CITATION:	*Holden v Nicholas* [2018] NTSC 76
PARTIES:	HOLDEN, Maxine Yvonne v NICHOLAS, Sally
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 48 of 2018 (21826132)
DELIVERED:	2 November 2018
HEARING DATE:	31 October 2018
JUDGMENT OF:	Riley AJ

CATCHWORDS:

CRIMINAL LAW – TRAFFIC OFFENCE – APPEAL AGAINST SENTENCE

Offence of crossing double dividing lines – rule 132 of the *Australian Road Rules* – whether sentencing judge should have considered harm to the victim – *De Simoni* principle – s 5(2) of the *Sentencing Act 1995* (NT) – meaning of victim under s 5(2) of the *Sentencing Act 1995* (NT) – foreseeability of harm – whether sentence was manifestly excessive – whether judge erred in disqualifying the appellant from driving – whether offending in the 'mid to serious range' – applicable principles – appeal dismissed.

Sentencing Act (NT) ss 3, 5(2), 106A.

Gumbinyarra v Teague (2003) 12 NTLR 226; *Staats v R* (1998)123 NTR 16; *Inkson v R* (1996) 6 Tas R 1; *Royall v The Queen* (1991) 172 CLR 378; *McCormack v R* (unreported judgment, 1991, BC 9100411); *R v Gathercole*

(2001) 34 MVR 156; *R v Austin* (2001) 35 MVR 302; *R v De Simoni* (1981) 147 CLR 383; *Demur v The Queen* (2014) 255 A Crim R 144.

REPRESENTATION:

Counsel:

Appellant:	J Ker
Respondent:	T Grealy

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Ril1804
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Holden v Nicholas [2018] NTSC 76
No. 21826132

BETWEEN:

MAXINE YVONNE HOLDEN
Appellant

AND:

SALLY NICHOLAS
Respondent

CORAM: RILEY AJ

REASONS FOR JUDGMENT

(Delivered 2 November 2018)

[1] On 3 September 2018 the appellant pleaded guilty before the Local Court to the offence of having driven a motor vehicle on a road with a dividing line comprising two parallel continuous lines and crossing over the dividing lines, contrary to rule 132(2) of the *Australian Road Rules*. The maximum penalty for the offence is a fine of 20 penalty units and/or six months imprisonment. There is no applicable mandatory period of disqualification from driving. The appellant was convicted and sentenced to a period of three months' imprisonment suspended forthwith with an operational period of 12 months. She was also disqualified from driving for a period of six months.

[2] The offending conduct, which occurred at night, involved the appellant moving her vehicle into the oncoming lane in order to overtake another vehicle. Regrettably this led to tragic consequences in that the appellant's vehicle, whilst on the incorrect side of the road, collided with a motorcycle travelling in the oncoming lane without any operating headlights or running lights. Sadly the young rider of the motorcycle died as a result of the injuries suffered in the collision.

[3] This was a very difficult and sensitive sentencing exercise. In her sentencing remarks the learned Local Court Judge addressed the family of the deceased rider and acknowledged the "immeasurable" loss they had suffered and the enormous and understandable grief which they experienced. Her Honour observed that the offence being dealt with was the regulatory offence of crossing over two parallel dividing lines and not for causing the death of the young man.

[4] The appellant appeals on the grounds that: (a) the Local Court Judge erred in disqualifying the appellant from driving; (b) the sentence was manifestly excessive; and (c) the Judge erred in characterising the offending conduct as falling within the mid to serious range.

[5] At the commencement of the hearing the respondent gave notice of contention to the effect that the Judge could have, and should have, taken into account the harm to the victim, being the rider of the motorcycle, when addressing the nature and seriousness of the offending.

Consequences of the offending

[6] The sentencing Judge determined that the offending of the appellant did not fall within the worst category of offences under rule 132(2) of the Australian Road Rules but, rather, in the "mid to serious range". At one point her Honour referred to the "serious nature of this particular offence" and the appellant argued that this characterisation was not justified on the materials before the Court and was in error.

[7] The submissions of both parties focused upon whether the consequences of the offending were matters to be considered in assessing the objective seriousness of the offence.

[8] It was submitted on behalf of the respondent that the harm caused to the victim (the rider of the motorcycle) and the family of the victim ought to be taken into account in assessing the objective seriousness of the offending. As the respondent acknowledged, harm is not an element of the charge of crossing a double line, nor is it a statutory aggravation. However, it was submitted that a sentencing court ought to have regard to the harm suffered by the victim for an offence against the rule as it would for any other offence.

[9] Section 5(2) of the *Sentencing Act* sets out the matters a court *must* have regard to in sentencing. Relevant for present purposes those matters include:

(a) the nature of the offence and how serious the offence was, including any physical, psychological or emotional harm done to a victim – s 5(2)(b);

(b) any damage, injury or loss caused by the offender – s 5(2)(d); and

(c) any harm done to a community as a result of the offence (whether directly or indirectly) – s 5(2)(da).

[10] There is no definition of "victim" relevant to s 5 of the *Sentencing Act*. There is a definition for the purposes of identity crime in the *Criminal Code* referred to in s 3 of the *Sentencing Act*. There is also a definition in s 106A of the *Sentencing Act* but this is relevant only to Subdivision 2 of Division 2 of the Act relating to victim impact statements. In the circumstances the word will have its normal meaning.

[11] In *Gumbinyarra v Teague*[1] Mildren J determined that the staff of a clinic were not victims following a break-in to their clinic in their absence. This was because there was no intention to injure them and it was not reasonably foreseeable that they would suffer any harm in the circumstances that prevailed. His Honour observed that no damage or injury to any member of the staff was caused by the appellant in that case.

[12] In my opinion, in the present case, the rider of the motorcycle was plainly a victim for the purposes of s 5(2) of the *Sentencing Act*. He was directly affected by the offending conduct of the appellant, suffering fatal injuries when her vehicle collided with his motorcycle whilst her vehicle was on her incorrect side of the roadway.

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1 (2003) 12 NTLR 226 at [13]

[13] In *Staats v R* [2] the Court of Criminal Appeal considered the operation of s 5(2)(b) and s 5(2)(d) of the *Sentencing Act*. Martin CJ[3] noted in relation to s 5(2)(b):

> What it requires is that the harm done to a victim be included in the factors going to make up the seriousness of the offence. The degree of seriousness of an offence is a matter which may have an effect on sentence; it is a factor which may lead to a greater penalty being imposed; there is a potential for an adverse effect upon the offender. Accordingly, before imposing a greater penalty on that account, the court must be satisfied that the harm was an outcome of the offence and that the offender is criminally accountable for it.

[14] In *Staats v R*, and in other cases, there has been discussion regarding the circumstances in which a person is to be held criminally accountable for harm done to a victim and, particularly, on the one hand, whether it was necessary for the offender to have foreseen the harm or that the harm should reasonably have been foreseen by the offender or, on the other, whether an offender should also be responsible for the unforeseen consequences of his or her conduct. Martin CJ considered the requirement to be that the offender was only responsible for harm that was foreseen or ought reasonably to have been foreseen by the offender.[4] Thomas J, reflecting what had fallen from the Judge below, stated the test as being "whether they were the very kind of things likely to happen as a result of

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2 (1998)123 NTR 16

3 (1998)123 NTR 16 at 21

4 (1998) 123 NTR 16 at 21

the prisoner's crimes".[5] Angel J took a different approach following a decision of the Tasmanian Court of Criminal Appeal in *Inkson v R*[6] to the effect that deterrence and retribution required consideration to be given to unforeseen and unforeseeable consequences.[7]

[15] The matter was again addressed in *Gumbinyarra v Teague*[8] where Mildren J discussed *Staats v R* and identified the test adopted by the majority as being that the consequences had to have been "either foreseen by the accused, or if not, have been reasonably foreseeable by the accused". His Honour went on to say that where the test is one of reasonable foreseeability, what must be foreseen is "damage of the same kind as in fact occurred". Reliance was placed upon the High Court decision of *Royall v The Queen*[9] and, in particular, the observations of Brennan J (at 398-399) and McHugh J (at 450) that "a person is not culpable in respect of harm which he did not actually foresee or which no reasonable person would foresee".[10]

[16] The respondent invited me to adopt the approach of Angel J in *Staats v R* and take into account harm suffered as a result of the offending, both foreseen and unforeseen. In so doing it relied upon what it submitted was the apparent legislative intention behind s 5(2) of the *Sentencing Act*. In my opinion the passage from the second reading speech relied upon by the

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5 (1998) 123 NTR 16 at 37

6 (1996) 6 Tas R 1

7 (1998) 123 NTR 16 at 26

8 (2003) 12 NTLR 226 at [8] and [9]

9 (1991) 172 CLR 378

10 (2003) 12 NTLR 226 at [9]

respondent does no more than confirm that harm suffered by a victim "may be taken into account in sentencing" in order to "ensure that victims are not the forgotten people in the sentencing process". The speech does not make reference to the issue discussed in these proceedings.

[17] The respondent also submitted that the wording of the section itself suggested the harm to be considered as a result of the offending included both the foreseen and unforeseen. Whilst the words of the section are broad and without apparent limitation it seems to me that it cannot have been the intention of the Legislature to attribute responsibility to an offender for harm which was not actually foreseen and which no reasonable person would foresee. As Brennan J commented in *Royall v The Queen*[11], albeit talking of a chain of causation:

> Foresight or reasonable foreseeability marks the limit of the consequences of conduct for which an accused may be held criminally responsible.

[18] In the same case McHugh J[12] made similar observations stating that "a person should not be regarded as morally culpable in respect of harm which he or she did not intend or which no reasonable person could foresee".

[19] In my opinion, if the Legislature intended to extend the concept of responsibility for harm to that which could not be foreseen, it would be necessary that a clear legislative statement to that effect be made.

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11 (1991) 172 CLR 378 at 398

12 (1991) 172 CLR 378 at 450

[20] The harm which is foreseen or reasonably foreseeable need not be the precise harm that occurred but need only be of the kind likely to happen as a result of the offending.[13]

[21] In the present case, in my opinion, serious physical injury or death to another was a foreseeable consequence of the appellant's conduct in driving as she did. She deliberately drove her vehicle so as to overtake another vehicle and in doing so crossed continuous double white lines. The crossing of those lines occurred shortly after her vehicle passed over a crest in the road and whilst it was heading toward another crest a relatively short distance away. The double white lines continued up to and over the second crest reflecting, and warning of, the danger of passing to the incorrect side of the road in that location. The driving occurred at night on a rural road and where there were no streetlights.

[22] The Local Court Judge concluded that this was not "just a momentary lapse of attention" and that the offending fell within the "mid to serious range of offences for this particular section". Her Honour, relied upon conclusions that: the appellant's actions were deliberate, requiring some forethought and action; it was dark and extra care and attention were required; there were no streetlights in the area; and the length of the double white lines was such as to command heightened care and attention. The deliberate action of the appellant involved what was described as "a want of care".

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13 (1998)123 NTR 16 at 37

[23] In reaching the conclusion the Judge took into account mitigatory matters including that the plea came at the very earliest possible opportunity and was accompanied by significant remorse. It was noted that the appellant was a 53-year-old single mother with no prior convictions. She had raised 10 children and was, at the time, of limited means relying on Centrelink benefits to maintain the remaining family in her care. That family consisted of three school-age children and one adult child and all were living on a rural property.

[24] In my opinion, in making the assessment, her Honour should also have taken into account the harm suffered as a consequence of the offending. Had her Honour taken that harm into account the conclusion would remain that the seriousness of the offending fell within the mid to serious range for offences of its kind.

[25] I note the above approach is similar to that adopted by the South Australian Court of Criminal Appeal in relation to a regulatory charge of driving without due care. Prior to amendment in 2005 the South Australian legislation provided for an offence of driving without due care and attention, without the addition of an aggravated form of that offence of causing serious harm or death. In a series of decisions commencing with *McCormack v R*[14] it was held that a judge sentencing for an offence of driving without due care was justified in "having regard to the fact that driving has caused death, bodily injury or other damage". However, it was observed that "it would not

14 *McCormack v R* (unreported judgment, 1991, BC 9100411) per King CJ

be relevant to do so, as a general rule, if the consequence sought to be taken into account would make the conduct a different and more serious crime".[15]

[26] Under the Northern Territory legislative regime the tragic consequences of the driving are to be taken into account to elevate the seriousness of the offending. This was not a case for the application of the principles in *R v De Simoni*[16] . In that case the High Court referred to the "fundamental and important principle" that no one should be punished for an offence of which he or she has not been convicted. In the present case the circumstances of the driving, including the collision and the death of the rider, were part of the surrounding circumstances directly related to the offending and, subject to the principle in *De Simoni*, were to be taken into account. The circumstances of this offending were not such as to warrant a conviction for a more serious offence. No separate, more serious, offence linking the offence of crossing over the dividing lines contrary to rule 132(2) of the *Australian Road Rules* to the collision or the death was identified or available. In taking those matters into account the appellant was not being punished for an offence of which she had not been convicted.

Manifest excess

[27] It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error and the appellate court does not interfere with the

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15 See also: *R v Gathercole* (2001) 34 MVR 156; *R v Austin* (2001) 35 MVR 302

16 *R v De Simoni* (1981) 147 CLR 383 at 389

sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it be shown that the sentencing Judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing Judge said in the proceedings or the sentence itself may be so excessive as to manifest such error. It is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so.

[28] The conduct for which the appellant was to be punished consisted of her driving across double white lines in order to pass a slower moving vehicle. The photographs provided to the Local Court demonstrate that at the time of crossing those lines her vehicle had just passed over a crest and there was a short line of sight of oncoming vehicles. The double white lines continued because another crest loomed. Save for the presence of the vehicle being passed, for a short time there would have been no impediment to the appellant seeing the oncoming motorcycle. However, vision of oncoming traffic was quite limited in terms of time and opportunity even at a moderate speed, creating a dangerous situation. That dangerous situation included that, for the period in which her vehicle was passing the other vehicle, the appellant did not have a clear path back to the correct side of the road in the event of oncoming traffic. Further, the photographs show a side road entering the main road with the danger that vehicles may enter into the path of the appellant's vehicle from that side road.

[29] The failure of the appellant to see the oncoming motorcycle was probably due to the fact that it was dark and the motorcycle was unlit. However, even if the motorcycle had been correctly lit, the situation would have been quite dangerous.

[30] The significant matters in mitigation set out at [23] above were taken into account and accorded weight. The appellant had done all that she could to take responsibility for her actions.

[31] The appellant was sentenced to imprisonment for a period of three months and the sentence was suspended immediately. In my opinion the sentence of imprisonment imposed was not, in the circumstances, manifestly excessive.

Licence disqualification

[32] The appellant contends that the imposition of any period of license disqualification was not warranted. It was noted that the Australian Road Rules do not provide for any mandatory period of disqualification although, under the *Sentencing Act*, the court may impose an order upon conviction cancelling a driver's licence and disqualifying an offender from obtaining a licence for a time.[17]

[33] In imposing a period of disqualification the sentencing Judge acknowledged that such a disqualification would make it difficult for the appellant, who lived in a remote area and used her licence, to "care for your family and

17 *Sentencing Act* s 98

particularly in relation to school". However, her Honour regarded general deterrence as an important factor in relation to care on remote and rural roads. Reference was made to the "very high motor vehicle accident rate" and the need for people to take care in relation to their driving. Her Honour exercised her discretion to disqualify the appellant from driving for a period of six months.

[34] The appellant submitted that such a disqualification was not warranted by reference to the circumstances of the offending or the appellant's antecedents. Emphasis was placed on the fact that the appellant is a single mother who cares for her children in a rural area without ready access to public transport.

[35] The imposition of a disqualification is both punitive and protective and operates as a powerful public deterrent.[18] Whilst the imposition of a period of disqualification for six months may be said to be a stern response to the offending, in my opinion, it cannot be said to be manifestly excessive. I see no error on the part of her Honour. I dismiss this ground of appeal.

[36] Further, in my opinion, and in all the circumstances, the imposition of the total sentence including the conviction, the suspended period of imprisonment and the period of licence suspension, could not be said to be manifestly excessive.

[37] The appeal is dismissed.

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18 *Demur v The Queen* (2014) 255 A Crim R 144 at 151