

Doherty v Trenerry [1999] NTSC 111

PARTIES: IAN PAUL DOHERTY
v
ROBIN LAURENCE TRENERRY

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: JA47 of 1999

DELIVERED: 21 October 1999

HEARING DATES: 27 September 1999

JUDGMENT OF: MARTIN CJ

REPRESENTATION:

Counsel:

Appellant: D. Conidi
Respondent: A. Fraser

Solicitors:

Appellant: North Australian Aboriginal Legal Aid
Service
Respondent: Office of the Director of Public
Prosecution

Judgment category classification: C
Judgment ID Number: mar99030
Number of pages: 7

mar99030

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Doherty v Trenergy [1999] NTSC 111
No. JA 47 of 1999

BETWEEN:

IAN PAUL DOHERTY
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 21 October 1999)

Appeal against sentence

- [1] On 7 May 1999 the appellant was convicted in the Court of Summary Jurisdiction at Darwin, upon his pleas of guilty to three charges, arising out of the one incident on 6 September 1998. For unlawful use of a motor vehicle causing damage in excess of \$1000, he was sentenced to the mandatory minimum of 14 days imprisonment, for driving that motor vehicle without undue care he was fined \$500 and for driving it whilst disqualified was sentenced to three months imprisonment, which was wholly suspended. The operational period fixed was five years. The appellant was also disqualified from holding or obtaining a licence for five years.

- [2] The maximum penalty for driving a motor vehicle whilst disqualified is 12 months imprisonment (s 31(1)(a)). There is no statutory limitation upon the period for which the appellant could have been disqualified for holding a licence (*Traffic Act* s 31(1)). Five years is the maximum which can be fixed as the operational period (s 40(6)).
- [3] The appeal proceeded upon the limited ground that the learned sentencing magistrate erred in fixing the operational period at five years in that it was disproportionate to the gravity of the offence, his Worship failed to give sufficient weight to the circumstances of the appellant and took into account their relevant considerations. They are bound together.
- [4] The order suspending the sentence of three months was not subject to any conditions. However, if the appellant commits another offence punishable by imprisonment during the operational period he may be obliged to actually serve the term of the sentence (*Sentencing Act* s 40(6) and s 43).
- [5] The circumstances of the offending were that the appellant took one of his employer's motor vehicles without permission to go to buy food for himself. He had unsuccessfully sought to catch a taxi. The appellant had been disqualified from holding a driver's licence for five years on 11 August 1998. Whilst driving the motor vehicle he collided with another at an intersection. The collision was reported to police and when interviewed the appellant said that it had rained, the windscreen of the vehicle became fogged and he could not clearly see the other vehicle.

- [6] The appellant is 26 years of age. His mother died when he was aged two and he lived in foster homes in Victoria until coming to the Territory to live with his grandparents. They returned to Melbourne a few years ago and he found a home here with a man and his son who both took their own lives in 1997. He had lived with them for five years. Those deaths had a significant affect upon the appellant and provides a background to his earlier offending. He had maintained a good employment record since leaving school in 1989.
- [7] When before the Court of Summary Jurisdiction he was living with an elderly couple, Mr and Mrs Harding. Mr Harding suffers from a serious spinal injury and the appellant had been helping them with day to day needs including physical chores, such as lifting and loading Mr Harding's wheelchair, shopping and heavy work around the house. According to Mrs Harding, the alcohol and drug abuse which appears to have had their origin as a consequence of the deaths, had been overcome by the appellant's own volition.
- [8] The pleas of guilty to the charges were only indicated upon the day set down for contested hearing and after the appellant had obtained complete disclosure of the prosecution case. It does not carry much weight, given the nature of the charges and the appellant's own knowledge of the facts. His Worship so treated it and there is no complaint about that.
- [9] The matter to which is Worship paid particular attention, was the charge of driving whilst disqualified. He noted that the disqualification order had

been made just a month before the offence was committed and the circumstances in which it was committed. As to the disqualification for five years, his Worship noted that is effectively increased to total period of disqualification by 10 months (taking into account the date of the earlier disqualification and the date of the hearing). No complaint is made about that.

[10] The sentence of three months imprisonment was imposed taking into account the appellant's prior convictions for driving offences. They included "exceed .08 per cent" in March 1997, for which he was fined \$300 and disqualified for 12 months and "exceed .08 per cent" on 11 August 1998, for which he was fined \$650 and disqualified for the period of five years. It was that disqualification which the appellant breached on 6 September 1998.

[11] The only remarks made by his Worship as to the fixing of the operational period relating to the suspended sentence was "the suspended sentence is for driving disqualified".

[12] Assuming correct sentencing principles, and there is nothing to indicate otherwise, the punishment by way of a sentence to a term of imprisonment of three months, was fixed by his Worship taking into account all relevant factors. Suspending the sentence was an exercise of a further discretionary power with the intention of aiding the rehabilitation of the appellant. He was given an incentive to avoid further trouble by making that imprisonment contingent upon his committing a further imprisonable offence. He would

then stand liable to serve the term and suffer any punishment for the breaching offence. The obvious intention was to insure that if the appellant drove a motor vehicle whilst disqualified again during the operational period he would not only be punished for that but be liable to serve the three months. However, as already noted the appellant was at much greater risk of having to serve the three months than that, or it could be activated regardless of the nature of the imprisonable offence including offences covered by the mandatory sentencing regime (as to the operation of s 43(7) see *Wilson v Taylor* (1997) 113 NTR1).

[13] It strikes me as being incongruous that an operational period of five years (the maximum available) has been fixed in relation to a sentence of three months in respect of an offence where the maximum penalty is imprisonment for 12 months.

[14] My researches of the text on sentencing in Australia, Canada and England shed no light on the considerations to be taken into account in determining the operational period. The Australian Criminal Reports provide no cases on the subject (in ex parte *Brown: re McIntosh* (1988) 87 WN (Pt 1) (NSW) the Court of Appeal was dealing with a sentence of two months suspended for two years but on grounds not going to the sentence itself).

[15] The appellant had not previously been convicted of driving whilst disqualified. Applying by analogy the principle that the maximum penalty for an offence is fixed for the worst type of offending, this was not of that

character but the operational period, undoubtedly a form of punishment, was the maximum.

[16] Counsel for the appellant provided this Court with a summary of 28 cases decided in the Court of Summary Jurisdiction of recent times involving convictions for driving whilst disqualified. As here, many of those cases involved other motor vehicle offending committed at the same time, often quite serious. The antecedents of the offenders varied considerably, as did their prior records and the length of time after disqualification until they committed the offence. Of the 28 cases, 18 concerned offenders who had not previously been convicted of driving whilst disqualified. Of those, seven received fully suspended sentences, four of them for 12 months and three for 18 months, three people were fined, seven had sentences of imprisonment suspended upon the making of a home detention order and one was obliged to carry out community service. Counsel for the respondent pointed out that in some cases the sentences also involved additional penalties but they must have been for convictions for associated offending.

[17] I do not consider that the information supplied establishes a tariff, the circumstances vary too much. What they demonstrate however, is that nothing like the maximum of the operational period has been fixed in any circumstances, even where the period of disqualification was five years, six cases.

[18] If the offender ever drives whilst disqualified again, the fact of this conviction and the sentence imposed will be on his record to be taken into account regardless of when the offence takes place. Whether he is obliged to serve the three months will depend upon whether the further offending occurs during the operational period and the exercise of discretion by the sentencing court.

[19] The appellant may have been fortunate in that no home detention order was made after suspension of the sentence as had happened in some cases. Nevertheless, I consider that the maximum operational period exceeded that which could be arrived at in the exercise of sound judicial discretion. I recognise what his Worship had in mind, the disobedience of a court order will not usually be treated lightly and he sought to reinforce that for the whole of the disqualification period. However, it would be more in line with the trend of practice in that court in matters of this kind that the operational period bear some relationship to the sentence suspended and be reduced if accompanied by a home detention order.

[20] No specific error is assigned to his Worship in arriving at the fixing of the operational period. It is however, manifestly excessive and must be set aside. In lieu thereof the operational period fixed in relation to the suspended sentence is two years.
