McDonald v Cornford [2011] NTSC 109

PARTIES:	McDONALD, Albert
	v
	CORNFORD, Michael
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 45 of 2011 (21112229)
DELIVERED:	30 December 2011
HEARING DATES:	18 November 2011
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Mr Birch SM

CATCHWORDS:

CRIMINAL LAW – Sentencing - Appeal against sentence – three appeal grounds - failure to impose concurrent sentences – failure to apply principle of totality – manifestly excessive – drink driving – driving whilst disqualified – offences arising from one course of conduct - whether adjustment to overall sentence consistent with totality principle - fully accumulated sentence resulted in total sentence that was disproportionate to the whole criminal conduct - Appeal allowed in part.

Sentencing Act (NT) s 50, s 103,

Attorney General v Tichy (1982) 30 SASR 84; applied

Brown v Lynch (1982) 15 NTR 9; *Miles v The Queen* [2001] NTCA 9; *R v Tait and Bartley* (1979) 46 FLR 386; followed

Carroll v The Queen (2011) 29 NTLR 106; *Pearce v The Queen* (1998) 103 A Crim R 372; *Thomas v Henderson* (2001) 162 FLR 395; referred

REPRESENTATION:

Counsel:

Appellant:	Mr Scholz
Respondent:	Mr McMinn

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	BLO 1117
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

McDonald v Cornford [2011] NTSC 109
No. JA 45 of 2011 (21112229)

BETWEEN:

Albert McDonald
Appellant

AND:

Michael Cornford
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 30 December 2011)

Introduction

[1] This is an appeal against sentences imposed by the Court of Summary Jurisdiction on 18 August 2011. The appellant was sentenced after pleading guilty to driving with a high range blood alcohol content of .219%; driving while disqualified; driving without a current compensation contribution; driving unregistered and driving without a securely fastened seat belt.

[2] The two sentences under appeal are a sentence of eight months imprisonment for driving with a high range blood alcohol reading and a cumulative sentence of five months imprisonment for driving while disqualified. On the same date the appellant was sentenced to a further cumulative five month term of imprisonment in relation to an aggravated

assault that is not the subject of this appeal. It is not in any way associated with the traffic offences. In relation to the other traffic charges, an aggregate fine of $700.00 was imposed.

[3] The appellant alleges the learned Magistrate erred by failing to impose a concurrent sentence of imprisonment for the drink driving and drive while disqualified offences; that there was error by failing to take into account adequately the principle of totality; and the sentence was in all the circumstances manifestly excessive.

Proceedings Before The Court of Summary Jurisdiction

[4] The accepted facts were that the appellant had been disqualified from driving by the Court of Summary Jurisdiction on 6 August 2010 for ten years. On the day of this offending (6 April 2011), the appellant was located driving on Kintore Road when he was stopped by police. Police noticed he was not wearing a seatbelt and the car's registration had expired. He was so intoxicated that when he got out of the car he fell over twice. The breath analysis taken gave a reading of .219%. The Court of Summary Jurisdiction was told his reason for driving was that he had been nominated to drive the vehicle by another person.

[5] The learned Magistrate noted the appellant lived with his mother and worked at night patrol; it was accepted he had a long term significant problem with alcohol. On behalf of the appellant it was put that he realised he needed to spend some time in rehabilitation to deal with the alcohol problem. The

appellant was sentenced on the basis of pleas of guilty at the first opportunity.

[6] His Honour was concerned about what he described as the appellant's "absolutely abysmal record" in relation to the use of motor vehicles over an extended period. In particular it was noted the appellant had been convicted some 11 or 12 times for drink driving or similar offences and 13 or 14 times for drive disqualified. His Honour also noted the appellant's criminal record had progressively deteriorated since his first conviction for driving while disqualified. The appellant was described as a serious recidivist offender who had "little regard for the use of motor cars and the road rules or what the Court has told you about not driving cars". With respect, His Honour's comments appear to be most appropriate and accurate in relation to this appellant.

[7] His Honour ordered a s 103 *Sentencing Act* (NT) Supervision Assessment Report, noting that the appellant had breached a variety of Court orders demonstrating his unwillingness or perhaps inability, (because of alcohol addiction) to comply with Court orders. The appellant was unsurprisingly found unsuitable for supervision.

[8] He was found, however, to be suitable to undertake an alcohol rehabilitation program at CAAPU for 56 days. Perhaps also unsurprisingly, His Honour did not act on this recommendation given the unsuitability for supervision and the appellant's history.

[9] His Honour regarded the appellant as someone who because of his overall antecedent history, demonstrated some degree of contempt for what the Court had said to him on previous occasions in relation to disqualifications. As a consequence His Honour was of the view that specific deterrence was a significant factor; the high reading in relation to the drink driving was also regarded as an aggravating factor.

[10] No-one would disagree with His Honour's general findings in relation to the appellant. At the heart of this appeal is His Honour's decision to order the two terms of imprisonment for the driving offences to be served cumulatively. After allowing a 25% plea discount, His Honour set the total term for the traffic offences at 13 months imprisonment, commencing on 8 August. The appellant was also disqualified from driving for a period of 12 years. As His Honour also sentenced the appellant to the further five months imprisonment for the aggravated assault, the total effective sentence was 18 months imprisonment. His Honour fixed a non parole period of nine months imprisonment.

Consideration of Arguments on Appeal

[11] An appellate Court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it can be shown that a 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 or inadequate as to manifest such error.[1] The presumption is that there is no error.

[12] On behalf of the respondent it is argued no error is disclosed. Section 50 *Sentencing Act* as relevant is: "unless otherwise provided ... the term of imprisonment for the other offence is to be served concurrently with the first offence". The respondent relied on *Miles v The Queen*[2] where Riley J (as he then was), described s 50 as creating "a prima facie rule that terms of imprisonment are to be served concurrently unless the court otherwise orders". There is no fetter upon the discretion exercised by the court and the prima facie rule may be displaced by a positive decision.[3]

[13] The respondent submitted that due to the extremely poor criminal history for driving offences, (set out above), the level of intoxication (.219%) and consequent potential danger to others and the need for specific deterrence, His Honour had made the "positive decision" to accumulate the sentences. It was submitted this decision was soundly based in the circumstances of this particular case and should not be disturbed on appeal.

[14] The respondent emphasised the often quoted and well accepted illumination of the relevant principles by Wells J in *Attorney General v Tichy*:[4]

> It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether the sentences should be ordered to

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1 *R v Tait and Bartley* (1979) 46 FLR 386 at 388.
2 [2001] NTCA 9, para 36.
3 *Miles v The Queen* (above); *Carroll v The Queen* (2011) 29 NTLR 106.
4 (1982) 30 SASR 84, at 92.

> be served concurrently or consecutively … what is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identifiable crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably characterized, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with technical offences or they may not. Sometimes, the process of characterization rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice. The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been (found) guilty …
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> Where consecutive sentences are imposed it may be thought that they are kept artificially apart where they should, to some extent, overlap. Where concurrent sentences are imposed, there is the danger that the primary term does not adequately reflect the aggravated nature of each important feature of the criminal conduct under consideration.

[15] Similar arguments were advanced in relation to the application of the principle of totality, once again drawing on Wells J's comments (above), that offences comprising the same course of criminal conduct may yet be characterised as separate invasions of the community's right to peace and order.

[16] During the argument of the appeal, both counsel acknowledged that in their experience, and as a matter of practice, sentences of imprisonment were generally ordered to be served concurrently for drink driving coupled with drive disqualified offences. This underlines the submission that the decision

of the learned Magistrate to accumulate was taken positively. Both counsel also acknowledged the significant dangers of drink driving in remote roads and areas, leading to tragic consequences, particularly for members of the Aboriginal community.[5]

[17] As well as identifying the aggravating features of both offences, (which although not solely, was primarily related to repeat offending), as His Honour was obliged to do, there was an obligation to deal with the highly interdependent nature of the offending. Clearly, the offences were part of the one episode; it is acknowledged however the driving did breach two distinct and serious traffic provisions. In *Thomas v Henderson*[6] Martin (BF) CJ was of the view that the offences there of failing to submit to a breath analysis and driving whilst disqualified were quite distinct from each other;[7] the act of driving whilst disqualified was completed before police arrived, and the failure to supply a sufficient sample of breath occurred later at a different place and comprised quite different conduct. His Honour did not consider in those circumstances there should be concurrency. Even so, His Honour in those circumstances said it would be open to order a degree of concurrency to take into account the totality principle.[8]

[18] The offences here are more closely connected than those discussed in *Thomas v Henderson*. The offences also however have a distinctive quality.

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5 Although not to hand at the time of hearing the appeal, the consequences of high levels of serious traffic offending are discussed in Paper, Richard Coates, DPP(NT) "Law and Disorder in Aboriginal Communities", 8 – 10, CLANT Conference, June/July 2011.

6 (2001) 162 FLR 395.

7 *Thomas v Henderson* at 399.

8 *Thomas v Henderson* at 401.

They are breaches of two separate laws flowing from the one course of conduct. As a matter of general principle, when a number of offences arise from substantially the same act or circumstances, providing the gravity of the criminal conduct can be reflected in the ultimate penalty, concurrent sentences are appropriate.[9]

[19] In this case, particularly as His Honour considered the aggravating features of offending both in relation to the imposition of the penalty for the single offences and further by determining to accumulate the sentences, the assessment of the gravity of the offending was magnified in the overall sentence for the conduct that overlapped both counts, including the aggravating features.[10]

[20] In sentencing for the drink driving offence, the maximum penalty available was 12 months imprisonment. His Honour reduced the penalty by 25% because of the early plea. Aside from the plea discount, the aggravating features were considered to be so significant as to make the plea reduction from effectively the maximum penalty. On behalf of the appellant it was argued the remoteness and lack of other vehicles and lack of other poor driving meant that this sentence was excessive. I do not agree with that submission.

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9 *Brown v Lynch* (1982) 15 NTR 9 at 11 – 12.

10 In the case of very different offending, this problem was acknowledged in *Pearce v The Queen* (1998) 103 A Crim R 372.

[21] In my view it was open in the circumstances, for His Honour to impose a sentence almost at the maximum applicable for the drink driving charge. Having imposed the most serious penalty open to him, His Honour with respect was obliged to consider fully whether any adjustment to the overall sentence consistent with the principle of totality should be made. The aggravating features of the offending for each single offence contributed to the assessment of the gravity of the other. In those circumstances, I am persuaded error occurred in the overall accumulated sentences.

[22] I am persuaded the decision to fully accumulate the sentences resulted in a total sentence that was manifestly disproportionate to the whole criminal conduct.[11]

[23] The offending was serious for all of the reasons His Honour carefully discussed. I would not uphold ground 3 as it relates simply to the term of imprisonment imposed on the drink driving charge. It was within His Honour's discretion to impose the sentence he did. As this course of conduct involves strongly connected facts and circumstances, yet simultaneously breaches two significant provisions of the criminal law, in my view there are grounds for partial accumulation, but not full accumulation.

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[11] *Carroll v The Queen* (2011) 29 NTLR 106.

[24] I will allow grounds 1 and 2 of the appeal and dismiss ground 3. In re-sentencing there will be partial accumulation. The non-parole period will be adjusted at the statutory minimum of 8 months.

[25] Orders:

1. Appeal allowed in part.

2. The order that the sentences of imprisonment on file 21112229 of 8 months (Count 1) and 5 months imprisonment (Count 2) be served cumulatively is quashed.

3. The sentence of imprisonment of 8 months (Count 1) on file 21112229 is confirmed to commence on 8 August 2011. The sentence of imprisonment of 5 months (Count 2) is to commence after the completion of service of four months imprisonment on count 1. The total term of imprisonment on file 21112229 is 9 months.

4. Confirm the sentence on file 21125843 is to be served at the completion of the term on 21112229.

5. The total effective term for files 21112229 and file 21125843 is 14 months imprisonment.

6. I set a new non-parole period of 8 months commencing 8 August 2011.

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