Club v Westphal [2010] NTSC 66

PARTIES:	CLUB, Martin v WESTPHAL, Lindsay
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 19 of 2010 (21025545)
DELIVERED:	2 December 2010
HEARING DATES:	18 November 2010
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Mr Neill SM

CATCHWORDS:

CRIMINAL LAW – SENTENCING – ROAD TRAFFIC OFFENCES – An appeal against sentence by Stipendiary Magistrate of term of imprisonment for 14 days suspended forthwith for driving unlicensed – sentence manifestly excessive – appeal allowed.

House v The King (1936) 55 CLR 499; *Lucy Long v Lindsay Westphal* [2010] NTSC 55; *Peter Michael v Donald Eaton* [2010] NTSC 56; *R v Ragget* (1991) 50 A Crim R 41.

REPRESENTATION:

Counsel:

Appellant:	M O'Reilly
Respondent:	I McMinn

Solicitors:

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

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

Club v Westphal [2010] NTSC 66
No. JA 19 of 2010 (21025545)

BETWEEN:

MARTIN CLUB
Appellant

AND:

LINDSAY WESTPHAL
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 2 December 2010)

Introduction

[1] This is an appeal against a sentence made on 3 August 2010 in the Court of Summary Jurisdiction. The Appellant pleaded guilty to one count of drive unlicensed. The sole ground of appeal is that the sentence of 14 days imprisonment, suspended forthwith was manifestly excessive in all the circumstances. The appellant had five prior convictions for driving unlicensed. At the same time, he was dealt with for driving with a prescribed level (.130) of alcohol in his blood.

[2] The Respondent concedes the sentence for driving unlicensed was manifestly excessive in all of the circumstances. A sentence is a

discretionary order and will not be interfered with unless error is shown in the sense discussed in well known authorities.[1]

Proceedings before the Court of Summary Jurisdiction

[3] On the facts before the Court of Summary Jurisdiction the Appellant was found to be driving unlicensed by a police computer check being made at a roadside breath test station where he had submitted to a random breath test. The breath test measured .130 blood alcohol reading. The Appellant remained in custody overnight and pleaded guilty the next day in the Court of Summary Jurisdiction.

[4] Clearly the learned Magistrate was troubled by the five previous convictions for drive unlicensed. No criticism could be made because of that. The Appellant received fines on all of those occasions. The last of the previous convictions was recorded on 23 March 2007 for offending that occurred in 2006, approximately four years prior the current offending. On that occasion he was fined $200.

[5] In submissions before the learned Magistrate counsel told His Honour the Appellant was from "out bush", namely Alpara community; he came to Alice Springs with his wife and family to shop for clothes; while in town he was at Hoppy's Camp and had been drinking; he did not expect to be driving to go back to Ilpeye Ilpeye Camp; his wife who would normally drive was unable

[1] *R v Ragget* (1991) 50 A Crim R 41; *House v The King* (1936) 55 CLR 499.

to drive on this occasion due to family responsibilities and the Appellant made the decision to drive. He pleaded guilty at the first opportunity.

[6] Counsel told the learned Magistrate the Appellant was an Alyawarre speaker and did not speak very much English; he had minimal schooling at Alpara; he was not literate, was not socially sophisticated and those factors as well as remoteness had impacted on his ability to obtain a license. He was married with three children and worked part-time for the Alpara Council, "topped up" by Centrelink. He rarely comes into Alice Springs. He usually relies on persons who have a driving license to drive him, particularly his wife. On occasions when there is no-one to assist him or he perceives pressure to drive a vehicle, he has done so.

[7] In his ex-tempore reasons His Honour referred to the Appellant's poor record of driving while unlicensed. There could be no complaint about His Honour's observation on the Appellant's driving record, save for perhaps the gap in offending over the most recent few years. His Honour was concerned the Appellant had not learnt from his mistakes and experiences. His Honour noted (T 6):

> "The particular difficulties that arise from your being a man raised in the community with a different social attitude have been highlighted on your behalf. But not to the extent that they are going to permit you to drive any time you want to without bothering to get a driver's license".

[8] His Honour fined, disqualified and imposed an Alcohol Ignition Lock order on the Appellant with respect to the drink driving charge.

[9] His Honour then convicted the Appellant and told the Court he sentenced the Appellant to two weeks imprisonment on the drive unlicensed. The Appellant's counsel immediately requested to make submissions on the question of suspension of the term of imprisonment. The opportunity to make those submissions was granted. A fair reading of the transcript indicates counsel appeared surprised at the imposition of a term of imprisonment. As noted later in these reasons, in recent times there has not been a sentence of imprisonment for drive unlicensed. In further submissions counsel pointed out the Appellant's circumstances again and the gap in offending of around four years.

[10] His Honour was clearly of the view the Appellant chose to disregard his legal obligations and a more serious sentence was called for (T 7). His Honour initially indicated that if he were to suspend the sentence the head sentence would be "for a lot longer" (T 8). His Honour did not proceed to make the head sentence longer. That would, with respect, clearly have been an error and His Honour did not in fact proceed down that path. In his final deliberations His Honour stated:

> I suppose the starting point is that the sentence available to a court in relation to an offence of this sort at its maximum is 12 months prison. As you correctly point out, an imprisonment of any sort is not often imposed in relation to the offence of driving while unlicensed, and I've given consideration to imposing the sentence raised today because of the very sorry record of your client. He does not come before this court as a person of very good character in terms of his record as being a sixth conviction for driving unlicensed over a period of a few years.

> However, I have reconsidered this position in the light of the submissions and the sentence of 14 days in prison from 2 August 2010 is suspended forthwith. The operative period I impose in relation to the suspended sentence is 24 months".

Discussion

[11] Before this Court is a comprehensive schedule of penalties that have been imposed on persons for the offence of drive unlicensed in Alice Springs between 19/1/2010 and 28/7/2010. In all instances the penalty imposed was a fine, save for when no penalty has been imposed. Usually the fine is greater for multiple repeat offenders but not invariably so, reflecting no doubt the myriad of conceivable circumstances of the offending and the offender. Sometimes the penalty is aggregated with penalties for other offending.

[12] Persons recorded on the schedule who have five previous convictions, (as with this Appellant), have received fines of $200 - $250.

[13] The circumstances of many people in remote central Australia sometimes means compliance with obtaining a license may well be more difficult than for a person in an urban centre. Those circumstances usually provide some mitigation. The Appellant is a case in point. In a general sense the circumstances provide some explanation for the style of sentencing that forms the basis of the sentencing standards. Although the non-compliance is frustrating, the Appellant had no offending for four years. It was not his sixth conviction with respect "over a period of a few years". There had been

no further offending in the last "few years" if with respect that means the last three or four years.

[14] Although the Appellant's record is of concern, the latest offence does not have the contumelious character of more egregious examples of offending by way of driving unlicensed or other offences where compliance with regulatory regimes has been poor.

[15] In *Lucy Long v Lindsay Westphal,*[2] Martin CJ found the imposition of a disqualification period was outside of the range of penalties commonly imposed for the offence of drive unlicensed. The imposition of a sentence of imprisonment being a more significant penalty than a disqualification must be seen in a similar light.

[16] In coming to that conclusion, I acknowledge there is an aggravating feature of this Appellant's conduct in that he was also driving under the influence of alcohol at the relevant time. His Honour dealt with that matter quite separately as is appropriate. That aspect of the Appellant's offending was not the reason the learned Magistrate imposed a period of imprisonment. The Appellant cannot be punished for the drink driving again in the sentence for the drive unlicensed, however when the drive unlicensed is coupled with other poor driving including alcohol, it does elevate the objective seriousness to a higher level. That is not a reason in this case that could

[2] [2010] NTSC 55.

justify an increase in the penalty to imprisonment and was not in my view within the range expected.

[17] As noted, the Appellant, despite his driving record, had not been dealt with for any offence in the Court since 2007, for an offence committed in 2006. Bearing that in mind, and bearing in mind the schedule of penalties, provided to this Court, the Appellant has demonstrated a term of imprisonment, albeit suspended is outside of the range of penalties and is manifestly excessive.

[18] On behalf of the Respondent it was submitted the learned Magistrate may have fallen into error demonstrated by His Honour's statement "I suppose the starting point is that the sentence available to a court in relation to an offence of this sort is 12 months prison" (T 9). The Respondent relied on Martin CJ in *Peter Michael v Donald Eaton*[3] where Martin CJ held "It is well settled that the maximum penalty is reserved for offending that falls within the worst category of offending of the particular type". Although I appreciate with respect that is the correct principle, I am not persuaded His Honour erred in that fashion. The reading of the whole transcript leads me to the conclusion that on this occasion His Honour was plainly stating the maximum penalty as it is always relevant to sentencing.

[3] [2010] NTSC 56.

[19] I am persuaded the sentence of imprisonment was manifestly excessive. The appeal will be allowed. The sentence is quashed. I impose instead a fine of $400 and I order a victim's levy of $40.