Frank v Cassidy [2010] NTSC 54

PARTIES:	FRANK, Daniel v CASSIDY, Craig
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 14 of 2010 (21016024) JA 15 of 2010 (20941221)
DELIVERED:	9 August 2010
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JUDGMENT OF:	MARTIN (BR) CJ
APPEAL FROM:	Mr Neill SM

CATCHWORDS:

CRIMINAL LAW – SENTENCING – ROAD TRAFFIC OFFENCES – DRIVING WHILE DISQUALIFIED – BREACH OF SUSPENDED SENTENCE
Appeal against severity of sentence – whether Magistrate erred in failing to consider principle of totality – whether Magistrate erred in using maximum penalty as starting point – circumstances of offence not in worse category – sentence manifestly excessive – appeal allowed – sentence set aside.

Daniels v The Queen (2007) 20 NTLR 147, followed.

REPRESENTATION:

Counsel:

Appellant:	M O'Reilly
Respondent:	I McMinn

Solicitors:

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

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

Frank v Cassidy [2010] NTSC 54
Nos. JA 14 of 2010 (21016024) and JA 15 of 2010 (20941221)

BETWEEN:

DANIEL FRANK
Appellant

AND:

CRAIG CASSITY
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered *ex tempore* 9 August 2010)

Introduction

[1] This is an appeal against a total sentence of ten months imprisonment, comprised of eight months for driving while disqualified and the restoration of two months in respect of a breach of a suspended sentence. In substance, the appellant submitted that the learned Magistrate, Mr Neill SM, erred in failing to take into account adequately the principle of totality, and in imposing an individual sentence and total period that were manifestly excessive.

[2] For the reasons that follow, the appeal will be allowed.

Facts

[3] On 17 December 2009, a different magistrate imposed a sentence of four months imprisonment, suspended after service of two months for the offences of failing to provide breath for analysis and driving while disqualified. The sentence was suspended on conditions which included supervision and admission to the Central Aboriginal Alcohol Prevention Program, CAAAPU. It was also a condition that for a period of nine months the appellant not consume or purchase alcohol.

[4] Although the appellant attended at CAAAPU, his attendance was unsatisfactory, and he absconded on a number of occasions. Each time, in the words of his counsel before the Magistrate, 'he picked himself back up' and returned to CAAAPU. At the age of 25 the appellant has a serious problem with alcohol, and not surprisingly, his efforts at rehabilitation have been set back from time to time by relapses into the abuse of alcohol.

[5] On 12 May 2010, in breach of the suspended sentence, the appellant drove a motor vehicle while disqualified. He was also seriously affected by alcohol. Counsel informed the Magistrate that the appellant had been drinking at Larrapinta Camp where he was visiting family. Intending to travel home, there was to-ing and fro-ing about who was to drive the car and, believing he was the least intoxicated, the appellant agreed to drive.

[6] Police stopped the appellant on South Terrace in Alice Springs where he was subjected to a roadside breathtest. There is no suggestion that the attention

of the police was drawn to the vehicle by the manner of driving. The appellant had bloodshot eyes and smelt of alcohol. He was arrested and a breath analysis conducted at the watchhouse returned a reading of 0.185 percent. When asked his reason for driving, the appellant told police that he had been forced to do so.

[7] It was on 20 March 2009 that the appellant had been disqualified for a period of five years.

Prior Offending

[8] Although the appellant is only 25 years of age, he has a poor driving record commencing in 2005. The matter under consideration was his sixth drive while disqualified. On this occasion, the appellant also drove with an excessive concentration of alcohol, and it was his fourth offence of driving with a high range level of alcohol.

Sentences

[9] Fines were imposed for the other driving offences. The balance of the previous sentence of two months was restored, and it was directed that it be served cumulatively upon the sentence of eight months imposed for the offence of driving while disqualified. This gave a total sentence of ten months.

Conclusion

[10] In support of the complaint that the sentence of eight months imposed for the offence of driving while disqualified was manifestly excessive, counsel for the appellant tendered a schedule of sentences imposed in the Court of Summary Jurisdiction for this offence between 14 December 2009 and 5 August 2010. It was not suggested that the schedule contains every sentence for this offence during that period, rather, counsel has endeavoured to produce a useful representative sample in an effort to demonstrate the current range for offences of this type.

[11] The longest individual sentence in that period was six months imposed on an offender who had six prior convictions for driving while disqualified, and seven for driving with an excessive level of alcohol. Sentences for offenders with prior convictions for driving while disqualified are more commonly in the range of two to five months. Viewed in isolation, the sentence of eight months appears to be above the current range.

[12] The role of a current sentencing range, or standard, was explained in the joint judgment of Martin (BR) CJ and Riley J in *Daniels v The Queen*:[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

[1] (2007) 20 NTLR 147 at 152 [29].

> 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. …"

[13] There was nothing in the circumstances of the appellant's offending to remove it from the 'ordinary' or 'run-of-the-mill' offending of this type. It was the sort of offending with which the Court of Summary Jurisdiction is repeatedly required to deal. The circumstances were typical. The offender was prevailed upon by others to drive. This was not a case of an offender who simply thumbed his nose at the previous court order.

[14] The circumstances were not such as to place this particular offending within the worst category of offences of this type. The maximum penalty for this offence is imprisonment for 12 months, and the maximum must be reserved for offences properly categorised as falling within the worst category.

[15] It appears that the Magistrate may have used a starting point in the order of the maximum because, after allowance of approximately 25 percent for a

plea, the starting point of 12 months would give a sentence of nine months. It is not known precisely what starting point was used, but it must have been either the maximum or close to it.

[16] Having regard to the current range of sentences, the Crown has properly conceded that this sentence was outside that current range, and that the appellant has succeeded in demonstrating that the sentence was manifestly excessive. That concession was properly made.

[17] While there was no apparent error in the approach of the Magistrate, and his Honour was well aware of all the relevant factors. In some unspecified way his Honour has erred in imposing a penalty which is so far outside the current range of sentences for offending of this type, as to result in a sentence which is manifestly excessive and demonstrative of error.

[18] As to re-sentencing, there can be no doubt that a sentence of imprisonment is the appropriate sentence. The appellant has repeatedly offended by driving while disqualified and previous penalties, including sentences of imprisonment, have failed to deter him.

[19] The first sentence of imprisonment for driving while disqualified was a period of six weeks imposed in February 2008. That sentence was suspended after service of two weeks. At the same time, the appellant was sentenced to a period of four weeks imprisonment for the same offence committed earlier in September 2007.

[20] On 19 March 2009 the appellant again drove with a high range blood alcohol level and while disqualified. On 20 March 2009 an aggregate sentence of imprisonment for three months was imposed which the appellant was required to serve.

[21] The appellant again drove while disqualified; this time on 3 December 2009, and on this occasion he failed to provide breath for analysis. On 17 December 2009, an aggregate sentence of imprisonment of four months was imposed, and suspended after two months.

[22] As can be seen from this brief summary, the sentences imposed on the appellant for this type of offending, coupled with alcohol-related offences, started at six weeks and then incrementally increased through three months to four months imprisonment.

[23] The appellant has well and truly exhausted any entitlement to leniency, and has demonstrated that personal deterrence is an important factor in sentencing. Somehow, it must be brought home to the appellant that he cannot continue to drive while disqualified, nor can he continue to drink and drive.

[24] Notwithstanding the appellant’s bad record and the need to impose a sentence of imprisonment in order to reflect the requirements of both general and personal deterrence, as I have said, in my view the period of eight months was so far outside the prevailing standard as to be manifestly

excessive and demonstrable of error by the magistrate. In these circumstances, the sentence must be set aside.

[25] In my view, after allowing a reduction in the order of 25 percent to reflect the plea, the appropriate sentence is one of five months imprisonment.

[26] As to the restoration of the balance of the previously suspended sentence, being a period of two months, in my view, a degree of accumulation is appropriate. I have decided that one month of that restored sentence should be served cumulatively, making a total sentence of six months.

[27] In making that order, I do not mean to imply that it was beyond the range of the sentencing discretion for the Magistrate to determine that the entire period of two months should be served cumulatively.

[28] The formal order of the Court is the appeal allowed, the sentence of eight months imprisonment and the order that the two-month sentence restored be served cumulatively upon the eight months, are set aside. I substitute a sentence of five months imprisonment, and direct that of the sentence of two months restored, one month be served cumulatively, making a total sentence to be served of six months imprisonment.