Heineman v Bradley [2011] NTSC 105

PARTIES:	HEINEMAN, Stuart Dan George v BRADLEY, Sandi-Lee
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 15 of 2011 (21037291)
DELIVERED:	19 December 2011
HEARING DATE:	21 October 2011
JUDGMENT OF:	BARR J
APPEAL FROM:	HANNAM CSM

CATCHWORDS:

APPEAL – Sentencing – *Alcohol Court Act 2006* – alcohol intervention order – whether the imposition of the maximum alcohol intervention order of 12 months was manifestly excessive in the circumstances.

APPEAL – Sentencing – manifest excess – whether the imposition of 6 month term of imprisonment as a component of the alcohol intervention order was manifestly excessive.

Alcohol Court Act 2006 s 20(1), s 20(2), s 40
Traffic Act s 22(1)

Miller v Burgoyne [2004] NTSC 47, followed

Bakos v The Queen [2006] NTCCA 5; *Cranssen v R* (1936) 55 CLR 509; *Gokel v Hammond* [2001] NTSC 9; *Hales v Garbe* [2000] NTSC 49; *Hales v Knight* [2001] NTSC 58; *R v Lange* [2007] NTCCA 3; *Mace v Hales* [2002] NTSC 15; *Midjumbani v Moore* [2009] NTSCF 27; *Pryce v Foster* (1986) 3 MVR 321, considered

REPRESENTATION:

Counsel:

Appellant:	A Elliott
Respondent:	L Brown

Solicitors:

Appellant:	I Rowbottam
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

Heineman v Bradley [2011] NTSC 105
No. JA 15 of 2011 (21037291)

BETWEEN:

STUART DAN GEORGE HEINEMAN
Appellant:

AND:

SANDI-LEE BRADLEY
Respondent:

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 19 December 2011)

Appeal against severity of sentence

[1] On 7 November 2010 at 1:25 pm the appellant was driving his station wagon along McMillans Road Malak when he was detected travelling at 93km per hour by a police radar. The speed limit for the area was 80km per hour.

[2] Police stopped the appellant and he was subjected to a roadside breath test which returned a positive result. He was arrested and a subsequent breath analysis returned a blood alcohol reading of 0.126%. The appellant told police officers at the time of his apprehension that he had been drinking

heavily the previous night and had stopped drinking at approximately 4:15 am, some nine hours prior to his arrest.

[3] On 10 February 2011 the appellant appeared in the Darwin Court of Summary Jurisdiction charged with exceeding the speed limit contrary to Rule 20 of the Traffic Regulations and driving with a medium range blood alcohol content (0.126%) contrary to s 22(1) of the *Traffic Act*.

[4] This was not the appellant's first appearance in court for drink driving matters.

[5] On 16 November 2006 the appellant was disqualified for driving for six months after a breath analysis on 14 September 2006 returned a blood alcohol reading of 0.98%. The appellant was also driving in excess of the speed limit.

[6] On 25 January 2009 the appellant drove with a high range blood alcohol content of 0.252%. He was convicted of that offence on 12 February 2009 and sentenced to imprisonment for 21 days, fully suspended, with an operational period of 18 months. He was disqualified from driving for 18 months.

[7] The offending on 10 November 2010 occurred shortly after the expiration of that disqualification period.

[8] On 10 February 2011 the appellant indicated a plea of guilty to the charges and requested that he be assessed for admission to the Alcohol Court. His

bail was consequently varied to include conditions that he not purchase or consume alcohol and that he report to the court clinicians for assessment for entry into the Alcohol Court.

[9] The Alcohol Court was a court "with enhanced powers to make orders in respect of people with alcohol dependency", established by the now repealed *Alcohol Court Act 2006* and constituted by the Chief Magistrate and any other magistrates appointed.[1] Orders made by the Alcohol Court were intended to provide offenders with increased opportunity for rehabilitation, as well as to reduce the commission of offences (and general risks and harm) associated with alcohol dependency.

[10] An offender's eligibility for referral from the Court of Summary Jurisdiction to the Alcohol Court was dependent upon his satisfying a number of criteria, including that (1) the person pleaded or intended to plead guilty; (2) it was "highly likely" on the facts alleged and the person's criminal history that the Court of Summary Jurisdiction would impose a term of imprisonment; and (3) that, on the information available to the Court of Summary Jurisdiction, the person appeared to be dependent on alcohol.[2]

[1] The *Alcohol Court Act 2006* was replaced by the *Alcohol Reform (Substance Misuse Assessment and Referral for Treatment Court) Act 2011*. The Alcohol Court itself has been replaced by the SMART Court.
[2] *Alcohol Court Act 2006 (repealed)* s 14(1).

[11] An ‘alcohol intervention order’ was the sentencing tool available to the Alcohol Court, defined in s 20(1) *Alcohol Court Act 2006* as an order that the offender –

> (a) is sentenced to a term of imprisonment, for a period not exceeding 2 years, that is suspended wholly or partly; and
>
> (b) for a period not exceeding 12 months-
>
> (i) must undergo treatment for alcohol dependency; and
>
> (ii) is subject to the supervision of the Director of Correctional Services and the conditions imposed under this section.

[12] Section 20(2) of the Act contained a number of mandatory conditions to be included in an alcohol intervention order including that the offender remain in the Territory, not consume alcohol, undergo “the specified treatment for the specified period”, and report to and obey the directions of the Court, the Director of Correctional Services, or a court clinician.

[13] Following his court appearance on 10 February 2011, the appellant was assessed by an Alcohol Court clinician and an assessment report provided under s 40 of the Act. The appellant then pleaded guilty to both charges on 24 February 2011. The Court file was endorsed that the appellant was “admitted to Alcohol Court.”

[14] The matter was adjourned to 17 March 2011 for review, and on that date further adjourned to 14 April 2011 for completion.

[15] In the Alcohol Court on 14 April 2011, submissions were made in mitigation. The Chief Magistrate then imposed an alcohol intervention order under which the appellant was sentenced to a term of imprisonment of six months, wholly suspended, and under which he was ordered, for a period of 12 months, to undergo treatment for alcohol dependency and to be subject to the supervision of the Director of Correctional Services in relation to the requirement that he submit to random breath testing. Her Honour specified that the treatment for alcohol dependency was to be continuing counselling at Catholic Care, noting that the appellant had three more sessions "paid for under this program". The mandatory conditions summarized in par [12] above were also included, in compliance with s 20(2) *Alcohol Court Act 2006*.

[16] The appellant challenges the decision of the Chief Magistrate in the Alcohol Court on two grounds:

1. The imposition of the maximum available Alcohol Intervention Order was manifestly excessive; and

2. The sentence was manifestly excessive in all the circumstances of the offence and the offender.

Ground 1 – The period of the alcohol intervention order

[17] In support of the contention that the imposition of a 12 month alcohol intervention order was manifestly excessive in the circumstances, the appellant argues that 12 months is the maximum period the court may impose under s 20(1)(b) *Alcohol Court Act 2006*; that in setting the

maximum period, the Chief Magistrate did not sufficiently acknowledge the appellant's participation in counselling and the gains made by him to that point.

[18] The appellant argues that decisions of single judges of this Court and of the Court of Criminal Appeal in relation to participation by drug offenders in the CREDIT NT program should be applied by analogy. Reference was made to *Miller v Burgoyne* [2004] NTSC 47 and *Bakos v The Queen* [2006] NTCCA 5.

[19] In *Miller v Burgoyne*, Olsson AJ explained that the imposition of a 'short sharp custodial sentence' for several counts of supplying cannabis and one for possession of a traffickable quantity of cannabis plant material constituted an error in conceptual approach to the sentence because the magistrate had allowed considerations of general deterrence to overwhelm the significance of the offender's completion of the CREDIT NT program diversion scheme. His Honour said that the error in conceptual approach lay in the magistrate's having confused quite separate sentencing factors and aims; that the practical outcome was counterproductive to the appellant's rehabilitation, and that:-

> "…. general deterrence ought to have been achieved by imposing a custodial head sentence of a length that plainly recognised the factor of general deterrence in relation to cases of multiple sales of cannabis for gain. The particular situation of the appellant, bearing in mind his successful diversion into the CREDIT NT scheme and the mitigating factors that had been identified in relation to him, ought

then to have been recognised by appropriate use of the power of suspension."[3]

[20] His Honour added that the magistrate's approach had a strong potential to negate the potential long-term efficacy of the CREDIT NT program, in that if treatment program candidates thought that they may be required to serve an actual custodial sentence, there would be a greatly reduced incentive for them to approach participation in such a program in a positive way.

[21] The Court of Criminal Appeal in *Bakos v The Queen* fully concurred with the reasons for judgment of Olsson AJ in *Miller v Burgoyne*.[4]

[22] I reject the appellant's arguments on ground 1.

[23] At the time the appellant was sentenced by the Chief Magistrate, he had commenced, but had not finished, his treatment for alcohol dependency. Her Honour noted this in her sentencing remarks to the appellant:

> "Now, I think all of the things that Mr Rowbottam says about the way in which you've started to turn your life around are very good indicators. Things such as being invited to normal social events that people of your stage in life would be, instead of being avoided, are very, very important markers that you're moving back into a much more normal kind of life and your prospects of leading a normal, law-abiding life are much better.
>
> However, I don't think you can talk in the terms of you have completed your rehabilitation, you have turned your life around. It will be quite some time, particularly after there is no longer a court order hanging over your head, and the question will be whether you are prepared to continue to maintain the gains that you've made. And there will be times of stress in your life and you very well easily

[3] *Miller v Burgoyne* [2004] NTSC 47; (2004) 150 A Crim R 7, at [38].
[4] *Bakos v The Queen* [2006] NTCCA 5 at [13].

> could be falling back into the same use of alcohol to overcome those periods of stress. However, you are an intelligent man; you have seen the gains, you've seen what it does to your health, what it does to your social life, what it does to your finances and to your normal functioning and that hopefully will be enough of an incentive not to fall into this pattern of problematic drinking again."

[24] Notwithstanding her Honour's reference to the offender's insight being a sufficient incentive, her sentencing disposition indicates that she was concerned to ensure that the appellant's early steps towards rehabilitation would be supported by a lengthy regime of supervision. The alcohol intervention order was substantially rehabilitative, albeit restrictive. The appellant would still be undergoing treatment for alcohol dependency, motivated (or at least held to his commitments) by the court-imposed restraint of not consuming alcohol. That restraint would be enhanced by supervision, and by the fact that the appellant (at the direction of the Director of Correctional Services or a probation officer) could be required to submit to testing for blood alcohol.

[25] It should be borne in mind that the *quid pro quo* for the alcohol intervention order was that the appellant would not be sentenced to a term of actual imprisonment. There was no error in conceptual approach of the kind identified by Olsson J in *Miller v Burgoyne*. The Chief Magistrate did not confuse sentencing factors and aims. On the contrary, her Honour's disposition demonstrated a clear and consistent conceptual approach.

[26] I mention finally that counsel for the appellant addressed her Honour on the period of operation of the alcohol intervention order in these terms:

> "As to the length of that alcohol intervention order, your Honour, that's a matter for the court. The legislation provides it shouldn't exceed 12 months but of course, in my submission, it can be less. He's essentially been part and parcel of the program and of course has indicated on the first occasion he appeared in court, I should say, a plea of guilty to these offences and proceeded accordingly. But having said that, your Honour, my client's certainly medium-term view, he's not firm one way or the other long-term, but certainly thinks that it's a matter that he could give it up permanently, but certainly his medium-term view is alcohol is not going to be a part of his life at all."

[27] That was not a submission that a period of 12 months was inappropriate. It was more akin to a concession that a period of 12 months was open to the magistrate. There were no reasons advanced in defence counsel's submissions as to why 12 months was not an appropriate period for the alcohol intervention order. Her Honour was given no guidance by defence counsel as to what lesser period than 12 months was the appropriate period.

[28] The appellant has failed to demonstrate that the period of 12 months fixed for the alcohol intervention order was manifestly excessive. The first ground of appeal must be rejected.

Ground 2 – Manifestly excessive sentence

[29] The appellant argues that a sentence of 6 months imprisonment for a medium range offence is well in excess of sentences routinely imposed by the Court of Summary Jurisdiction where there is no concurrent breach of an existing court order (such as driving disqualified, or breaching a suspended sentence). It is submitted that a number of cases demonstrate "somewhat of a tariff" for this offending: *Pryce v Foster* (1986) 3 MVR 321; *Hales v*

Garbe [2000] NTSC 49; *Hales v Knight* [2001] NTSC 58; and *Gokel v Hammond* [2001] NTSC 9.

[30] I disagree that those cases establish a tariff, whether individually or collectively. They are 10 years old or more. All were prosecution appeals against sentence and hence subject to the special considerations explained by the Court of Criminal Appeal in *R v Lange*[5]: -

> "On a Crown appeal against the adequacy of a sentence, it is not enough that the Appeal Court is of the view that the sentence is too light. In the absence of a specific error by the sentencing Judge, the sentence must be so manifestly inadequate as to demonstrate that error of principle must have occurred. To put it another way, the sentence must be so low as to "shock the public conscience": *R v Osenkowski* (1992) 30 SASR 212 per King CJ at 213. The principles governing Crown appeals were discussed by this Court in *R v Riley* (2006) 161 A Crim R 414 at 419 [18] - [20] and 421 – 422 [34] and it is unnecessary to repeat that discussion."[6]

The principles applicable to an appeal against sentence are well known. The court will only interfere with a magistrate's sentencing discretion if it is satisfied that the sentence was manifestly excessive, for example: *Mace v Hales*[7], or that error in the exercise of the sentencing discretion is shown, such as acting on a wrong principle, or misunderstanding or wrongly assessing some salient feature of the evidence: *Cranssen v R.*[8] The presumption is that there is no error: *Midjumbani v Moore.*[9] In reviewing a sentence imposed, this Court will normally assume that the sentencing

[5] [2007] NTCCA 3 at [31].
[6] The discussion in *Riley* also included at [34] reference to the principles on Crown appeals set out in *Everett v The Queen* (1994) 181 CLR 295 at 299 - 300; 74 A Crim R 241 at 244-245.
[7] [2002] NTSC 15.
[8] (1936) 55 CLR 509 at 519-520.
[9] [2009] NTSC 27.

magistrate has considered all matters that are necessarily implicit in any conclusion arrived at.

[31] A medium range blood alcohol content is 0.08 grams or more, up to 0.15 grams of alcohol, per 100 millilitres of blood. The appellant (0.126%) was well into the range, indeed closer to the top than the bottom. The maximum term of imprisonment for driving with a medium range blood alcohol content is six months for a first offence, and 12 months for a second or subsequent offence. The appellant had previously been found guilty of driving with a high range blood alcohol content, and so was liable to a maximum of 12 months' imprisonment.

[32] The appellant had committed three drink driving offences in the period of just over 4 years from 14 September 2006 to 10 November 2010. The blood alcohol levels were (in chronological order) 0.098%, 0.252% and 0.126%. The point could be made that the appellant's most recent offending was at a less serious level than his immediately preceding offence, 0.252%, for which he had been sentenced to imprisonment for 21 days, fully suspended. On the other hand the most recent offending was the appellant's third offence of drink driving. Mr Elliott, counsel for the appellant, submits that the maximum penalty of imprisonment for 12 months is applicable not only to a second offence, but also to each subsequent offence, whether it be the third, fourth or tenth such offence. I accept this submission, but that does not mean that it is necessarily wrong in principle to impose the maximum penalty on, say, a third offence.

[33] This Court is left in some difficulty in considering the second ground of appeal because the Chief Magistrate did not give any indication as to what the sentence would have been if she had dealt with the matter in the Court of Summary Jurisdiction on a plea of guilty. Consistent with s 14(1)(b) *Alcohol Court Act 2006*, I conclude that it was highly likely that the appellant would have been ordered to serve a term of imprisonment. However, this Court does not know what the head sentence would have been, nor the actual period of imprisonment the appellant would have been required to serve, assuming that the head sentence was suspended under s 40(1) *Sentencing Act*. The appellant therefore had no idea whether he had secured any (and if so what) advantage for himself in terms of a reduced head sentence by his being referred to the Alcohol Court and by his submitting to the restrictions of an alcohol intervention order.

[34] In my opinion, consistent with what was said by Olsson AJ in *Miller v Burgoyne* referred to by me in par [20] above, all 'benefits' (by way of reduction in head sentence and any favourable exercise of the Alcohol Court's discretion to wholly or partly suspend the sentence) should have been explained, both so that the appellant would understand the advantage he had secured and so that other candidates for alcohol intervention orders would have an incentive to seek referral to the Alcohol Court for treatment for their alcohol dependency and thereby facilitate their rehabilitation.

[35] A further difficulty in considering the second ground of appeal is that the Chief Magistrate did not specify the discount allowed for the early plea of

guilty. I expect the discount would have been in the vicinity of 25%. On this assumption, the starting point for the head sentence would have been eight months, a sentence well out of kilter with the term of imprisonment of 21 days, fully suspended, for the offence in January 2009 of driving with a high range blood alcohol content of 0.252%. However, that apparent discrepancy does not, as a matter of logic, mean that the sentence of six months imposed in April 2011 as a component of an alcohol intervention order was manifestly excessive.

[36] My comments notwithstanding, it was not an error on the part of the Chief Magistrate not to explain the matters referred to in par [34].

[37] The appellant has not established error in the exercise of the Chief Magistrate's sentencing discretion, and has failed to show that the sentence of six months imposed as a component of an alcohol intervention order was manifestly excessive.

[38] The second ground of appeal must therefore fail.

Conclusion

[39] The appeal is dismissed.
