

Price v Westphal [2010] NTSC 57

PARTIES: PRICE, Grace
v
WESTPHAL, Lindsay

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION

FILE NO: JA 13 of 2010 (21004416)

DELIVERED: 11 August 2010

HEARING DATES: 11 August 2010

JUDGMENT OF: MARTIN (BR) CJ

APPEAL FROM: Mr Neill SM

CATCHWORDS:

CRIMINAL LAW – SENTENCING – ROAD TRAFFIC OFFENCES

Appeal against severity of sentence – whether Magistrate erred in failing to consider appellant’s financial circumstances and the totality of fines – sentence manifestly excessive – appeal allowed – sentence set aside.

Sentencing Act 1995 (NT) s 17(1) and s 17(2)
R v Rahme (1989) 43 ACR 8, followed.

REPRESENTATION:

Counsel:

Appellant: M O’Reilly
Respondent: R Noble

Solicitors:

Appellant: Central Australian Aboriginal Legal Aid Service Inc
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

Price v Westphal [2010] NTSC 57
No. JA 13 of 2010 (21004416)

BETWEEN:

GRACE PRICE
Appellant

AND:

LINDSAY WESTPHAL
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered *ex tempore* 11 August 2010)

Introduction

- [1] This is an appeal against fines imposed for driving offences that resulted in a total fine of \$2990. The individual offences and fines were as follows:

Count	Offence	Fine
1	Drive a motor vehicle while unlicensed	\$650
2	Drive a unregistered vehicle	\$390
3	Drive an uninsured vehicle	\$1300

4	Give false information to the police	\$650
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- [2] The grounds of appeal assert that the learned Magistrate, Mr Neill SM, erred in failing adequately to take into account the financial circumstances of the offender and the totality of the fines thereby arriving at a total fine which was manifestly excessive.
- [3] For the reasons that follow, the appeal is allowed.

Facts

- [4] The offending occurred in the late afternoon of Saturday 6 February 2010. The appellant, who was then aged 40 years, has never held a licence. She drove an unregistered and uninsured vehicle north on Stuart Highway and was stopped by police for the purpose of a random breath test which returned a negative result. There was nothing abnormal about the appellant's manner of driving. When asked her name, the appellant gave her cousin's name.
- [5] The Magistrate was informed that the offending occurred because the appellant's ex-partner was at her house in an intoxicated state and wished to go to Old Timers Camp for the purpose of participating in sorry business. After resisting a number of requests, ultimately the appellant acquiesced and it was while she was driving to Old Timers Camp that she was stopped for the purpose of a random breath test. The appellant's vehicle was out of registration by slightly more than a week. It had not been registered and

reinsured because of the appellant's poor financial position following recent payment of a debt of \$2216.

- [6] As is so typical in these types of cases, this was not the first occasion on which the appellant had driven in breach of the road traffic rules. In May 2005, while unlicensed, the appellant drove an unregistered and uninsured motor vehicle. In March 2007, still unlicensed, the appellant drove with an excess level of alcohol. The penalties had no impact as a few months later in July 2007 the appellant committed her third offence of driving a motor vehicle without a licence. Again the vehicle was unregistered and uninsured and the appellant's blood alcohol level was 0.152 percent.
- [7] Counsel informed the Magistrate that on the last occasion the appellant was in court for road traffic offences it was impressed upon her that she needed to get a licence. She enquired at the Motor Vehicle Registry as to the cost and process and was told that it was necessary to undertake a test. However, the appellant did not understand how she might go about undertaking the test or the details of what she was being told and she went home without making the necessary arrangements.
- [8] The appellant grew up in country near Ti Tree where she received some school which has left her with limited literacy. She was married in Utopia and there are four children of the marriage. The appellant left her husband in 2000 after the birth of her fourth child and began living in Alice Springs where she was caught up in the drinking culture. At the time of the

offending the appellant had stopped drinking, except on her birthday, because she has become a diabetic. Since 2007 the appellant has lived in the same residence and she is the permanent carer for her disabled brother and very young niece.

- [9] As to the appellant's financial position, counsel informed the Magistrate that from her pension and carer payments the appellant receives a total of \$644.20 per fortnight from which \$283 is taken for rent. At the time of sentencing she owed a video store \$60. It appears that she owed the fine recovery office at least \$1300.

Magistrate's Reasons

- [10] In brief ex tempore reasons the Magistrate referred to the record of prior offending and observed that apparently the appellant preferred to pay off a debt to a video store than to re-register her motor vehicle. His Honour remarked that given the appellant's history it was "very hard" for him to feel "a whole lot of sympathy for her". After warning the appellant that the next time she came to court for driving unlicensed she might end up in gaol, his Honour imposed the individual fines.
- [11] The Magistrate specifically referred to the total of \$2990 in fines and \$160 in victim's levies. As to how the appellant would pay the total owing, his Honour said:

"You will need to talk to the Finance Recovery Unit and sort out how you are going to deal with all of this.

Ms Price, you are a repeat offender. You have done all this before. I am sure you will manage this time”.

Fines

[12] Section 17 of the *Sentencing Act* provides that where a court determines that a fine is an appropriate penalty, the court shall have regard to the financial circumstances of the offender:

17 Exercise of power to fine

- (1) Where a court decides to fine an offender, it shall, in determining the amount of the fine, take into account, as far as practicable:
 - (a) the financial circumstances of the offender; and
 - (b) the nature of the burden that its payment will impose on the offender.

[13] Although a court is not prevented from fining an offender by reason of lack of information as to the financial circumstances of the offender and the burden that payment of a fine will impose on the offender,¹ nevertheless it is well settled that where possible the court should obtain information about the financial circumstances of an offender before imposing a fine. Behind this statutory requirement is a recognition of the principle that fines imposed upon impecunious offenders run the risk of amounting to an unduly harsh penalty and, in some situations, might amount to a de facto term of imprisonment if imprisonment is a consequence of a failure to pay.

¹ Section 17(2).

Commonly, the impecuniosity of an offender will lead to a lower fine than would otherwise be appropriate.

[14] The relevant principles and a number of authorities are discussed in *R v Rahme*.² In particular Finlay J, with whose judgment Studdert J agreed noted that the fundamental principle applies notwithstanding that failure to pay might not result in imprisonment:³

“It is trite to say that a court generally should not impose a fine which the offender does not have the means to pay, even though these days failure to pay a fine does not lead to imprisonment but to a civil execution for its non-payment”.

Conclusion

[15] The total of \$2,990 was well beyond the capacity of the appellant to the point that the imposition of such a total offends against the principles underlying s 17 of *Sentencing Act* and the general principles to which I have referred. The total is manifestly excessive and this has been properly conceded by the Crown. Error has been demonstrated.

[16] There is a further aspect to the question of totality as it applies to the circumstances under consideration. The total sentence must be proportionate to the total offending conduct. In the particular circumstances under consideration, in my opinion the total of \$2990 offends that principle.

[17] The appeal is allowed, all fines by the Magistrate are set aside.

² (1989) 43 ACR 81 at 86-89.

³ At 86.

[18] The minimum fine for driving an uninsured vehicle is \$1300. Bearing that minimum in mind, I impose an aggregate fine of \$1600, together with a victim's levy of \$40 on each count.
