Eustace v Hales & Anor [2002] NTSC 16

PARTIES:	ALAN GORDON EUSTACE
	v
	PETER WILLIAM HALES and KERRY LEANNE RIGBY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA15 OF 2002
DELIVERED:	21 March 2002
HEARING DATES:	19 March 2002
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	I. Read
Respondents:	A. Fraser

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	ril0207
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Eustace v Hales & Anor [2002] NTSC 16
No. JA15 of 2002

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

ALAN GORDON EUSTACE
Appellant

AND:

PETER WILLIAM HALES and KERRY LEANNE RIGBY
Respondents

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 21 March 2002)

[1] On 14 February 2002 the appellant pleaded guilty to various charges under the *Traffic Act*. He now appeals against the sentences imposed on that occasion.

[2] The offending arose out of events that occurred on 26 November 2000 and on 22 December 2001. On 26 November 2000 the appellant was driving a Toyota Hilux motor vehicle along Rundle Street in Katherine. He had a

passenger in the vehicle. Police followed his vehicle and noted that he was swerving within the lane and at one point moved to the opposite side of the road whilst cutting a corner. Police stopped the vehicle and determined that the registration and insurance relevant to the vehicle had expired on 9 September 2000. The appellant was arrested and conveyed to the Katherine Police Station for the purpose of breath analysis and that breath analysis returned a blood alcohol reading of 0.234 percent. He was then served with a notice of immediate licence disqualification issued pursuant to s 20A of the *Traffic Act.* The effect of such a notice is that the accused person is by force of s 20A disqualified from driving a motor vehicle and any licence held by that person is suspended until the charge is determined by a court. It seems the appellant did not attend court when the matter was next mentioned. The appellant failed to answer his bail on 30 November 2000.

[3] The appellant did not come to police attention again until 22 December 2001. On that occasion he was driving a Toyota Landcruiser on East Point Road at Fannie Bay when he was directed to enter a random breath testing station. He supplied a sample of breath and as a result was arrested and the subsequent breath analysis returned a blood alcohol reading of 0.202 percent. He was asked to produce his driver's licence but indicated that it was "at home in Elcho". He provided a false name and a false date of birth. After his identity had been established a check of the licence details relating to his name revealed that he had been issued with the notice pursuant to

s 20A of the *Traffic Act* in November 2000. When asked why he was driving whilst disqualified he said: "I was going to Nightcliff". At the time of driving he had one child and two adult passengers in his vehicle.

[4] The court was told that the appellant was from Port Moresby and that he came to Australia at the age of 14. He underwent schooling on Thursday Island and then he worked in Townsville. He has worked on the railways and as a furniture removalist. He has been in a permanent de facto relationship with his wife for a period of some twelve years and the Court was told they have a good relationship and he assists her in taking care of the children. He is aged 44 years and has no prior convictions.

[5] In relation to the offences that occurred in November 2000 he had gone to Katherine intending to see his sister but had missed her. He then got drunk and drove. No further information in relation to either offence was placed before his Worship. It was not suggested that there was any reason for the appellant's conduct on either occasion. Nothing was put to the sentencing Magistrate that would explain his actions. In discussions with counsel his Worship confirmed that the appellant lived at Ramingining and that an order for home detention was not available at that location.

[6] As to the events that occurred on 26 November 2000 the appellant was dealt with for three offences. In relation to driving a motor vehicle with a blood alcohol concentration of 0.234 percent he was convicted and fined $500 with a victim levy of $20. He was disqualified from driving for 15 months with

effect from 26 November 2000 being the date upon which he was disqualified pursuant to s 20A of the *Traffic Act*. On the charge of driving an unregistered motor vehicle he was fined $200 with a victim levy of $20. On the charge of driving a motor vehicle that did not have a current compensation contribution on a public street he was fined $500 with the victim levy of $20. He was allowed 28 days to pay the fines.

[7] In relation to the offences that occurred on 22 December 2001 he was dealt with on four matters. On the charge of driving disqualified he was convicted and sentenced to two months imprisonment and disqualified from driving for a period of twelve months with effect from 14 February 2002. On the charge of providing false information to a member of the police force he was convicted and sentenced to fourteen days imprisonment concurrent with the earlier sentence. On the charge of driving with a blood alcohol reading of 0.202 percent he was convicted and sentenced to three months imprisonment cumulative upon the earlier sentences.

[8] The total effective sentence of imprisonment was for a period of five months. His Worship directed that the sentence be suspended after the appellant had served a period of three months of the five months imprisonment and specified pursuant to s 40(6) of the *Sentencing Act* a period of twelve months as the operational period. It was a condition of his release that he place himself under the supervision of a delegate of the Director of Correctional Services and obey all reasonable directions of the Director.

[9] The first ground of appeal was that the learned Magistrate erred in finding that a breach of a licence disqualification notice pursuant to s 20A of the *Traffic Act* was "just as serious as a breach of a disqualification order made by a court". It was submitted that disqualification under s 20A of the *Traffic Act* is the result of administrative action required of a police officer whilst other disqualification is imposed by a court following a finding of guilt.

[10] Reference to the *Traffic Act* and in particular to s 31(1) reveals that the penalty for driving whilst disqualified is a maximum penalty of twelve months imprisonment and is the same whether the original disqualification arose from an administrative act or by order of a court. The section does not distinguish between the two. In *Crook v Roberts* (1990) 53 SASR 236 Bollen J observed (at 238) that the real gravamen of all offences of driving whilst disqualified is that:

> "No matter whether it be a court or the Registrar which or who imposes an order of disqualification, it is an exercise of power given by Parliament in the *Motor Vehicles Act* or in the *Road Traffic Act* 1961. It is the law speaking and saying that someone shall for a time be disqualified from holding or obtaining a licence. It is the exercise of that power given by that law which must be protected. Persons who act in defiance of an order, even one imposed by the Registrar, are acting in defiance or contempt of the law."
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> See also *Maione v Higgins* (1991) 13 MVR 73 at 75 per Olsson J.

[11] In my view his Worship was correct in proceeding on the basis that an offence of driving disqualified where the disqualification results from the

issue of a notice under s 20A of the *Traffic Act* was just as serious as a breach of a disqualification order made by a court. The circumstances of the disqualification may be relevant to sentence if they serve to explain the conduct of the offender in driving whilst disqualified or provide other circumstances of mitigation eg if the fact of disqualification was not made clear to the offender for one reason or another. That was not a matter raised in these proceedings and, in my opinion, his Worship was correct in proceeding as he did.

[12] The second ground of appeal was the complaint that the learned Magistrate failed to give the appellant an opportunity to address the prospect of the appellant being sentenced to a term of imprisonment in relation to the second offence against s 19(2) of the *Traffic Act* and also in relation to the offence of providing false information pursuant to Regulation 9(4) of the *Traffic Regulations*. It was submitted that the appellant was not accorded procedural fairness.

[13] With respect to Mr Read, who appeared on behalf of the appellant, a reference to the transcript does not support his submissions. It was clear throughout the proceedings that a term of imprisonment was contemplated by his Worship and this was particularly so in relation to the offence of driving whilst disqualified. The prosecutor also called for a sentence of imprisonment in relation to the offences against s 19(2) of the *Traffic Act*. At one point in the transcript the prosecutor is recorded as making the following submission to his Worship:

> "The juxtaposition of the two readings within 13 months of each other are, even without the charge of drive disqualified, enough to set this Court to considering a term of imprisonment in respect of this defendant."

[14] The submission was made by the prosecutor that each of the offences was "a high range exceed 08". It was submitted that "the practice of this Court and the protection of the community point to a sentence of imprisonment to be actually served in respect of the two close together high range drink driving offences which display a lack of concern for the safety of the community by the defendant." The submissions made to his Worship and the discussion that took place with his Worship made it clear that the prosecution was calling for a sentence of actual imprisonment in respect of the offences against s 19(2) of the *Traffic Act*. In my view it cannot be suggested that the sentence of imprisonment imposed came as a surprise or that counsel for the appellant in the proceedings before his Worship should not have anticipated such a sentence when making submissions to his Worship. The discussion centred upon the fact that a term of imprisonment was likely to result from all of the offending and counsel had the opportunity to address all relevant matters in light of that understanding. I do not accept that the appellant was not accorded procedural fairness.

[15] The final ground of appeal was that the sentences, in all the circumstances, were manifestly excessive. I was provided with a schedule of penalties imposed upon a range of offenders who had been dealt with for offences contrary to s 19(2) of the *Traffic Act* and s 31(1) of that Act. The

information provided in relation to each of the offenders and each of the offences included in the schedule was limited and I found the schedule largely unhelpful. In relation to the s 19(2) offences it revealed that a wide range of penalties was imposed including sentences of imprisonment of up to six months. In relation to offences of driving whilst disqualified penalties of up to ten months imprisonment were imposed. The circumstances of the offences were not described and the reasons for more severe penalties were not explained in the document. The schedules were not of much assistance. No assistance was provided in relation to penalties applicable to the offence of providing false or misleading information contrary to Regulation 9(4) of the *Traffic Regulations*.

[16] The principles applicable to an appeal against sentence are well known. The exercise of the sentencing discretion will not be disturbed on appeal unless error in that exercise is shown. There is a presumption that there has been no error. The appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence was insufficient or excessive. It interferes only if it can be shown that the sentencing Magistrate 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 Magistrate said in the course of the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. The onus rests upon the appellant to demonstrate that the sentencing discretion of the learned Magistrate was

improperly exercised. If it is contended that the sentence is manifestly excessive the appellant must demonstrate that the sentence is not just excessive, but that it is manifestly so.

[17] The focus of the submissions made on behalf of the appellant in relation to this ground was the penalty imposed for the offence against s 19(2) of the *Traffic Act* that occurred in December 2001. In my view his Worship was correct in treating that offence as more serious than the earlier offence even though, as his Worship acknowledged, the appellant was to be regarded as a first offender in each matter. The December 2001 offence involved a high reading in circumstances where the appellant had in his vehicle a child and two adults as passengers. It occurred whilst the appellant was driving in a populated area on a major thoroughfare. It also occurred in circumstances where the appellant was at large in breach of bail conditions imposed in relation to the earlier matter, which itself involved a high reading. This was a more serious example of offending under this provision of the *Traffic Act*.

[18] In this case his Worship had regard to all of the matters relevant to the sentencing process. I have reviewed each of the sentences and have considered them in their totality. Whilst the sentences imposed by his Worship may be seen to be stern, in my opinion, they are not manifestly excessive.

[19] The appeal is dismissed.

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