Foster v Cornford [2010] NTSC 58

PARTIES:	FOSTER, Keith
	v
	CORNFORD, Michael
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA5 of 2010 (21010514)
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 – DRIVING WHILE UNLICENSED

Appeal against severity of sentence – disqualification order outside standard range – sentence manifestly excessive – appeal allowed – sentence set aside.

Daniels v R (2007) 20 NTLR 147, followed.

REPRESENTATION:

Counsel:

Appellant:	M O'Reilly
Respondent:	M McColm

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Mar1020
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Foster v Cornford [2010] NTSC 58
No. JA 5 of 2010 (21010514)

BETWEEN:

KEITH FOSTER
Appellant

AND:

MICHAEL CORNFORD
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered *ex tempore* 11 August 2010)

Introduction

[1] This is an appeal against an order disqualifying the appellant from holding or obtaining a driver's licence for a period of six months. The disqualification was imposed in respect of an offence of driving while unlicensed. In respect of that and other offences, fines were also imposed but the appeal relates only to the order for disqualification.

[2] In substance the appellant complains that the disqualification amounted to a manifestly excessive sentence. For the reasons that follow, the appeal is allowed.

Facts

[3] The facts of the offending were unremarkable. On the morning of Sunday 28 March 2010 the appellant drove a motor vehicle north on the Stuart Highway from Ti Tree towards Tennant Creek. He was stopped for a licence check and a breath test and, when asked if he had a current driver's licence, the appellant replied 'No.' Asked if there was an emergency reason for driving, the appellant replied 'Yeah, I've been to a funeral in Ti Tree, at out bush.'

[4] The appellant's driver's licence expired on 16 December 1997. Registration and insurance on the vehicle had expired on 22 January 2010.

[5] The appellant did not appear in answer to his bail. The Magistrate proceeded ex parte and was, therefore, deprived of any information about the personal circumstances of the appellant except the information derived from a record of the appellant's prior offending which dated back to 1979 and included numerous offences against the road traffic laws. Of significance were seven previous offences of driving while unlicensed committed in 1984, 1986, 1992, 1993, 1997, 2005 and 2006. On each occasion fines were imposed and on two of those occasions the appellant had also been driving with an excessive level of alcohol. Only the 1997 offending involved an unregistered and uninsured vehicle.

Licence Disqualification

[6] The licence disqualification for six months was imposed in respect of the offence of driving while unlicensed. In support of the contention that such a disqualification amounted to a manifestly excessive sentence, counsel for the appellant referred to a schedule of penalties for driving unlicensed tendered in another Justices Appeal heard in the current sittings. The schedule set out penalties for driving unlicensed imposed in the Court of Summary Jurisdiction between 19 January and 28 July 2010. It was not suggested that the schedule contained all sentences imposed for this offence during that period, rather, counsel endeavoured to produce a useful representative sample in an effort to demonstrate the current range for offences of this type.

[7] Notwithstanding that many of the offenders had prior convictions for driving without a licence or driving while disqualified, none of the offences contained in the schedule resulted in periods of disqualification. Fines ranged from $80 to $500. Higher fines were imposed by way of aggregate fines for driving without a licence coupled with other road traffic offences.

[8] The appellant has demonstrated that a licence disqualification for 12 months for an offence of driving without a licence is outside the range of penalties commonly imposed for this offence. However, the mere fact that it is outside the standard range does not necessarily establish that the sentence is manifestly excessive. The proper role of sentencing standards was

explained by the Court of Criminal Appeal in the following passage from the joint judgment of Martin (BR) CJ and Riley J in *Daniels v R*:[1]

> "The role of sentencing standards must be properly understood. They do not amount to a fixed tariff, departure from which will inevitably found a good ground of appeal. We respectfully agree with the observations of Cox J in *R v King* (1988) 48 SASR 555 as to the proper role of sentencing standards (at 557):
>
> > … In a word, this case is about sentencing standards, but is it important, I think, to bear in mind that when a standard is created, either by the cumulative force of individual sentences or by a deliberate act of policy on the part of the Full Court, there is nothing rigid about it. Such standards are general guides to those who have to sentence in the future, with certain tolerances built into or implied by the range to cater for particular cases. The terms of approximation in which such standards are usually expressed – 'about' and 'of the order of' and 'suggest' and so on – are not merely conventional. … It follows that a particular sentence will not necessarily represent a departure from the standard because it is outside the usual or nominal range; before one could make that judgment it would be necessary to look at all of the circumstances of the case. Those circumstances will include, but of course not be confined to, the questions whether or not the offences charged are multiple or single and whether the defendant is a first offender with respect to the particular crime charged. That is not to undermine the established standard but simply to acknowledge that no two cases, not even two 'standard' cases, are the same. …"

[9] The circumstances of the appellant's offending in driving without a licence were typical of the cases that come before the Court of Summary Jurisdiction. There was nothing in the circumstances of the appellant's offending to remove it from the 'ordinary' or 'run of the mill' offending of

[1] (2007) 20 NTLR 147 at 152.

this type. The offence of driving without a licence was not accompanied by excessive concentration of alcohol or bad driving.

[10] In these circumstances the Crown has conceded that the disqualification for six months was manifestly excessive. This was a proper concession. Disqualification for six months was so far outside the prevailing range of penalties as to be manifestly excessive and demonstrable of error. The appeal is allowed for the purpose of setting aside the period of disqualification.
