Stuart v Malogorski [2011] NTSC 85

PARTIES:	**Stuart, Russell**
	v
	Malogorski, Mark Anthony
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 60 OF 2010 (21031295)
DELIVERED:	20 October 2011
HEARING DATES:	6 APRIL 2011
JUDGMENT OF:	KELLY J
APPEAL FROM:	E MORRIS SM

REPRESENTATION:

Counsel:

Appellant:	J Adams
Respondent:	D Jones

Solicitors:

Appellant:	John W M Adams
Respondent:	Office of the Director for Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	KEL 11022
Number of pages:	5

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

Stuart v Malogorski [2011] NTSC 85
No. JA 60 of 2010 (21031295)

BETWEEN:

RUSSELL STUART
Appellant

AND:

MARK ANTHONY MALOGORSKI
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 20 October 2011)

[1] On 4 November 2010, the appellant appeared before the Darwin Court of Summary Jurisdiction and pleaded guilty to driving a vehicle on the Stuart Highway with a high range blood alcohol content namely, 0.152%, contrary to s 21(1) of the *Traffic Act*.

[2] Despite the guilty plea, the appellant has appealed to this Court against his conviction based on material which has become apparent to him since the plea was entered. On 6 April 2011, I made an order allowing the appeal and setting aside the conviction. I indicated that I would publish reasons at a later date. These are those reasons.

[3] On 4 November 2010, after the appellant entered his plea, the facts relating to the charge were read to the court and admitted by the appellant. The learned Magistrate subsequently convicted the appellant and sentenced him to three months imprisonment as well as disqualifying him from obtaining a drivers licence for five years from 16 September 2010. This period of disqualification was arrived at by applying the mandatory minimum disqualification period prescribed by s 21 of the *Traffic Act*.

[4] The appellant filed a notice of appeal on 3 December 2010 citing three grounds of appeal. He has abandoned two of those grounds. The only ground argued was that the appellant did not properly understand the charge and the consequences of him entering a plea of guilty.

Matters ascertained since the hearing

[5] The respondent has drawn to the attention of the Court the following matters which came to light after the hearing.

(a) At 11:08 p.m. on 16 September 2010, the appellant provided a sample of breath for analysis (the first sample).

(b) From the first sample a reading of 0.152% breath alcohol content was ascertained.

(c) After providing the first sample the appellant asked police to conduct a blood test. Due to the location and the time the arresting police officers formed a view it would be impractical to obtain a blood test,

so the appellant asked to provide a further sample of breath analysis, as he was entitled to do under s 29AAD(2) of the *Traffic Act*.

(d) At 11:21 p.m. on 16 September 2010, the appellant provided a further sample of breath for analysis (the second sample).

(e) From the second sample a reading of 0.146% breath alcohol content was ascertained.

(f) On 30 September 2010, Ms Franz of the Northern Territory Legal Aid Commission sent representations to police prosecutions asking that the second reading be taken into account in relation to the matter.

[6] Similar information appears in the affidavit of the appellant sworn on 22 February 2011. Leave was sought and obtained to rely on that affidavit on the hearing of the appeal. It seems that what occurred is that the reading from the first sample was read into the Crown facts by the prosecutor in error and neither the appellant nor his counsel picked up the mistake at the time before agreeing to the facts for the purpose of the plea.

Relevant provisions of the *Traffic Act*

[7] Under the *Traffic Act* a reading of 0.152% breath alcohol content is a high range reading[1] and a reading of 0.146% breath alcohol content is a medium range reading.[2]

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1 *Traffic Act* s 19.

2 *Traffic Act* s 19.

[8] After giving a sample of breath for analysis, a person may seek and/or may be required to complete a further breath analysis, [3] and if more than one breath analysis is conducted, it is the lower reading which is taken to be the person's breath alcohol content at the time.[4]

[9] In this case, however, it was the higher of the two readings which was read into the Crown facts. As a result the charge before the learned Magistrate was incorrect: the charge should have been that of driving a motor vehicle with a medium range breath alcohol content under s 22, rather than with a high range breath alcohol content under s 21, to which the appellant pleaded guilty by mistake.

[10] Under the *Traffic Act* offences for driving a motor vehicle with a low range, medium range and high range breath or blood alcohol content are separate and distinct offences. Each is dealt with in a different section, [5] attracts different penalties for both initial and subsequent offences, and different mandatory minimum disqualification periods depending upon the frequency of offending.

[11] From the affidavit filed on the appeal and the facts admitted by the respondent, it appears that, by error, the appellant pleaded guilty to and was sentenced on an incorrect charge.

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3 *Traffic Act* s 29AAD.

4 *Traffic Act* s 29AAT(3).

5 Section 21 deals with high range breath or blood alcohol content, s 22 with medium range and s 23 with low range.

Disposition of the appeal

[12] On the hearing of the appeal, on the invitation of counsel for the respondent (who noted that pursuant to s 52 of the *Justices Act* the time limit for laying a fresh complaint or amending the current complaint had expired) the appellant sought and was granted leave to amend the notice of appeal to seek an order setting aside the conviction, and by consent I allowed the appeal and set aside the conviction.