Keil v Westphal [2012] NTSC 11

PARTIES:	**KEIL, Jade**
	v
	WESTPHAL, Lindsay
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 48 of 2011 (21125470)
DELIVERED:	2 MARCH 2012
HEARING DATES:	1 MARCH 2012
JUDGMENT OF:	KELLY J
APPEAL FROM:	J NEILL SM

REPRESENTATION:

Counsel:

Appellant:	C Ingles
Respondent:	C Roberts

Solicitors:

Appellant:	Self represented
Respondent:	Office of Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	KEL 12003
Number of pages:	10

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Keil v Westphal [2012] NTSC 11
No. JA 48 of 2011 (21125470)

BETWEEN:

JADE KEIL
Appellant

AND:

LINDSAY WESTPHAL
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 2 March 2012)

The offence

[1] On 1 August 2011 the appellant drove a motor vehicle with a blood alcohol content of 0.08%. A blood alcohol content of 0.08% is a medium range blood alcohol content within the meaning of s 22 of the *Traffic Act* (NT) ("the Act").[1]

[2] Police issued the appellant with a Notice to Appear in relation to the offence. On 25 August 2011 the appellant appeared unrepresented in the Court of Summary Jurisdiction at Alice Springs, and pleaded guilty to a

1 A medium range blood alcohol content as 0.08% or more, but less than 0.15%: *Traffic Act* s 19.

charge of driving with a blood alcohol content of 0.08% contrary to s 22(1)[2] of the Act.

[3] On the hearing of the appellant's plea, the respondent tendered a South Australian Offender History Report showing that the appellant had previously been convicted in the Adelaide Magistrates' Court on 29 November 2000 of committing an offence under the equivalent South Australian legislation of driving with excess blood alcohol. She had been fined $500.00 and disqualified from driving for 6 months commencing on 17 September 2000 (the date the offence occurred). There were no other relevant prior convictions.

[4] The learned magistrate convicted the appellant, fined her $274.00 with a victims' levy of $40.00, and disqualified her from holding or obtaining a drivers licence for 12 months, to be followed by a further 12 month period during which the appellant was to be disqualified from holding a licence to drive otherwise than with an Alcohol Ignition Lock.

The appeal

[5] The appellant appeals to this Court against the periods of disqualification. She does not challenge the conviction or the fine.

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[2] This is the sub-section which creates the offence of driving with a medium range blood alcohol content.

The basis for the period of disqualification

[6] The learned magistrate imposed a 12 month disqualification because he was of the view that that was the minimum period of disqualification required by the Act in light of the prior conviction in South Australia.

[7] Section 22(3) of the Act provides as follows:

> (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 6 months; and
>
> (b) for a second or subsequent offence:
>
> (i) obtaining a licence for a period (mandatory period) that is at least 12 months; and
>
> (ii) if the mandatory period is less than 5 years – obtaining a licence other than an AIL licence[3] for an additional period (AIL period) immediately after the mandatory period that is at least 12 months and not more than 3 years.

[8] The learned magistrate assumed that, because of the earlier conviction in South Australia, the offence for which he was sentencing the appellant was "a second or subsequent offence" within the meaning of s 22(3)(b), so that the mandatory minimum period of disqualification was 12 months in accordance with s 22(3)(b)(i) and, that, in addition, he was obliged to

[3] This is a licence under which the licensed person is disqualified from driving other than with an Alcohol Ignition Lock, which is the second order made by the learned magistrate.

impose a period of disqualification from holding a licence to drive otherwise than with an Alcohol Ignition Lock in accordance with s 22(3)(b)(ii).

Appeal Ground 1

[9] The first ground of appeal is that the learned magistrate was wrong in law in holding that the offence to which the appellant pleaded guilty was a second or subsequent offence which enlivened the provisions of s 22(3)(b).

[10] The circumstances in which an offence is taken to be a second or subsequent offence for the purposes of s 22(3)(b) are set out in s 22(2) as follows:

> (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 breath or blood alcohol content; or
>
> (ii) a medium range breath or 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 breath or blood (if the person, at the time of the previous offence, was of a class mentioned in section 24(1)).[4]

[4] Section 24(1) sets out classes of drivers required to have a zero blood alcohol content. It did not apply to the appellant.

[11] The equivalent provisions in s 21 (which creates an offence of driving with a high range blood alcohol content) were considered by Southwood J in *Burnham v Westphal*[5] *("Burnham").* In *Burnham*, Southwood J was called upon to consider whether the aggravated minimum disqualification period in s 21(4) of the Act was enlivened by a Western Australian conviction for driving while under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle.

[12] Section 21(4), which serves a similar function to s 22(3)(b), provides as follows:

> (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 breath or 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.

[13] The basis of Mr Burnham's Western Australian conviction was that he had had a blood alcohol reading of 0.153%, and was therefore deemed under the Western Australian legislation to be under the influence of alcohol to such

5 [2012] NTSC 2.

an extent as to be incapable of having proper control of the vehicle. A blood alcohol reading of 0.153% would be a high range blood alcohol content under the Territory legislation.[6]

[14] In *Burnham*, the learned magistrate at first instance held that the Western Australian conviction was a conviction for a high range breath or blood alcohol content and that therefore the provisions of s 21(4)(b) applied, making the mandatory minimum period of disqualification a period of 5 years.

[15] The question before Southwood J on appeal was whether the Western Australian offence for which Mr Burnham had been convicted was an offence of "driving with a high range breath or blood alcohol content" within the meaning of s 21(4). His Honour held that it was not. He said:[7]

> "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 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."

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6 *Traffic Act* s 19.

7 *Burnham* [25] and [28].

He also said:

> "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."

[16] Section 22(2) of the Act must be interpreted consistently with that reasoning. Hence:

(a) the offence referred to in s 22(2)(a)(i) of driving with a high range breath or blood alcohol content, is limited to an offence against s 21(1);

(b) the offence referred to in s 22(2)(a)(ii) of driving with a medium range breath or blood alcohol content, is limited to an offence against s 22(1);

(c) the offence referred to in s 22(2)(c) of failing to provide a sufficient sample of breath for a breath analysis is limited to an offence against s 29AAE;

(d) the offence referred to in s 22(2)(d) of failing to give a sample of blood for analysis is limited to an offence against s 29AAH.

Although not specifically referred to in *Burnham*, by the same reasoning:

(e) the offence referred to in s 22(2)(e) is limited to an offence against s 24; and

(f) the offence referred to in s 22(2)(b) of driving under the influence of alcohol or a drug, must be limited to an offence against s 29AAA of the Act.

[17] It follows that, as the appellant was not alleged to have had a conviction for an offence against any of these provisions of the Act, the offence to which she pleaded guilty was not a second or subsequent offence as defined in s 22(2); the provisions of s 22(3)(b) did not apply; and the learned magistrate was in error in holding that 12 months disqualification and 12 months disqualification from driving without an Alcohol Ignition Lock were the minimum prescribed by the Act. The first ground of appeal is therefore made out. I should add that the respondent conceded that this ground of appeal had been made out in light of the decision in *Burnham*.

Appeal Ground 2

[18] The second ground of appeal is that, given that the minimum applicable period of disqualification was in fact that prescribed by s 22(3)(a), namely disqualification for 6 months, the imposition of the two periods of disqualification actually imposed was manifestly excessive.

[19] The appellant relies on the following facts and circumstances in support of the contention that the disqualification periods imposed were manifestly excessive.

(a) The magistrate did not impose a disqualification period in excess of the period he considered was the minimum he was required by law to impose.

(b) The appellant's blood alcohol level was at the very bottom of the range defined as "medium level blood alcohol content".

(c) There had been a gap of over 10 years since the appellant's single previous drink driving offence from South Australia.

(d) The appellant had entered a plea at the earliest opportunity, and had been co-operative with police.

(e) The offence was not committed in conjunction with any other offences.

[20] The respondent has also conceded the bulk of the appellant's submissions in relation to Ground 2 of the appeal. The respondent concedes that, although it would have been open to the learned magistrate to impose a period of disqualification in excess of the mandatory minimum of six months, in the absence of aggravating circumstances, this would be an unusual course. I take this also to be a quite proper concession that there are no such aggravating circumstances in the appellant's case.

[21] I am of the opinion that Ground 2 is made out. In view of the factors relied upon by the appellant and the lack of aggravating circumstances to the

offending, I am of the opinion that the appropriate period of disqualification is the mandatory minimum period of 6 months.

[22] ORDERS:

(A) The appeal is allowed.

(B) The order of the learned magistrate disqualifying the appellant from holding or obtaining a drivers license for a period of 12 months and imposing a period of 12 months during which the appellant is to be disqualified from holding a licence to drive otherwise than with an Alcohol Ignition Lock, is set aside.

(C) In lieu thereof, the appellant is disqualified from holding or obtaining a drivers licence for a period of 6 months from 25 August 2011.