Breadon v Nicholas [2010] NTSC 70

PARTIES:	LYNESE BREADON
	v
	SALLY NICHOLAS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	NO 26 OF 2010 (21014190)
DELIVERED:	14 DECEMBER 2010
HEARING DATES:	6 DECEMBER 2010
JUDGMENT OF:	MILDREN J
APPEAL FROM:	MR J BIRCH SM

CATCHWORDS:

CRIMINAL LAW – appeal against sentence – driving with blood alcohol level of 0.149 – driving whilst disqualified – whether sentence manifestly excessive – appeal dismissed – *Traffic Act* (NT), s 22(1) and s 31(1)

Traffic Act, s 22, s 22(1), s 31(1)
Sentencing Act, s 43

Daniels v The Queen (2007) 20 NTLR 147; applied

Frank v Cassidy [2010] NTSC 54; *Oldfield v Shute* (1992) 107 FLR 413; *Pryce v Foster* (1986) 38 NTR 23; *R v King* (1988) 48 SASR 555; *Szymanski v Andrew* [2005] NTSC 32; referred to

REPRESENTATION:

Counsel:

Appellant:	T Collins
Respondent:	R Micairan

Solicitors:

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

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

Breadon v Nicholas [2010] NTSC 70
No. 26 of 2010 (21014190)

BETWEEN:

LYNESE BREADON
Appellant

AND:

SALLY NICHOLAS
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 14 December 2010)

[1] This is an appeal against a sentence imposed by the Court of Summary Jurisdiction.

[2] On 19 October 2010, the appellant pleaded guilty to a charge of driving a motor vehicle at 1:16 am on 29 April 2010 along Hartley Street, Alice Springs with a blood alcohol content of 0.149 per cent, contrary to s 22(1) of the *Traffic Act* and also to driving whilst disqualified, contrary to s 31(1) of the *Traffic Act*.

[3] The maximum penalty for each of those offences was imprisonment for 12 months. The learned Magistrate imposed an aggregate sentence of imprisonment for four months which was suspended after one month had

been served and fixed an operative period of 14 months for the purposes of s 43 of the *Sentencing Act*. A period of license disqualification totalling three years was also imposed.

[4] The appellant had previously been dealt with by the Court of Summary Jurisdiction on 3 March 2008 for a breach of s 22 of the *Traffic Act*. On that occasion without proceeding to a conviction, the Court found the offence proved and imposed a fine of $250. On that occasion, the blood alcohol reading was 0.06 per cent. She was also dealt with for other driving offences on that occasion which resulted in small fines.

[5] On 30 March 2010, the appellant was convicted of driving whilst unlicensed in relation to an offence on 26 February 2010 and for driving in a manner dangerous. On that occasion, she was fined in relation to both of those counts and received a period of disqualification for six months. The Court also dealt with a charge of a breach of s 22 of the *Traffic Act*. In relation to that offence, she was convicted and fined $450 and her license was disqualified for 12 months. The blood alcohol reading on that occasion was 0.122 per cent.

[6] At the time of the offending, the appellant was 24 years of age. She had been raised in Tennant Creek to the age of 10 before moving to Adelaide for her schooling. After completing Year 12, she returned to Tennant Creek to look after her mother, who suffers from diabetes and requires her care.

[7] Shortly after the offending which was dealt with by the Court in March 2010, the appellant's brother passed away. He had been hospitalised in Melbourne with a heart condition.

[8] Prior to her brother's death, the appellant and her mother had travelled to Melbourne to visit her brother shortly before his death. After the death, the appellant had returned to Alice Springs. She was apparently staying with an aunt, awaiting her mother's return from Melbourne.

[9] The appellant was distressed by her brother's death and began drinking on a daily basis. On the evening of the offending, the appellant had been at a 24-hour shop with a cousin who was the owner of the vehicle which she was driving at the time of the offending. Apparently, the aunt was also with them. The aunt wanted to go home. The cousin was intoxicated and asked the appellant to drive the aunt home to some flats in Alice Springs. The appellant did so and was driving back to where her cousin had been left in order to return the vehicle back to him.

[10] The matters were brought before the Court of Summary Jurisdiction but were adjourned to enable the appellant to attend the CREDIT course. After attending the CREDIT course for a period of time, the appellant travelled to Mount Isa with her mother to visit family and unfortunately they became stuck there when their car broke down. The appellant eventually returned but had missed her Court date and a warrant was issued for her arrest.

Apparently, there were two warrants, one of which related to another person of the same name and it took some time to clear up the mistake.

[11] At the time of the sentence, the appellant was receiving Centrelink benefits, but was looking for employment.

[12] The matter was dealt with by the learned Magistrate on 19 October 2010.

[13] The learned Magistrate accepted that the appellant had entered pleas of guilty at the first available opportunity and was prepared to still deal with the appellant on that basis, notwithstanding her Court absences.

[14] Notwithstanding that the appellant did not complete the CREDIT course, the learned Magistrate accepted that the appellant had been able to stop drinking and was no longer smoking cannabis, which he observed was very much in the appellant's favour.

[15] The learned Magistrate regarded the combination of offences as being of a run-of-the-mill type and took into account the fact that the appellant had been before the Court on two previous occasions for drink driving offences and had never had a driver's licence. He also said that he took into account the appellant's personal circumstances at the time as well as the fact that the appellant was a relatively young woman for sentencing purposes.

[16] His Honour considered that it was not a case which warranted a fully suspended sentence. Although he did not articulate why that was so, it

would appear that his Honour had in mind that the offending occurred very shortly after the Court had imposed a licence disqualification.

Grounds of Appeal

[17] The main ground of appeal was that in all the circumstances the head sentence was manifestly excessive. Counsel for the appellant relied upon a schedule of sentences passed by the Court of Summary Jurisdiction following findings of guilt for offences of driving whilst disqualified under s 31(1) of the *Traffic Act*. The sentences on the schedule were those imposed by the Court of Summary Jurisdiction sitting in Alice Springs between 14 December 2009 and 5 August 2010.

[18] In *Szymanski v Andrew*,[1] Riley J said:

> In appeals of this kind the courts in the Northern Territory have, over many years, observed that where it is contended that a punishment manifestly exceeds the tariff it is desirable that sufficient factual information be submitted to the appellate court to enable it to determine what the tariff is. What is required is information which discloses adequate details of offences and penalties imposed so that the Court can see what the normal range of sentences for a particular offence is. Obviously where there is a normal range of sentences for a particular offence, sentences imposed by different magistrates should fall within that range unless the circumstances of the offence or of the offender are exceptional or require otherwise: *Clair v Brough* (1985) 37 NTR 11. See also *Mason v Pryce* (1988) 53 NTR 1.

[1] [2005] NTSC 32 at [14].

[19] In *Daniels v The Queen*,[2] Martin (BR) CJ and Riley J said:

> The role of sentencing standards must be properly understood. They do not amount to a fixed tariff, departure from which will inevitably found a good ground of appeal.

[20] Their Honours agreed with the observations of Cox J in *R v King*,[3] where Cox J said that such standards are general guides to those who have to sentence in the future with certain tolerances built into or implied by the range to cater for particular cases and that it follows that a particular sentence will not necessarily represent a departure from the standard because it is outside the usual or nominal range.

[21] The same statistics were provided to Martin (BR) CJ in the case of *Frank v Cassidy*,[4] where his Honour observed:

> The longest individual sentence in that period was six months imposed on an offender who had six prior convictions for driving while disqualified, and seven for driving with an excessive level of alcohol. Sentences for offenders with prior convictions for driving while disqualified are more commonly in the range of two to five months.

[22] In his submissions, Mr Micairan pointed out that there were in fact only eight cases in the total list where the charges were the same as were dealt with by the learned Magistrate in this case. The range of sentences imposed was between two months and four months as an aggregate sentence. In only two cases was the sentence suspended. Only five cases in the list involved a

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2 (2007) 20 NTLR 147 at 29.
3 (1988) 48 SASR 555 at 557.
4 [2010] NTSC 54 at [11].

first offence of driving whilst disqualified. One of these cases (Patrick) was very similar in both the charges, the blood alcohol level and the prior convictions and resulted in an aggregate sentence of three months imprisonment, no period of which was suspended. In another case (Jurrah) where the priors and blood alcohol level were similar, the Court imposed a fully suspended sentence of three months.

[23] I am unable to conclude on a consideration of the very limited material before the Court as to the tariff, that the sentence actually imposed was so far out of the range as to be manifestly excessive.

[24] The other grounds of appeal which are the subject of written submissions were not pressed during the hearing of the appeal. As I am not certain that they were actually abandoned, I will deal with them briefly.

[25] Ground 2 was that the learned Magistrate erred by failing to consider sentencing options other than a period of actual imprisonment. Although a sentence of actual imprisonment is a sanction of last resort, the attitude of the Courts for quite some time in relation to the offence of driving whilst disqualified is to treat this offence as a serious one. As Rice J observed in *Pryce v Foster*,[5] the constant attitude adopted by this Court in relation to this offence is to indicate that unless exceptional circumstances exist, a term of imprisonment is almost inevitable.

[5] (1986) 38 NTR 23 at 28.

[26] However, as I pointed out in *Oldfield v Shute*,[6] it must be emphasised that the Courts are not *required* to impose a term of imprisonment unless exceptional circumstances exist because there are many other factors to be considered, one of which is whether the appellant has been previously convicted of driving whilst disqualified and another is the period of time that has passed between the date of the disqualification and the offence.

[27] Having regard to the fact that the offending took place only a very short time after the disqualification was imposed, the lack of any pressing circumstances for the appellant to drive that evening and the fact that this was the appellant's third conviction for a breach of s 22 of the *Traffic Act*, I am not able to find that the learned Magistrate erred in failing to suspend the whole of the sentence.

[28] The other grounds of appeal submitted that the head sentence imposed of four months was too long, having regard to the appellant's personal circumstances and her plea of guilty. Apart from considerations of the submissions on the question of the tariff, I am unable to find that the actual sentence imposed was manifestly excessive or that the learned Magistrate gave too much weight to the issue of general deterrence. It must be shown not merely that the sentence is excessive, but that it is manifestly so and I am unable to conclude that this is so.

[29] The order of the Court is that the appeal is dismissed.

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[6] (1992) 107 FLR 413.