Stanischewski v Trenerry [2001] NTSC 50

PARTIES:	STANISCHEWSKI, Kevin
	v
	TRENERRY, Robin Laurence
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA13 of 2001
DELIVERED:	28 June 2001
HEARING DATES:	22 May 2001
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL

Justices – appeal against sentence – driving whilst disqualified – whether sentence manifestly excessive

Justices Act 1928 (NT)
Traffic Act 1987 (NT), s 31(1)

Salmon v Chute (1994) 94 NTR 1, approved
Raggett, Douglas & Miller (1990) 50 A Crim R 41, approved
Cransen v R (1936) 55 CLR 519, approved
House v R (1936) 55 CLR 499, approved
Police v Cadd (1997) 94 A Crim R 466, approved
Maxwell (1998) 102 A Crim R 374, distinguished

REPRESENTATION:

Counsel:

Appellant:	M Johnson
Respondent:	A Elliott

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

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

Stanischewski v *Trenerry* [2001] NTSC 50
No. JA13 of 2001

BETWEEN:

KEVIN STANISCHEWSKI
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 28 June 2001)

[1] Appeal against sentence. The appellant was convicted upon his plea of guilty before the Court of Summary Jurisdiction of Darwin on 16 February 2001 for that on 13 June 1996 being a person who was disqualified from holding a driver's licence drove a motor vehicle in a public place, namely, East Point Reserve and when required by member of the Police Force to give his full name and address, gave a false name and address.

[2] The appellant was sentenced to an aggregate term of imprisonment of four months to commence from the date upon which he had been taken into custody, namely, 13 December 2000. His Worship confirmed that when

fixing the penalty he had taken into account abolition of remissions provided for in the Sentencing Act, meaning that the nominal sentence before that reduction was six months imprisonment. No part of the sentence was suspended.

[3] The appellant filed no written submissions or list of authorities as required by Practice Direction No. 6 of 2001, but counsel for the respondent did not object to the matter proceeding in their absence. I take this opportunity to again remind practitioners of that Direction.

[4] The admitted facts giving rise to the offences are that late on the afternoon of 13 June 1996, the defendant was driving a motor vehicle at East Point Reserve. There were two passengers. He was apprehended by plain clothes police in relation to another matter and when uniform police arrived and asked his name he said "William Stanischewski". The appellant and the passengers were asked to identify the driver of the vehicle and the appellant said that he was the driver. He later corrected his name to tell the truth, and produced identification to verify it. A check of the police system revealed that he had been disqualified from driving a motor vehicle and when asked if he had a reason for driving, he said "No" and "It was only at the carpark, I thought that that was okay". At the time of the offence East Point Reserve was a public street open to and used by the public.

[5] On 23 August 1994, the appellant had been convicted of driving whilst having a blood alcohol content in excess of .08 (.089) and was disqualified

from holding a driver's licence for six months. On 27 July 1995, he was convicted of driving whilst so disqualified and again disqualified for driving for 12 months.

[6] Counsel for the appellant before his Worship explained that the group had travelled to East Point Reserve to go fishing with one of the other men driving, however, he had had a few drinks and it was decided to move the car to a better fishing spot so the appellant drove it, but only within the carpark. Counsel for the appellant put to his Worship that:

> "It was a very short distance that he drove the car and he was only behind the wheel for a short period of time. He was doing it as a favour to his friend; his friend had drunk some beers while they were fishing and thought that perhaps he was over the limit. Mr Stanischewski was sober, somebody asked him to drive the car and he did that, your Worship. It was not an extended drive. It did not go out onto the street, it was in East Point Reserve only."

[7] It was pointed out that the appellant's admission that he was the driver of the motor vehicle was the only evidence of that fact. The precise area in which the offence occurred has not been identified, either to his Worship or this Court.

[8] At the time of the offence the appellant was 19 years of age. It appears that the delay in bringing the matter before the Court of Summary Jurisdiction arose from the fact that he had failed to appear before that court as required and although a warrant was issued for his arrest for that failure it was not executed until the appellant came to the notice of police in relation to the other matter. It is said that in the meantime the appellant remained in

Darwin. There is some confusion about why the appellant came to be in custody in December 2000 but his Worship has given him full credit and has backdated the whole of the sentence under appeal to that date and there is no complaint by the respondent on that account.

[9] He had not been convicted of any offences in the intervening period apart from a minor drug offence on the day before this matter came before his Worship. It was said that he had been employed in the meantime. Beyond the offences already referred to, the appellant had also been convicted of offences of trespass and stealing in 1995 for which he was convicted and ordered to undertake community service order, he failed to do that and was convicted and sentenced to 14 days imprisonment later in 1995. In July of that year he was also convicted of driving an unregistered and uninsured motor vehicle and riding a motorcycle without a helmet, for which he was fined on each count and in September 1995 convicted and sentenced to four months imprisonment, suspended upon his entering into a bond of good behaviour for 12 months, for unlawful use of a motor vehicle. He was also then convicted for stealing, for which he was fined. The offence now under consideration was committed during the period of the undertaking to be of good behaviour.

[10] Counsel for the appellant before his Worship emphasised by way of mitigation, that he was about 19 years of age at the time he committed the offence, that about five years had passed and with one minor exception he had been of good behaviour during that period and it was put that the period

he had been in custody prior to being dealt with should be treated as sufficient punishment. The circumstance of the offence were described to be at the lower end of the scale of offences of its kind, taking into account the location in which the offence occurred, the unspecified short distance over which the vehicle was driven and the circumstances giving rise to the appellant's driving it. There was no suggestion that the appellant had committed any alcohol related offence. It was also urged that the 12 months of disqualification had but one month to run. Taking into account his work record and job prospects it was also submitted that he should not be further disqualified from holding a driver's licence.

[11] At the conclusion of submissions his Worship had an opportunity to look at the record of the appellant's prior convictions and noticed that he was under a suspended sentence when he committed this offence.

[12] Turning to the law to be applied in relation to sentencing in a case such as this, his Worship reminded himself of a number of decisions including that of Mildren J, *Oldfield v Chute* (1992) 107 FLR 413, *Eldridge v Bates* (1989) 8 MVR 394 and the more recent decisions delivered by me on 30 June 2000, *Hales v Garbe* and Angel J in *Gokel v Rogers* delivered on 17 November 2000.

[13] His Worship referred to my decision thinking that I had said there ought to be a prison sentence unless there are special or exceptional circumstances. That is not quite right, what I said was that since 1976 Territory Judges have

consistently maintained that the usual disposition of an offender who drives whilst disqualified is by way of a sentence to imprisonment, even for the first offence and went on:

> "The reference to 'usual' rule indicates that there may be circumstances which give rise to exceptions to the rule (see the reference to 'exceptional circumstances' in some of cases). Clearly it would be an abnegation of fundamental principles of criminal justice for a court invested with discretion to deny the discretion and proceed as if a sentence to imprisonment is mandatory in all cases where a person drove while disqualified."

[14] Turning to the particular matters that were raised in this case, his Worship observed that the fact that the breach was near the end of a period of disqualification did not seem to him to be exceptional, although a matter which he would take into account. "The period of disqualification is the period and the breach is a breach at anytime during the relevant period". As to driving in the carpark his Worship noted that people often drive or move their cars short distances and the fact the appellant was not drunk at the time did not impress himself upon his Worship as justifying a departure from the usual rule. I agree. The presence of alcohol may be an aggravating feature, but its absence could not create a circumstance which of itself would justify departure from the usual disposition.

[15] His Worship noted that the appellant had been in relatively little trouble with the law over the past five years, but clearly did not consider that that factor justified departure either. His Worship noted that the admissions made by the appellant at the scene carried some weight (in mitigation), on

the other hand noted that his failure to come before the court when required shortly after the offence could not be said to be in his favour. He mentioned that a factor weighing against the appellant was that the offence was committed whilst he was serving a suspended sentence.

[16] It is apparent that his Worship quite properly took into account matters which had been raised before him, though I notice there is no particular mention of the fact that the offence had been committed at the time when the appellant was aged 19. Noting that the offence was aggravated by the fact that it was the second offence of this type, the learned Magistrate suggested that the fine of $800 imposed when the first offence was committed indicated that there was special circumstances. He then proceeded to impose the sentence of four months imprisonment commencing 13 December 2000, approximately two months prior to the date on which the sentence was imposed.

[17] I remind myself that the exercise of a sentencing discretion is not to be disturbed on appeal unless error is shown. The presumption is that there is no error (*Salmon v Chute* (1994) 94 NTR 1 at p 24; *Raggett, Douglas & Miller v R* (1990) 50 A Crim R 41 at p 42). The error, if there be one, may appear from what the sentencing tribunal said or no such an error appearing the sentence may impress itself on the appellate court as being manifestly excessive, that is, the nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of discretion has

been unsound (*Cransen v R* (1936) 55 CLR 509 at 519; *House v R* (1936) 55 CLR 499 at 505).

[18] The maximum term of imprisonment which might be imposed for driving whilst disqualified is 12 months (Traffic Act s 31(1)). It is not suggested that the appellant drove as a result of an emergency or some exceptional circumstance. The driving was a matter of convenience for him and his friends who might have committed an offence related to driving a motor vehicle whilst affected by alcohol had either of them done so.

[19] *Robert Garbe* drove whilst disqualified about five or six weeks prior to expiry of the period of disqualification of 12 months. He had driven some distance from his place of employment on his return journey to home. Stopping along the way he drank alcohol such that when detected his blood alcohol level was .134 per cent. I regarded his driving whilst disqualified as being aggravated by the fact of his alcohol intake but that the fact that he completed about 90 per cent of the disqualification period without conviction provided some mitigation. Upon the prosecutor's appeal the penalty imposed in the Court of Summary Jurisdiction was set aside and the appellant was sentenced to imprisonment for four months which, bearing in mind that it arose from a prosecution appeal, was suspended forthwith. I regard the circumstances of that offending as being somewhat more serious than this case. *Wayne Rogers* was driving home having taken a lady to hospital which could have been regarded as an emergency but it had abated by the time of the offending. His Honour observed that he had driving

offences going back some years and it appears that he had received a suspended sentence of nine months imprisonment for driving whilst disqualified in May of 1996. His Honour quashed the fine which had been imposed and, bearing in mind it was a Crown appeal, imposed a sentence of six months imprisonment to be suspended forthwith. Mr Rogers committed the offence at the expiry of about four years and one month into a period of disqualification of five years. His age, at the time of committing the offence, does not appear on the material before me.

[20] Robert Hammond had been sentenced to three months imprisonment suspended for a period of two years and disqualified from driving for 18 months from the date of his sentence. He was detected driving on 18 August 2000 when he had been disqualified for a period of some years, which was not due to expire until 24 March 2001. He was affected by alcohol. He was also driving home from work. It was his first offence of driving whilst disqualified. Her Honour did not disturb the suspended sentence of three months imprisonment, apparently because the prosecutor before the Court of Summary Jurisdiction had an opportunity to address the court on the issue of a possible suspended sentence and did not do so. In my opinion, the sentence imposed in that case is not a reliable guide to the appropriate sentence or range of sentences for this type of offending.

[21] The tension which I have felt in this case is that which necessarily arises when consideration is given to the circumstances of this offence and the relative youth of the offender, as opposed to the usual sentence imposed

upon persons who commit such an offence and in particular contumacious nature of this offending, bearing in mind the prior conviction for the same offence. This was not a "mere technical breach", examples which were given by Bleby J in *Maxwell* (1998) 102 A Crim R 374 at 377. Nor was it an emergent circumstance, it was for convenience.

[22] Although his Worship did not specifically mention the appellant's age at the time of the offence when sentencing him five years later, it is plain that the primary objective in sentencing a person for driving whilst disqualified is deterrence both personal and general. It involves a deliberate defiance of the law exemplified through orders of the courts and puts at nought orders made primarily for the protection of the public, that is, to keep people off the roads who, by their offending, have demonstrated that they are not to be trusted with a licence to drive a motor vehicle.

[23] The need for deterrence arises from the fact that this was the appellant's second offence of this type, and that he failed to turn up to be dealt with as required. They are factors which outweigh the considerations which might prevail in considering an appropriate sentence or a young offender.

[24] I consider that the sentence imposed by his Worship is at the upper end of the range in the circumstances of the offence and of the offender, but no error has been assigned and I do not consider that the sentence imposed is manifestly excessive. The appeal is dismissed.

[25] The general principles in relation to sentencing for an offence of driving whilst disqualified are discussed in detail in *Police v Cadd* (1997) 94 A Crim R 466 by a Full Court of the Supreme Court of South Australia comprising the Chief Justice and four other judges).

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