *Hales v Garbe* [2000] NTSC 49; *Police (SA) v Cadd* (1997) 69 SASR 150, 94 A Crim R 466; *Pearce v R* (1998) 194 CLR 610; *R v MMK* (2006) 164 A Crim R 481 – cited

Hammoud (2000) 118 A Crim R 66 – disapproved

REPRESENTATION:

Counsel:

Appellant:	T Opie
Respondent:	R Barry

Solicitors:

Appellant:	NT Legal Aid Commission
Respondent:	Office of Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Ang200703
Number of pages:	10

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

Patterson v Balchin; Patterson v Davis [2007] NTSC 19
Nos. JA 5/07 (20618596) & JA 6/07 (20619817)

BETWEEN:

SHANNON PATTERSON
Appellant

AND:

VIVIEN BALCHIN
Respondent

AND:

SHANNON PATTERSON
Appellant

AND:

STUART DAVIS

Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 22 March 2007)

[1] This is a justices appeal against severity of sentence.

[2] On 9 November 2006 the appellant pleaded guilty in the Darwin Court of Summary Jurisdiction to three charges arising out of two separate incidents. With respect to an incident on 22 July 2006 he was convicted of driving whilst disqualified from holding a licence contrary to s 31(1) Traffic Act for

which the maximum penalty is 12 months imprisonment and driving whilst exceeding .08 alcohol in the blood contrary to s 19(2) Traffic Act for which the maximum penalty is 20 penalty points or imprisonment for 12 months for a second offence – s 19(3)(b). With respect to the second incident on 4 August 2006 he was convicted of driving whilst disqualified from holding a licence contrary to s 31(1) Traffic Act for which the maximum penalty was 12 months imprisonment.

[3] The admitted facts before the Court were as follows:

> "At 1.40 am on Saturday morning 22 July 2006 the appellant was driving a maroon Daewoo Hatchback NT registered number 710–261 outbound from Katherine along Victoria Highway in the company of one other passenger. The appellant was stopped at a random breath testing station and supplied a sample of breath that indicated he was in excess of the legal limit. The appellant was arrested for the purpose of a breath analysis and conveyed to the Katherine Police Station. He supplied a sample of breath sufficient for analysis and returned a reading of .104 blood alcohol content. The appellant was informed he was under arrest for exceeding the legal limit. Further checks of Police records revealed that he had been disqualified from driving for 12 months from 18 August 2005. When the appellant was asked his reason for driving after drinking alcohol he replied 'She needed a lift home' referring to his passenger. The appellant was later charged and bailed to appear in court. At the time of the offence the Victoria Highway was a public street open to and used by the public traffic was light and the weather was fine and clear. In relation to the third charge the facts were that on Friday 4 August 2006 at around 6 pm the appellant was observed by Police driving east along Progress Drive in Nightcliff outside the Litchfield Court unit complex in a maroon Daewoo Lanos NT registered number 710–261. Police were aware that the appellant was currently disqualified from holding a licence and subsequently was motioned to stop by Police for the purpose of speaking to him regarding his reason for driving. Police asked the appellant his reason for driving whilst disqualified to which he replied 'Dropping the car for my mum'. Police checks revealed that the appellant was disqualified by the courts until 18 August 2006. At the time of the offence Progress Drive was a public street open to and used by the public, traffic was

> moderate and the road was dry and sealed. The appellant had two adult passengers in the vehicle at the time."

[4] The plea in mitigation proceeded on 9 and 24 November 2006. Sentence was handed down on 24 December 2006. In relation to the first incident the appellant was sentenced to an aggregate of four months imprisonment suspended upon him entering into a home detention order pursuant to s 44 Sentencing Act. In relation to the other charge the appellant was sentenced to four months imprisonment suspended upon him entering into a home detention order. Those sentences were ordered to be served cumulatively resulting in a total effective sentence of eight months to be served by way of home detention.

[5] At the outset of the plea in mitigation counsel for the appellant submitted as follows:

> "… sir, perhaps if I concede at the outset that the circumstances are such that Mr Patterson is in that position where, as the courts have generally said, one will often, if not usually, go to gaol in a circumstance where there is a drive while disqualified. I will be seeking today to convince you that due to a number of factors, despite the fact that given that there's two incidents within a fairly short period of each other, that your Honour should not put this young man in custody straight away. But I concede and he knows full well that I have my work cut out in front of you today and I have behind me a very frightened young man about what stands before him."

To this the learned Magistrate replied :

> "Well he should be because I must say that even with one offence when it's coupled with a drink drive that usually sends it over as far as I'm concerned and here he's got that as well as within two weeks or so another drive disqualified."

Counsel then said :

> "The repeat offence, yes. And as I say, your Honour, he's been advised of the realities he faces, but I've taken some fairly lengthy instructions about some of these matters and what I'll be hoping to convince your Honour is, that when you put a number of matters together that this is a case deserving of an opportunity not to serve time and that ultimately it would be in the interests not only of this defendant but of the community at large and in particular in relation to this family as well. But I'll take your Honour through all of these matters."

[6] Having heard submissions from both the prosecution and defence at the conclusion of the hearing on 9 November 2006 the learned Magistrate said as follows :

> "Well, Mr Smith, I'm prepared to deal with the matter by way of a home detention disposition. The reason I'm doing that, and I tell you it's borderline quite frankly because not only did your client get a warning in court, and I do accept that his condition is something that a warning may not be as effective on or carry the same effect on a person with your client's disorder as it would on someone without that disorder, but it's clear from the file that your client was also given an immediate suspension notice on 22 July. So he's had plenty to reinforce it and the fact that he's made two impulsive decisions within a short period of time I think really render it borderline.
>
> However, I can't dismiss that from the context and it's clear on what I've heard and what I know about the disorder that impulsivity is the key factor there. So I'm prepared to treat your client subjectively and your client may well have – put greater importance on the need to drive than any other person would have, certainly any other person without the disorder, and I think that's quite obvious and apparent.
>
> When I'm leading up to is that exceptions are usually made in the case of what's an actual emergency and I think that it's appropriate in this current case that I look upon that or apply the test of how your client perceives that because we all quite frankly can sit here and say well it certainly wasn't an emergency, but from his point of view it may well have been and that's by reason of the fact of his disorder. So for that reason, subject to him being found suitable for home

> detention after a proper assessment, I will dispose of the matter in that way with a length of appropriate duration in regard to the matters before me, of course.
>
> And I will just tell Mr Patterson, you've had a number of warnings now. Mr Patterson, stand up, please. This is the last warning that you will get because after this it appears on your record that you have not only two drink driving offences, but you will also have two drive disqualified offences and the explanation that I've been given might carry some favour on the first occasion now, but it certainly won't any time after that. So it really is up to you to do something about your disorder if it's going to lead you to making these sorts of decisions in the future."

[7] Thus it is apparent that in accordance with binding authorities, see eg. *Lynch v Dixon* (2004) 148 A Crim R 472 at 477, *Hales v Garbe* [2000] NTSC 49, *Police (SA) v Cadd* (1997) 69 SASR 150; 94 A Crim R 466, the hearing proceeded on the assumption that the appellant faced serving an actual term of imprisonment short of the Court being satisfied that there were reasons why exceptionally he should not do so.

[8] The grounds of appeal are first that each of the sentences was manifestly excessive and secondly that the learned Magistrate erred in that he failed to apply the principle of totality.

[9] The question arising on the first ground of appeal is whether the disposition of the Court is unreasonable and plainly unjust such that it was therefore manifestly excessive: *Markarian v R* (2005) 215 ALR 231 at 221 [25].

[10] In his concluding remarks to the appellant on 22 December 2006 the learned sentencing Magistrate said :

> "It's the condition and the fact that you might obsess and fixate on things and have an anxiety about things which has led me to treat your actions on the two separate days as more akin to someone without your disorder in an emergency type situation and that's the only thing that's keeping you from going to gaol. But there are two separate incidents here. I am going to default to a home detention order in both cases. They are going to be cumulative home detention orders and they are going to be of significant terms because I think that's warranted in all the circumstances."

[11] Counsel for the appellant in support of the first ground of appeal submitted that in treating the appellant's medical condition as the *only* thing that kept him from going to gaol the learned Magistrate erred in failing to have regard to a number of other significant mitigatory matters such as his youth (twenty years of age), that he was well thought of by friends and neighbours, had a close and caring family and only one prior traffic conviction. Counsel also criticised the learned Magistrate for accumulating the home detention orders for what the learned Magistrate described as "significant terms", because, it was submitted, in all the circumstances, particularly having regard to the appellant being diagnosed with "Attention Deficient Hyperactivity Disorder" at the age of four and taking medication therefor since that age and suffering from obsessiveness and stuttering his moral culpability for the offences was reduced. Indeed this was recognised by the learned Magistrate in saying the case was to be approached somewhat akin to people in situations of emergency. As a consequence of the appellant's disorder he had had an extremely difficult time at school, was the victim of bullying, and was unable to complete his schooling or cope with his occupation of choice, the Army or Navy.

[12] Both driving incidents concerned the family car. The first incident involved the appellant taking the car on condition that another male friend would remain sober and drive. The friend failed to adhere to that agreement. The appellant drove out of fear that the family car would be damaged and that his parents would be stressed as a result. In the context of the appellant's medical condition – that of obsession – this seemed reason enough to drive the car. The appellant's reason for driving on the second occasion was to take the vehicle to his mother after deciding that a friend was not driving it safely and advising his mother by telephone of his predicament. His manner of driving on neither occasion had attracted Police attention. Given all these things it was submitted there was no need for the imposition of a "significant terms" of home detention.

[13] Given the way the matter was conducted in the Court below and the state of the authorities counsel for the appellant on the appeal properly conceded that a home detention order was appropriate, but of a lesser term than that fixed by the learned Magistrate.

[14] The respondent submitted that the sentences imposed by the learned Magistrate for each incident fell within the range available to him in the exercise of his discretion having regard to all relevant matters. In particular it was emphasised that the offence of driving whilst disqualified is akin to a contempt of court, that the first incident on 22 July 2006 involved two charges, that the second incident on 4 August 2006 occurred less than two weeks after the first incident, that the appellant had a prior conviction on

8 September 2005 for starting the engine of a motor vehicle whilst having .163 milligrams of alcohol in his blood for which his driver's licence was cancelled and he was disqualified from holding a licence for 12 months until 18 August 2006, that there was a need for general deterrence given that this type of offending was prevalent, and there was also a need for specific deterrence given the appellant's prior conviction and the fact that the two incidents occurred so closely together.

[15] Given the appellant's reduced culpability for the offences on account of his disorder, his youth, his reasons for driving, his strong family support in my opinion "significant terms" of home detention were not warranted in all the circumstances. The length of the home detention order when considered in relation to the offending and the circumstances of the case are in my opinion such as to afford convincing evidence that the exercise of the discretion has been unsound: *Cranssen v R* (1936) 55 CLR 509 at 520.

[16] It follows that the appeal should be allowed and the sentences set aside and the appellant should be re–sentenced. In respect of the two counts arising from the incident on 22 July 2006 there will be an aggregate sentence of imprisonment for two months that will be suspended on a home detention order for that period of time. The approved premises are 38 Castlereagh Drive, Leanyer NT and the appellant is to report forthwith to the Community Corrections Court officer. In respect of the other incident of 4 August 2006 there will be a sentence of imprisonment of two months that will also be suspended on a home detention order for two months the approved premises

being 38 Castlereagh Drive, Leanyer NT. Those two sentences are to be served cumulatively.

[17] In support of the second ground of appeal the appellant submitted that the learned Magistrate failed to consider the question of totality and reference was made to *Pearce v R* (1998) 194 CLR 610 at 624 where it was said that a judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as the question of totality.

[18] In *Hammoud* (2000) 118 A Crim R 66 at 68, Simpson J, Mason P agreeing, said :

> " 'Appropriate' sentences imposed in relation to each individual … count would, if made wholly concurrent, fail to reflect the total criminality; if made wholly cumulative, would exceed what totality permits. The only solution is …. to make the sentences partly concurrent and partly cumulative."

[19] However, with respect, that logical approach does not reflect the discretionary nature of sentencing. As Gleeson CJ, Gummow, Hayne and Callinan JJ said in *Markarian* (2005) 215 ALR 213 at 221[27] :

> "Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that sentencers, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the basis for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence and judges at first instance

> are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies."
>
> Compare *R v MMK* (2006) 164 A Crim R 481.

[20] So in the present case it is not inappropriate that the Court fix a penalty with respect to each of the two discrete incidents of offending and accumulate them. It does not follow that the net result inexorably exceeds what totality permits.

[21] The orders of the Court will be as I have proposed.
