Burnham v Westphal [2012] NTSC 2

PARTIES:	BURNHAM, Joseph v WESTPHAL, Lindsay
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	30 of 2011 (21027198)
DELIVERED:	6 January 2012
HEARING DATES:	11 August and 1 September 2011
JUDGMENT OF:	SOUTHWOOD J

CATCHWORDS:

APPEAL AGAINST SENTENCE – Traffic offence - driving with a high blood alcohol content – disqualification from driving for five years – prior interstate convictions for similar offences – whether territorial limitation to be given to aggravated penalty section – *Traffic Act* (NT), s 21(2), s (4) – Appeal dismissed

Misuse of Drugs Act 1990 (NT) s 37
Traffic Act (NT) s 19, s 20, s 21, s 22, s 23

Road Traffic Act 1974 (WA) s 63

Dinsdale v The Queen (2000) 202 CLR 321; *Hampton v the Queen* [2008] NTCCA 5, followed

Australian Securities Commission v Marlborough Gold Mines Ltd (1993) 177 CLR 483; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, considered

Director of Public Prosecutions v Beauman [2005] 64 NSWLR 634; *R v R W Collins* [1976] 12 SASR 498; *R v Green* [1982] 2 NSWLR 933, distinguished

REPRESENTATION:

Counsel:

Appellant:	R Goldflam
Respondent:	C Roberts

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
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

Burnham v Westphal [2012] NTSC 2
No. 30 of 2011 (21027198)

BETWEEN:

JOSEPH BURNHAM
Appellant

AND:

LINDSAY WESTPHAL
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 6 January 2012)

Introduction

[1] This is an appeal against sentence. The appellant appeals against the length of his disqualification from obtaining a driver's licence.

[2] On 9 May 2011 the appellant was convicted by the Court of Summary Jurisdiction of driving a motor vehicle in Alice Springs on 14 August 2010 while having a high range blood alcohol content of .174 per cent.[1] His driver's licence was cancelled and he was disqualified from obtaining a

[1] Contrary to s 21(1) of the *Traffic Act* (NT).

driver's licence for five years.[2] He was also fined $665 and ordered to pay a victim levy of $40.

[3] The basis of the appellant's disqualification from holding a Northern Territory driver's licence for five years was his prior conviction for driving a motor vehicle on 16 August 2008 in Western Australia while under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle. On that occasion he had a blood alcohol content of .153 per cent. He was convicted of this offence, which is an offence contrary to s 63(1) of the *Road Traffic Act 1974* (WA), by the Magistrates Court in Kalgoorlie on 18 September 2008.

[4] The sentencing Magistrate held that the appellant's prior conviction in Western Australia for driving under the influence of alcohol enlivened the aggravated penalty provisions of s 21(4)(a) of the *Traffic Act* (NT). His Honour found that the driving offence the appellant committed in Western Australia on 16 August 2008 was "a high range blood alcohol content" offence within the meaning of s 21(4)(a) of the Act which was committed within three years before the offence for which the appellant was sentenced in Alice Springs on 9 May 2011. This meant that the appellant's driver's licence was automatically cancelled and the sentencing Magistrate was required to disqualify him from obtaining a licence for a minimum mandatory period of five years.

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[2] s 21(4) of the *Traffic Act* (NT).

The grounds of appeal

[5] The grounds of appeal are: (1) the sentencing Magistrate erred in imposing a disqualification period of five years under s 21(4) of the *Traffic Act* (NT); and (2) a disqualification period of five years is manifestly excessive.

[6] The principal issue in the appeal is – were the aggravated penalty provisions of s 21(4)(a) of the *Traffic Act* (NT) enlivened by the appellant's conviction in Western Australia on 18 September 2008 of driving under the influence of alcohol? In other words, was the Western Australian offence an offence of "driving a motor vehicle with a high range blood alcohol content" within the meaning of s 21(4) of the *Traffic Act* (NT)? In my opinion, it was not. The sentencing Magistrate erred in law in applying s 21(4) of the *Traffic Act* (NT) in the appellant's case. An offence of "driving a motor vehicle with a high range blood alcohol content" is an offence which is committed in the Northern Territory contrary to the provisions of s 21(1) of the *Traffic Act* (NT) or the equivalent repealed provisions of the Act.

[7] Nonetheless, the appeal should be dismissed as the length of the appellant's disqualification from driving was not manifestly excessive.

The remarks of the sentencing Magistrate

[8] The sentencing Magistrate made the following remarks.

> Mr Burnham you have been through the wars in your life, probably your own fault but it is easy to say that. It is perhaps not entirely accurate either. I have been told of your dreadful experience with your daughter in 2008 and that certainly explains if not justifies [why

you] clearly were in a lot of bother with alcohol and driving in that year.

Your last offending in relation to drink driving was less than three years ago. That was in 2008. As a consequence of that I have no discretion about a minimum licence disqualification of five years. I see that is September 2008 you had a high blood level, blood alcohol reading, hence the requirements of the five years disqualification.

…

Today's conviction will be a second or subsequent offence … under this legislation.

…

There is no doubt that to be a relevant offence or to be a second or subsequent offence it must be an offence under this legislation. That is precisely what we are dealing with here today for the conviction I am about to impose.

[However] if [you have] been found guilty of driving with a blood alcohol content over .15 percent that is a high range blood alcohol content [offence].

The list of previous convictions in s 21(2) is not by [the language of the section] limited to Northern Territory convictions of that type.

I am satisfied that I have evidence before me in exhibits P1 and P2 which [establishes that Mr Burnham has prior] convictions within the past three years of driving under the influence of alcohol [with a blood] alcohol [content] of more than 0.15 percent. Indeed there is a specific one of 0.153 percent in Western Australia in September 2008.

Even if I accepted Mr Anderson's argument about how to interpret the [*Traffic Act* (NT)], and I have not accepted it, but even if I had, I would still regard a lengthy period of disqualification as necessary because your history of driving under the influence of alcohol is not limited to that dreadful period in 2008 in Western Australia. Your

convictions in Victoria and South Australia also bristle with this sort of offending.

The point comes when a more serious period of disqualification [must] be imposed and that is what I am doing today, although I am specifically relying upon s 21(4) of the *Traffic Act* (NT).

I notice your history of employment. It is an impressive one. There are an awful lot of people in Australia who could not boast of any such history of employment. I also note the circumstances [in which your offending has occurred]. Domestic disputes are a fairly common background for people driving under the influence [of alcohol]. It does not justify it but it does explain it.

You are now a man of 43 years. I have little doubt that your life is settling, if it has not already. I also note you propose to travel to Victoria, your state of origin, where you will hopefully undertake a new domestic relationship. Certainly you will be there to assist your mother. You are taking steps to transfer your employment [to Victoria] which again in my view is a sign of your responsibility ….

I also note the history of your volunteer work with Eyre Peninsula Bushfires, something I know a little bit about. I am aware of the extraordinary severity of those bushfires and the danger to all of the people who worked there. I hold it very much in your favour that you were positively involved in that terrifying ordeal …. No doubt the State of South Australia took that into account in your release date.

Under the circumstances, the formal orders I make are: (1) count two is dismissed; (2) you are convicted of count one; (3) you are fined $665 with a victim's levy of $40. You are disqualified from holding or obtaining a driver's licence for five years from 15 August 2010. That disqualification will operate in the State of Victoria.

Section 21 of the *Traffic Act* (NT)

[9] Section 21 of the *Traffic Act* (NT) states:

(1) A person who drives a motor vehicle with a high range blood alcohol content commits an offence.

Maximum penalty: For a first offence – 10 penalty units or imprisonment for 12 months.

For a second or subsequent offence – 20 penalty units or imprisonment for 12 months.

(2) An offence against subsection (1) (a ***relevant offence***) is a second or subsequent offence if the person has previously been found guilty of any of the following offences:

(a) driving with:

(i) a high range blood alcohol content; or

(ii) a medium range blood alcohol content;

(b) driving under the influence of alcohol or a drug;

(c) failing to provide a sufficient sample of breath for a breath analysis;

(d) failing to give a sample of blood for analysis;

(e) driving with alcohol in the blood (if the person, at the time of the previous offence, was of a class mentioned in section 24(1)).

(3) If a court finds a person guilty of a relevant offence, the person's licence to drive is automatically cancelled and the person is disqualified from:

(a) for a first offence – obtaining a licence for a period that is at least 12 months; and

(b) for a second or subsequent offence:

(i) obtaining a licence for a period (***mandatory period***) that is at least 18 months; and

(ii) if the mandatory period is less than 5 years – obtaining a licence other than an AIL licence for an additional period (***AIL period***) immediately after the mandatory period that is at least 12 months and not more than 3 years.

(4) However, if a court finds a person guilty of a relevant offence and the person has previously been found guilty of any of the following offences, committed within 3 years before committing the relevant offence:

(a) driving with a high range blood alcohol content;

(b) failing to provide a sufficient sample of breath for a breath analysis;

(c) failing to provide a sample of blood for analysis;

the person's licence to drive is automatically cancelled and the person is disqualified from obtaining a licence for a minimum period of 5 years.

(5) Also, if a court finds a person guilty of a relevant offence and the person has previously been found guilty of any of the following offences, committed within 3 years before committing the relevant offence:

(a) driving with a medium range blood alcohol content;

(b) driving under the influence of alcohol or a drug;

(c) driving with alcohol in the blood (if the person, at the time of the previous offence, was of a class mentioned in section 24(1));

and the person has also been previously found guilty at any time of committing any of the following offences:

(d) driving with:

(i) a high range blood alcohol content; or

(ii) a medium range blood alcohol content;

(e) driving under the influence of alcohol or a drug;

(f) failing to provide a sufficient sample of breath for a breath analysis;

(g) failing to provide a sample of blood for analysis;

(h) driving with alcohol in the blood (if the person, at the time of the previous offence, was of a class mentioned in section 24(1));

the person's licence to drive is automatically cancelled and the person is disqualified from obtaining a licence for a minimum period of 5 years.

(6) A relevant offence is an immediate suspension offence.

[10] Section 51 of the *Traffic Act* (NT) provides that an offence contrary to s 21(1) of the Act is a regulatory offence. "High range blood alcohol content" means a blood alcohol content of 0.15 per cent or greater.[3]

[11] Section 21 of the *Traffic Act* (NT) is in Part V of the Act. Part V of the Act was enacted by s 5 of the *Transport Legislation (Drug Driving) Amendment Act 2008* (NT) which commenced on 1 July 2008. Division 2 of Part V of the Act creates three principal offences. First, driving with a high range

[3] *Traffic Act* (NT) s 19(1).

blood alcohol content.[4] Secondly, driving with a medium range blood alcohol content[5] which is a blood alcohol content of 0.08 per cent or greater, but less than 0.15 per cent.[6] Thirdly, driving with a low range blood alcohol content[7] which is a blood alcohol content of 0.05 per cent or greater, but less than 0.08 per cent.[8] In order to prove any of these three principal offences it is not necessary for the prosecution to establish that the person's ability to drive a motor vehicle was impaired.[9]

[12] For each of the three principal proscribed blood alcohol content offences the *Traffic Act* (NT) provides that the person's licence is cancelled and stipulates a minimum period a person is disqualified from obtaining a driver's licence for a first offence and a minimum period of disqualification for a second or subsequent offence. Of significance to this appeal, s 21(4)(a) of the *Traffic Act* (NT) provides that if a court finds a person guilty of driving with a high range blood alcohol content (the relevant offence) and the person has previously been found guilty of an offence of driving with a high range blood alcohol which was committed within three years before the person committed the relevant offence, the person's licence to drive is automatically cancelled and the person is disqualified from obtaining a licence for a minimum period of five years.

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4 *Traffic Act* (NT) s 21(1).
5 *Traffic Act* (NT) s 19(1).
6 *Traffic Act* (NT) s 22(1).
7 *Traffic Act* (NT) s 19(1).
8 *Traffic Act* (NT) s 23(1).
9 *Traffic Act* (NT) s 20.

Subsection 63(1) of the *Road Traffic Act 1974* (WA)

[13] Subsection 63(1) of the *Road Traffic Act 1974* (WA) states:

> A person who drives or attempts to drive a motor vehicle while under the influence of alcohol, drugs, or alcohol and drugs to such an extent as to be incapable of having proper control of the vehicle commits an offence, and the offender may be arrested without warrant.

[14] Subsection 63(5) of the *Road Traffic Act 1974* (WA) states:

> In any proceeding for an offence against this section a person who had at the time of the alleged offence a blood alcohol content of or above .15g of alcohol per 100ml of blood shall be deemed to be under the influence of alcohol to such an extent as to be incapable of having proper control of a motor vehicle at the time of the alleged offence.

[15] The offence created by s 63(1) of the *Road Traffic Act* (WA) is a similar offence to that created by s 29AAA of the *Traffic Act* (NT). It is an offence of driving while being so impaired by alcohol as to be incapable of having proper control of a motor vehicle. Subsection 63(5) of the *Road Traffic Act* (WA) deems a person who had at the time of the alleged offence a blood alcohol content of or above 0.15 per cent to have been under the influence of alcohol to such an extent as to be incapable of having proper control over a motor vehicle. The subsection does not create a separate offence. A person convicted of an offence against s 63(1) of the *Road Traffic Act* (WA) who has no prior convictions shall be disqualified from driving for a period of not less than six months. For a second offence against s 63(1) a person shall be disqualified from driving for a period of not less than two years. For a

third offence against s 63(1) a person shall be permanently disqualified from obtaining or holding a driver's licence.

[16] The offence created by s 63(1) of the *Road Traffic Act* (WA) is not an offence of the same class as that created by s 21(1) of the *Traffic Act* (NT). Section 64 of the *Road Traffic Act* (WA) creates an offence of the same class as the offences created by s 21 and s 22 of the *Traffic Act* (NT) and prescribes increasing penalties for various ranges of blood alcohol content.

The appellant's submissions

[17] The appellant submits that for an offence to fall within the provisions of s 21(4)(a) to (c) of the *Traffic Act* (NT), it must arise from conduct which takes place in the Northern Territory. It was submitted that the term "offence" as referred to in the *Traffic Act* (NT) is confined in its scope to an offence committed in the Northern Territory. For the purposes of s 21(4)(a) "driving with a high range alcohol content" refers exclusively to an offence established by s 21(1) of the *Traffic Act* (NT). The terms of s 21 of the Act, properly construed, limit the application of s 21(4) to offences against the provisions of the *Traffic Act* (NT).

[18] The appellant submitted that the provisions of s 21(4) and s 21(5) of the *Traffic Act* (NT) contrast with the provisions of s 37(1) of the *Misuse of Drugs Act 1990* (NT) which expressly state that it is an aggravating circumstance to be convicted of a second or subsequent offence against a provision of a law of the Commonwealth or a State or another Territory of

the Commonwealth (whether the offence was committed before or after the commencement of this Act) which, in the opinion of the Court, is the equivalent of or a similar offence to an offence against the provisions of the *Misuse of Drugs Act* (NT).[10] Similarly, s 78BA of the *Sentencing Act 1995* (NT) which aggravates the penalty for offenders who have committed a second or subsequent violent offence expressly applies to similar offences "committed against the law of some other jurisdiction". There are no such provisions in Part V of the *Traffic Act* (NT).

[19] Further, Part V of the *Traffic Act* (NT) which includes s 21 was enacted by s 5 of the *Transport Legislation (Drug Driving) Amendment Act 2008* ("the amending Act") which commenced on 1 July 2008. Section 6 of the amending Act repealed s 39 and s 49 of the pre-existing Act. Section 39(1) of the pre-existing Act did the work now done by s 21(4) and (5) of the *Traffic Act (NT).* Section 49 defined the meaning of "second or subsequent offence". It expressly confined the construction of that expression to specific offences committed under the pre-existing Act. Neither the Explanatory Memorandum nor the Second Reading Speech of the amending Act suggests that s 21(2), (4) or (5) of the *Traffic Act* (NT) were intended to broaden the scope of the aggravating circumstances which enliven the greater mandatory minimum period of disqualification from driving of five years to include prior offences committed in other jurisdictions. Similarly, neither the Explanatory Memorandum nor the Second Reading Speech to the

[10] s 37 *Misuse of Drugs Act 1990* NT.

amending Act purport to clarify or explain the repeal of s 39 of s 49 of the pre-existing Act, other than to say the sections were repealed because their provisions had been incorporated into Part V of the *Traffic Act* (NT). If Parliament had intended to broaden the scope of the term "second or subsequent offence" in the current Act it would have done so by the use of clear and express words.

The respondent's submissions

[20] Counsel for the respondent did not put forward any argument to resist ground one of the appeal. However, in order to assist the Court counsel for the respondent referred the Court to *R v Green*[11] and *The Queen v R W Collins.*[12] In the first case the Court of Appeal of New South Wales was required to interpret s 10(3A) of the *Motor Traffic Act 1909* (NSW). The section was of similar effect to s 21(4) of the *Traffic Act* (NT). The Court of Appeal held that the words "other crimes or offences" in s 10(3A) of the *Motor Traffic Act 1909* (NSW) were not confined to crimes or offences of the class referred to committed within New South Wales. This meant that a driving offence committed by Mr Green in Canberra prior to the driving offence he committed in New South Wales was to be taken into account in determining the period of his disqualification from driving. In the South Australian case the Full Court of the Supreme Court of South Australia held that notwithstanding the breach of the respondent's recognisance occurred outside South Australia, the District Court of South Australia had

[11] [1982] 2 NSWLR 933.
[12] [1976] 12 SASR 498.

jurisdiction to order the revocation of the suspension of a sentence of imprisonment that was imposed by the District Court of South Australia. The case turned on the nature of the respondent's recognisance to be of good behaviour.

[21] Counsel for the respondent's principal submission was that under the *Traffic Act* (NT) the sentencing magistrate had a wide discretion to impose a period of disqualification from driving. The minimum mandatory period of suspension for a first offence does not fetter the Court's discretion to impose a period of disqualification from driving in excess of the minimum mandatory period of disqualification. Given the appellant's appalling driving history and his numerous convictions for driving with a proscribed blood alcohol content, the length of the appellant's disqualification from driving was not excessive.

Consideration

[22] The only cases which consider similar provisions to s 21(4) of the *Traffic Act* (NT) to which the Court was referred were the New South Wales cases of *R v Green*[13] and *Director of Public Prosecutions v Beauman.*[14] In *R v Green* the Court of Appeal of New South Wales held that the words "other crimes or offences" in s 10(3A) of the *Motor Traffic Act (NSW)* are not confined to crimes or offences, of the class referred to, committed within New South Wales. The Court held there was to be found in the *Motor*

[13] [1982] 2 NSWLR 933.
[14] [2005] 64 NSWLR 634.

Traffic Act (NSW) no indication which might be relied upon as giving a territorial limitation to the concept of "other crimes or offences". The Court further held that the legislator had, by the terms it had used in the relevant provisions of s 10(3A) of the *Motor Traffic Act* (NSW), intended to extend the meaning of those words so as to apply to other crimes or offences whether committed in New South Wales or outside New South Wales. The only qualification which was to be placed upon "other crimes or offences" was that they be of the class referred to in the relevant section of the Act.

[23] In *Director of Public Prosecutions v Beauman* Latham J held the use of the words "one or more major offences" in s 3(1) and s 25 of the *Road Transport (Safety and Traffic Management) Act 1999* (NSW) does not point to a territorially restricted application of s 25 of that Act. The issue of substance was whether other States had offences of the same or similar character to the offences defined as major offences. Accordingly, convictions for equivalent interstate offences may be taken into account in determining penalties and disqualification periods. The advent of coordinate State and Territory Acts in 1999 with the stated purpose of providing a legislative framework for the adoption of a National Uniform Set of Australian Road Rules tends to support the notion that rather than the States and Territories existing in isolation there is a public benefit in their acting cooperatively. This is particularly so where public safety is the primary consideration.

[24] It is a principle of comity that uniformity of decision in the interpretation of statutes which are part of a national legislative scheme is a sufficiently important consideration to require that an intermediate appellate court – and all the more so a single Judge – should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless the legislation in one jurisdiction is not in *pari materia* with the legislation in another jurisdiction or unless the court is convinced that the interpretation is plainly wrong.[15]

[25] In my opinion, the cases of *R v Green*[16] and *Director of Public Prosecutions v Beauman*[17] are not applicable to s 21(2), (4) or s 21(5) of the *Traffic Act* (NT) and the cases should be distinguished from this case. Having reviewed the traffic legislation in various jurisdictions it is apparent that, while some significant steps have been taken towards a uniform national scheme, national uniformity has not as yet been achieved. The offence created by s 63(1) of the *Road Traffic Act* (WA) is not the same class of offence as that created by s 21(1) of the *Traffic Act* (NT). Subsection 21(2) of the Act determines when an offence against s 21(1) of the Act is a second or subsequent offence. The text of s 21(2) and s 21(4)(a) of the *Traffic Act* (NT) make it clear that the offence referred to in s 24(4)(a) is the specific offence created by s 21(1) of the Act. The text of s 21(4)(a) of the Act, properly construed, limits the application of s 21(4) to prior offences against

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[15] *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 492; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135].
[16] [1982] 2 NSWLR 933.
[17] [2005] 64 NSWLR 634.

s 21(1) of the Act. An offence of "driving with a high range alcohol content" is an offence committed contrary to s 21(1) of the Act. Likewise, the text of s 21(4)(b) of the Act limits the application of s 21(4) of the Act to offences against s 29AAE of the Act and the text of s 21(4)(c) of the Act limits the application of s 21(4) of the Act to s 29AAH of the Act.

[26] As was submitted by counsel for the appellant, s 21(4) of the *Traffic Act* (NT) does the work that was previously done by s 39(1)(e) of the pre-existing *Traffic Act* (NT) prior to its repeal by s 6 of the *Transport Legislation (Drug Driving) Amendment Act 2008* (NT). Prior to its repeal s 39(1)(e) was in the following terms:

> Where a court finds a person guilty of an offence [the relevant offence]
>
> (a) against s 20 [refusing to submit to breath analysis or provide a sample of blood], or
>
> (b) in which the concentration of alcohol is equal to or more than 150 mg per 100 mL of blood [a high range blood alcohol content offence]
>
> committed within three years after committing an offence against
>
> (a) s 19(2) for which the penalty was that specified s 19(3)(a)(ii) [a high range blood alcohol offence], or
>
> (b) s 20
>
> the person's licence is by force of that finding, cancelled for such period, being not less than five years, as is fixed by the court and the person is disqualified from holding a licence for that period

[27] The repealed s 39(1)(e) the pre-existing *Traffic Act* (NT) expressly provided that the offences which aggravated the relevant offence so as to make a person liable to be disqualified from driving for five years or more were offences against specific sections of the pre-existing Traffic Act. While s 21(4) of the *Traffic Act* (NT) is not drafted with such express specificity as the repealed s 39(1)(e) of the Act, the intention of the legislature in repealing s 39(1)(e) and enacting s 21(4) of the Act was not to include a prior conviction for a similar interstate offence as an aggravating circumstance which enlivened the greater mandatory minimum period of disqualification from obtaining a drivers licence, of five years, for a relevant offence. Rather, the intention of the legislature was simply to incorporate the provisions of s 39(1)(e) into Part V of the current Act.[18] If Parliament had intended to broaden the aggravating circumstances of an offence against s 21(1) of the *Traffic Act* (NT) it would have done so by clear and express words.

[28] Subsections 21(2), (3)(b) and (5) of the *Traffic Act* (NT) are to be interpreted in the same manner as s 21(4) of the Act. The appellant should have been sentenced in accordance with s 21(3)(a) of the Act. That is, for a first offence. This meant that the appellant was liable to be disqualified from obtaining a licence for a period that is *at least* [emphasis added] 12 months.

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[18] Explanatory Statement by the Minister for Infrastructure and Transport of the Northern Territory about the *Transport Legislation (Drug Driving) Amendment Bill 2007*, Serial No. 132 at cl 6.

[29] However, I accept the respondent's submissions that the length of the period that the appellant has been disqualified from driving is not manifestly excessive. The principles that apply when considering whether or not a sentence is manifestly excessive were considered by the Northern Territory Court of Criminal Appeal in *Hampton v The Queen.*[19] The Court of Criminal Appeal applied the principles enunciated by the High Court of Australia in *Dinsdale v The Queen.*[20] Riley J with whom Martin CJ and Southwood J agreed stated at par [44] that:

> It is necessary for the excess to be "plainly apparent": *Dinsdale v R.* It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it be shown that the sentencing judge 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 judge said in the proceedings or the sentence itself may be so excessive as to manifest such error. In relying upon this ground it is incumbent upon an appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive. The sentence must be so very obviously excessive that it was unreasonable or unjust.

[30] As has been observed on numerous occasions, a submission that a sentence is manifestly excessive is not one which is capable of a great deal of elaboration.

[31] The facts of the appellant's offending are as follows. At about 11.00 am on 14 August 2010 the appellant drove a motor vehicle away from the Town

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[19] [2008] NTCCA 5.
[20] (2000) 202 CLR 321 at [6].

and Country Tavern then south along Bloomfield Street Alice Springs which is a distance of more than two kilometres and would have involved him negotiating the Stuart Highway at some point. He was stopped by the police for random breath analysis and he turned into the driveway of unit 1/11 Bloomfield Street. A breath analysis was conducted and a reading of blood alcohol concentration of 0.174 per cent was obtained.

[32] The offender has a criminal record. He has an appalling driving history. He has five previous convictions for driving with more than the proscribed blood alcohol content, one conviction for driving under the influence of a drug and one conviction for driving under the influence of alcohol. On 1 August 1986 he was convicted by the Sunshine Magistrates Court in Victoria of three offences he committed on 11 April 1986: stating a false name or address; driving an unregistered motor vehicle; and driving unlicensed. On 23 December 1986 he was convicted by the Geelong Magistrates Court in Victoria of three offences he committed on 26 February 1986: riding an unregistered motor cycle; stating a false name; and riding while unlicensed. On 27 July 1992 he was convicted by the Melton Magistrates Court in Victoria of three offences he committed on 30 December 1990: stating a false name; driving while disqualified; and driving with a blood alcohol content of .130 per cent. He was disqualified from obtaining both a motor vehicle licence and a motor cycle licence for four years. On 24 February 1998 he was convicted by the Williamstown Magistrates Court in Victoria of eight driving offences committed on

unspecified dates: drive while disqualified; reckless conduct endanger serious injury; drive while authorisation suspended; unlicensed driving; fail to report an accident to the police; fail to stop motor vehicle after an accident; reckless driving; and drive under the influence of a drug. On 7 May 1998 he was convicted by the Adelaide Magistrates Court in South Australia of two offences he committed on 1 February 1997: driving while his licence was disqualified; and driving with excess blood alcohol. On 18 September 2008 he was convicted by the Kalgoorlie Magistrates Court in Western Australia of three offences; driving with no authority to drive on 16 August 2008; driving under the influence on 16 August 2008 with a blood alcohol content of .153 on 16 August 2008; and driving with a blood alcohol content of .086 on 14 September 2008. On 21 October 2008 he was convicted by the Kalgoorlie Magistrates Court in Western Australia of two offences he committed on 3 October 2008: driving with no authority to drive; and driving with a blood alcohol content of 0.102.

[33] By way of explanation of the appellant's offending on 14 August 2010, counsel for the appellant told the sentencing Magistrate that the appellant had been drinking at the Town and Country Tavern in Alice Springs. While he was there he had a domestic argument with a past girlfriend about her and her husband. He then got into his motor vehicle and drove off. He was attempting to drive home when he was stopped by the police. At the time of the offending the appellant was attending appointments with staff at the Alcohol and Other Drug Services of Central Australia and receiving

counselling and support to assist him overcome his misuse of alcohol. The appellant referred himself to this service on 19 July 2010.

[34] The offending is objectively serious offending. The appellant once again behaved impulsively and erratically. The offence is aggravated by the fact that it was committed without regard to public safety.[21] A blood alcohol content of .174 per cent is a very high blood alcohol content. The offender's gross motor skills would have been significantly impaired. Driving with such a high blood alcohol content is an extremely dangerous thing to do. Such offending is prevalent in the Northern Territory. Drink driving is a significant cause of serious traffic accidents which often result in death or serious personal injury and are an enormous cost to the community. While the appellant's offending interstate does not aggravate the offence which he committed on 14 August 2010, he has clearly lost any entitlement to leniency as a result of his bad driving record.

[35] In all the circumstances the principal sentencing purposes are punishment, denunciation, personal and general deterrence and protection of the community. The achievement of these purposes requires that the appellant be disqualified from driving for a number of years and five years is not a manifestly excessive period of disqualification. The appellant's disqualification from obtaining a licence for five years was neither unreasonable nor unjust. The appellant was not sentenced to a period of imprisonment and only a moderate fine was imposed on him.

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[21] s 6A(d) *Sentencing Act*.

[36] The appeal is dismissed.
