Dickson v Houseman & Dickson v Harland [2016] NTSC 28

PARTIES:	DICKSON, Graham v HOUSEMAN, Gary James
AND:	
	DICKSON, Graham v HARLAND, Maurice
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 50 of 2015 (21519830) and JA 51 of 2015 (21532063)
DELIVERED:	27 MAY 2016
HEARING DATE:	22 JANUARY 2016
JUDGMENT OF:	KELLY J
APPEAL FROM:	MS OLIVER SM

REPRESENTATION:

Counsel:

Appellant:	L Hopkinson
Respondent:	D Jones

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Director of Public Prosecutions

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

Dickson v Houseman & Dickson v Harland [2016] NTSC 28
No. JA 50 of 2015 (21519830) and JA 51 of 2015 (21532063)

BETWEEN:

GRAHAM DICKSON
Appellant

AND:

GARY JAMES HOUSEMAN
Respondent

AND BETWEEN:

GRAHAM DICKSON
Appellant

AND:

MAURICE HARLAND
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 27 May 2016)

[1] This is an appeal against the sentence imposed at the Lajamanu Court of Summary Jurisdiction on 15 September 2015.

[2] On that date the appellant pleaded guilty to four charges on two files.

[3] On file 21532063 he pleaded guilty to driving a vehicle with a high range blood alcohol content. The maximum penalty for a second or subsequent

offence[1] of this nature is 20 penalty units or imprisonment for 12 months. The learned magistrate imposed a conviction and sentenced him to imprisonment for three months and disqualified him from driving for three years.

[4] On file 21519830 he pleaded guilty to :

(a) driving whilst disqualified, which carries a maximum penalty of imprisonment for 12 months;

(b) driving an unregistered vehicle, which carries a maximum penalty of 20 penalty units or imprisonment for 12 months; and

(c) driving an uninsured vehicle, which carries a maximum penalty of 100 penalty units (with no statutory minimum).

For these matters, the learned magistrate imposed convictions and sentenced him to two months imprisonment for driving while disqualified, with one month cumulative on the sentence on the previous file, and fined him $1,500 with two victims' levies of $150 each for driving an unregistered and uninsured vehicle, giving him 28 days to pay.

[5] The appellant has appealed against the total sentence imposed on three grounds:

Ground 1: that the learned magistrate erred by failing to give sufficient weight to the appellant's subjective circumstances;

1 As appears below, the appellant had many prior convictions for this offence.

Ground 2: that the learned magistrate erred by failing to consider the sentencing options of a home detention order or a community custody order as alternatives to actual imprisonment; and

Ground 3: that the sentence was manifestly excessive.

[6] The appellant is a serial offender when it comes to traffic offences. He has 13 previous convictions for driving while disqualified and four for simply driving unlicensed, 14 convictions for drink driving (many of them high range), six convictions for driving an unregistered vehicle, one conviction for dangerous driving, three convictions for driving unsafe or defective vehicles, and one for failing to stop at a stop sign. Related to these matters he has four convictions for providing a false name or false information to police. [2] He has had numerous sentences of imprisonment imposed on him for driving disqualified and drink driving.

[7] On this occasion, the sentencing magistrate noted his appalling record and said that the present offence was a particularly serious example: the appellant had a blood alcohol content of more than four times the legal limit for driving and he was apprehended driving into the Todd Tavern bottle shop to buy more alcohol.

[8] Counsel for the appellant submitted to the sentencing magistrate that the appellant was a changed man: he had a job (which he had had for the last

2 He also has a reasonable number of other not currently relevant convictions including one for unlawful use of a motor vehicle.

three years), he was supporting his wife and children and contributing something towards the support of his children from his first marriage. Counsel tendered a reference from his employer which indicated that the appellant was doing well in his employment. He made the following submission in relation to the appropriate sentencing disposition:

> Of course your Honour would be considering a sentence of imprisonment particularly in light of his prior convictions. I would urge your Honour to consider a sentence that would see him remain in the community and to continue to earn income and provide for his family.

Application for leave to adduce fresh evidence

[9] The appellant sought leave to adduce fresh evidence on the appeal pursuant to s 176A of the *Justices Act 1982* (NT). The evidence was to the effect that the appellant had a loan contract with Esanda in the amount of $37,032 which he had used to purchase a Toyota Hilux. He worked as a groundsman at Lajamanu school (a fact which *was* before the sentencing magistrate) and was paying off the loan from his wages. His wife has a licence and his family uses the Toyota to get to town and visit other communities – Lajamanu being rather isolated. These matters were set out in an affidavit sworn by the appellant.

[10] Section 176A of the *Justices Act* permits the reception of evidence not adduced in the original hearing if:

(a) the evidence is likely to be credible, and would have been admissible in the proceedings from which the appeal lies;[3]

(b) the evidence was not adduced in those proceedings, and there is a reasonable explanation for this;[4] and

(c) appropriate notice of an intention to rely on the evidence is given to the respondent.[5]

If these conditions are satisfied, the Court must admit the evidence on the appeal unless it is satisfied that the evidence, if received, would not afford a ground for allowing the appeal.[6]

[11] It is common ground that the notice provisions in the Act have been complied with and that the evidence was not adduced at the sentencing hearing; it was not contended that the evidence would not have been admissible in the court below, and there is no real question about its credibility. However, the respondent contends:

(a) that no reasonable explanation has been given for the failure to adduce that evidence; and

3 Section 176A(1)(a)

4 Section 176A(1)(b)

5 Section 176A(1)(c)

6 Section 176A(1)

(b) that the evidence , if received, would not afford a ground for allowing the appeal.

[12] The appellant relied on an affidavit of Stephen Karpeles, the lawyer from NAAJA who represented the appellant in the Court of Summary Jurisdiction, setting out the circumstances in which instructions were taken. Essentially, the appellant was represented at an earlier stage of the proceedings by another lawyer from the NAAJA office who has since left that organisation. That lawyer took instructions from the appellant in relation to his background and personal circumstances and obtained an adjournment to obtain a reference from the appellant's employer.

[13] On the next appearance, Mr Karpeles represented the appellant and he deposed to the following.

> I met the appellant for the first time on the morning of the 15th September 2015. He appeared at approximately 10am, which was when the court was due to commence proceedings. He was one of the only defendants who had arrived at the court at that time so his matter was called on first. I spoke briefly to the appellant outside court to confirm that he was to enter a plea to the charges and I obtained the written character references from him. I did not have time to obtain further instructions from the appellant regarding his financial circumstances, nor did I think they were necessary considering that he had previously provided Mr Murphy with his subjective information.

[14] Was that a reasonable explanation for the evidence not being adduced at the sentencing hearing? I am inclined to think not. It has been held that the Court should be liberal in its interpretation of what amounts to a reasonable

explanation,[7] and I do not think it was unreasonable for the lawyer to have relied on the notes of the previous solicitor regarding the appellant's subjective information in the circumstances of a bush court with a busy list and limited available time and resources. However, if the appellant thought that the fact that he was paying off a loan for the purchase of a vehicle was something he wanted placed before the court on his sentencing hearing, he should have given that information to Mr Murphy on the previous occasion or mentioned it to Mr Karpeles before court. Presumably he did not think it was important for the court to know about and I agree.

[15] If I had been of the view that the explanation given for the failure to adduce that evidence in the court below was a reasonable one, I would nevertheless not have admitted the fresh evidence on the appeal. Under s 176A, once the court is satisfied of the other matters set out in that section (discussed above) it must admit the evidence on the appeal unless it is satisfied that the evidence, if received, would not afford a ground for allowing the appeal. It is not necessary for the court to conclude that the evidence would lead to the appeal being granted, simply that the evidence would weigh in the balance in favour of the appeal being granted.[8] However, I do not think the evidence sought to be adduced as fresh evidence in this case meets even that criterion.

7 *Bean v Considine* [1965] SASR 351 cited with approval by Reeves J in Woods v Eaton [2009] NTSC 49 at [25]

8 *Wilson v Berlin* [2015] NTSC 52 at [27]

[16] First, it was not sought to lead evidence that the car would necessarily be repossessed if the appellant were to be sentenced to a term of imprisonment. Second, even if that were the case, the only relevance of that was the suggested hardship to the family of being without a vehicle in Lajamanu. However, the impact which imprisonment might have on an offender's family is not a factor to be taken into account in sentencing except in exceptional circumstances, for example when imprisonment would result in young children being left to fend for themselves without parental support.[9] The circumstances relied on here are very plainly not of such an exceptional nature.

[17] I therefore did not grant the appellant leave to adduce that fresh evidence on the appeal.

Submissions on the appeal

[18] If leave had been given to adduce the fresh evidence, then the appeal would have proceeded as a hearing *de novo*,[10] and I would have exercised the sentencing discretion afresh.[11] Since leave was not given, the ordinary principles on an appeal against sentence are applicable.

[19] The principles governing such appeals are well known. A court does not interfere with the sentence imposed merely because it is of the view that the

9 *R v Yates* (1998) 99 A Crim R 483 at p 486 per Charles JA (Victorian Court of Appeal)

10 *Marshall v Court* [2013] NTSC 75, per Mildren AJ at [1]. See also *Seears v McNulty* (1987) 28 A Crim R 121 at p 127-128 ; 89 FLR 154 at p 160, and *Leaney v Bell* (1992) 108 FLR 360 at p 369

11 *Marshall v Court* at [18]

sentence is insufficient or excessive. Nor does it interfere because the appeal court might have been inclined to give somewhat more or somewhat less weight to relevant matters taken into account by the sentencing judge. It interferes only if it be shown that the sentencing judge or magistrate was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The sentence is presumed to be correct. It may be plain from the result that the sentencing judge or magistrate must have been in error but to be found to be manifestly excessive, the sentence must be plainly and not just arguably excessive.

[20] On Ground 1 the appellant contends that the learned magistrate erred by failing to give sufficient weight to the appellant's subjective circumstances. The sentencing magistrate's sentencing remarks show that her Honour was fully aware of the appellant's personal circumstances as relayed to the court by the appellant's counsel including the fact that the appellant was employed and the reference from his employer, and the fact that there had been a gap in his offending in traffic related matters, and that she took those matters into account. Her Honour said:

> True it is that there has been a gap in your offending of this nature. True it is that you seem to do extremely well at your job. …, you obviously do a good job there, people are impressed enough by your work ethic to give you a good reference, but it only takes one occasion of drink driving to harm someone through an accident because of your inability to drive properly.
>
> You just don't seem to be getting the message that you can no longer engage in this sort of behaviour, but it has to stop and it has to stop permanently. You're still not getting the message that when you're

> told you're not to drive that that is a serious matter and that you don't drive after that.
>
> It would be sending, in my view, completely the wrong message to you and to the community if I were not [to] impose a serious penalty for these offences.

[21] These remarks are unexceptional. Even if I would have been inclined, for example, to place greater weight on the appellant's employment (and I do not say I would have), that would not be a ground for allowing the appeal. No error of principle has been demonstrated. Ground 1 must fail.

[22] On Ground 2 the appellant contends that the learned magistrate erred by failing to consider the sentencing options of a home detention order or a community custody order as alternatives to actual imprisonment.

[23] The respondent relied on *Ross v Toohey*[12] as authority for the proposition that counsel appearing for a party must submit that a particular sentencing disposition is appropriate before the sentencing judge or magistrate has a duty to consider it. What Mildren J said on the matter in that case[13] was this:

> Consistently with the scheme of the Act, courts must always consider home detention orders as a real alternative to short sentences of actual imprisonment. Of course there are many situations where home detention will not be available. The Legislature has seen fit to provide that in the case of "violent offences" there must be a period of actual imprisonment, which has the effect that a home detention order is not an option. Given that many so-called "violent offences" are likely to result in a sentence of less than 12 months and many

12 [2006] NTSC 92

13 at [19]

> result in a very short sentence, the effectiveness of home detention as a sentencing option to deal with minor offending to that extent has been significantly curtailed. Further, some, perhaps many, offenders will not be eligible either because they are not suitable as individuals or because the place where they live is unsuitable, or because they do not consent to order. Magistrates and Judges are entitled to assume, if no submission is made for a home detention suitability report under s 45 of the Sentencing Act, that the offender's counsel has taken instructions on that matter and therefore it is not a matter which need to be considered. A person's history of non-compliance with court orders may make it plain that an actual sentence of imprisonment is the only available sentencing option. However, there are still many cases where it remains a real option and failure to properly consider it and, if it is decided to reject it, to articulate the reasons why, will amount to sentencing error. *[emphasis by underlining added]*

[24] Counsel for the appellant contended that the submission quoted in [10] above amounted to a submission that her Honour should consider all available sentencing options short of actual imprisonment and that her Honour failed to give any consideration to the appropriateness of home detention or a community custody order. While I accept that the submission in [10] above amounted to a submission that her Honour should consider all available sentencing options short of actual imprisonment, I do not accept that it has been established that her Honour failed to do so.

[25] Counsel for the respondent placed emphasis on the underlined passage from Mildren J's decision. However the sentence which follows is likewise relevant: "A person's history of non-compliance with court orders may make it plain that an actual sentence of imprisonment is the only available sentencing option." The inference to be drawn from the sentencing remarks is that her Honour took the view that prison was the only appropriate

sentencing option in the case of the appellant who had a sorry history of failing to comply with court orders – including three breaches of suspended sentence, one breach of parole, three breaches of recognizance and 13 breaches of court ordered periods of disqualification from holding a driver's licence.

[26] In any case, it is not to be assumed that the failure to mention a sentencing principle means that it has been overlooked.[14] In particular, magistrates are working under pressures which mean that they are simply unable to give the kind of detailed reasons which might be expected of a court delivering a reserved judgment, and sentencing remarks delivered in such circumstances should not be subjected to the same degree of critical analysis as the words in a considered reserved judgment.[15] An appellate court is entitled to assume that a magistrate has considered all matters which are necessarily implicit in any conclusions which she has reached.[16]

[27] I do not think that there has been any demonstrated error of principle. Counsel for the appellant submitted in the court below that her Honour should consider a disposition which would see him remain in the community continuing to earn income and provide for his family. I have no reason to suppose that her Honour did not consider all such available options and reject them. It is not surprising that she did. Ground 2 also fails.

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14 *Van Toorenburg v Westphal* [2011] NTSC 31 at [23]

15 *Jambajimba v Dredge* (1985) 33 NTR 19, at p 22 per Muirhead ACJ

16 *Bartusevics v Fisher* (1974) 8 SASR 601

[28] On Ground 3, the appellant argues that the sentence imposed was manifestly excessive. It plainly was not. The sentence was well within the appropriate range. The appeal is dismissed.