Canet v Hales [2001] NTSC 100

PARTIES:	DENNIS JAMES CANET
	v
	PETER WILLIAM HALES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 33 of 2001 (20005729)
DELIVERED:	13 November 2001
HEARING DATE:	30 October 2001
JUDGMENT OF:	BAILEY J

CATCHWORDS:

APPEAL - Justices

Criminal Law – appeal against sentence – dangerous act involving motor vehicle causing death – whether sentence was manifestly excessive – whether sentence imposed was within limits of a sound exercise of sentencing discretion – whether subjective mitigating factors were taken into account in sentencing – principles applicable to imposition of suspended sentence - whether there has been a misapprehension of fact or law which has led to the imposition of sentence.

Criminal Code 1999 (NT) – s.154
Justices Act 1928 (NT)
[1]
R v Jurisic (1998) 45 NSWLR 209 - referred
R v Guilfoyle (1973) 57 Cr App R 549 - considered
R v Boswell (1984) 79 Cr App R 277 – considered
R v Sandby (1993) 117 FLR 218 – followed

Simmons (1997) 93 A Crim R 589 – followed
McKaye (1982) 7 A Crim R 96 – followed
Marsh (1983) 35 SASR 333 – followed
Wacyk (1996) 66 SASR 530 – followed
Jonceski (1992) 60 A Crim R 189 – considered
Young (1990) VR 951 – referred
Mulholland (1991) 102 FLR 465 – referred
Ireland (1987) 49 NTR 10 – referred
Jabaltjari (1989) 64 NTR 1 – referred
Kelly (2000) 113 A Crim R 263 - considered

REPRESENTATION:

Counsel:

Appellant:	Ms H Spowart
Respondent:	Ms T Austin

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

Judgment category classification:	B
Judgment ID Number:	bai0108
Number of pages:	18

bai0108

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Canet v Hales [2001] NTSC 100
No. JA 33 of 2001 (2005729)

BETWEEN:

DENNIS JAMES CANET
Appellant

AND:

PETER WILLIAM HALES
Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 13 November 2001)

Background

[2] On 17 May 2001, the appellant was convicted after trial in the Court of Summary Jurisdiction of one charge of aggravated dangerous act contrary to s 154 of the *Criminal Code*.

[3] The particulars of the charge were to the effect that on 10 January 2000 at Acacia Hills the appellant "… did an act, namely took his attention from the road, to turn and look to the rear and steered his vehicle onto the incorrect side of the carriage-way in front of oncoming traffic, colliding with Jeep Cherokee, registration number NTG 811 825, that caused serious actual danger to the life of Thomas Price, in circumstances where an ordinary

person similarly circumstanced would have clearly foreseen such danger and not have done that act."

[4] The circumstance of aggravation was that the appellant caused the death of Thomas Price by his dangerous act.

[5] On 12 June 2001, the appellant was sentenced to imprisonment for a term of 12 months. The learned magistrate ordered that the term of imprisonment be suspended forthwith upon the appellant entering into a home detention order for a period of 3 months. His Worship did not disqualify the appellant from driving, but did impose a condition on the home detention order that the appellant be restricted to driving for the purposes of his employment during the three month term of that order.

[6] The appellant has appealed against the sentence imposed upon him on the sole ground that the sentence is "manifestly excessive". Ms Spowart, counsel for the appellant submitted that while no complaint was made against the imposition of a sentence of imprisonment, in all the circumstances such a sentence should have been fully suspended.

[7] In brief terms, the learned magistrate found that the appellant was driving a 3.5 tonne Toyota Dyna truck, loaded with approximately 300 kgs of bananas, north on the Stuart Highway at Acacia Hills at around 90 kph. The appellant was distracted from driving by some papers which became dislodged in the truck cabin. The appellant reached to retrieve the papers and then, sensing that his load of bananas may have shifted, checked both

his left and right hand rear-view mirrors before turning his head to look over his shoulder. The learned magistrate found that the appellant's forward view of the road and on-coming traffic had been distracted for some six seconds.

[8] His Worship found that during those six seconds, the appellant had allowed his truck to drift partly or fully onto the incorrect side of the carriage-way. The driver of a Ford Falcon travelling south on the Stuart Highway at approximately 115 kph had been forced to take evasive action to avoid a head-on collision with the appellant's truck. The driver of the Ford Falcon moved his vehicle onto the shoulder of the road and successfully avoided the appellant's truck. The learned magistrate found that the appellant was unaware of the Ford Falcon or the evasive action taken by its driver. The appellant's truck collided with the Jeep Cherokee driven by the deceased. His Worship found that the Jeep Cherokee was travelling immediately behind the Ford Falcon. The learned magistrate made no finding as to how close the Jeep was to the Ford, other than finding that the deceased's vehicle was not "tail-gating" the Ford. His Worship found that the deceased braked heavily but did not attempt to steer the Jeep onto the shoulder of the road.

[9] The learned magistrate found that the appellant's voluntary act of taking his attention from the road to retrieve papers, look in his rear-view mirrors and turn and check his load, while allowing his vehicle to drift onto the incorrect side of the carriage-way and collide with the on-coming Jeep, caused serious actual danger to the deceased's life. His Worship was further satisfied that

an ordinary person similarly circumstanced would have clearly foreseen such danger and not have acted as did the appellant.

Submissions

[10] Ms Spowart for the appellant submitted that the offence was one of momentary inattention. The learned magistrate held:

> "Although this was a dangerous act, and it was an act of driving, I'm content for shorthand to call it dangerous driving. And although it went on surely for several seconds, it was certainly not the sort of dangerous driving which one first thinks of. He was not hooning about. He was not deliberately going out to annoy other motorists along the road."

[11] His Worship also held that the appellant's act was "… not done with any intent to cause any sort of havoc or mayhem and even inconvenience …" and the "… real difficulty here in imposing a penalty is that this man was not doing anything wilful to cause harm on the road".

[12] In Ms Spowart's submission, the appellant's offence was at the lowest end of the scale of seriousness for offences of its kind. In this regard, Ms Spowart emphasised the absence of aggravating factors:

a) no alcohol or drugs were involved;

b) there was no excessive speed;

c) the 'dangerous act' was only a few seconds in duration;

d) there was no erratic driving;

e) there was no competitive driving or "hooning around";

f) there was no ignoring of warnings; and

g) there was no police pursuit involved.

[13] Factors such as these have been identified in the dangerous driving guideline judgment of the NSW Court of Criminal Appeal, *R v Jurisic* (1998) 45 NSWLR 209 as indicating that a driver may have abandoned responsibility for his or her own conduct and merit a starting point of 2 to 3 years imprisonment after a plea of guilty. The Court also adopted a guideline that:

> "A non-custodial sentence for an offence against s 52A (dangerous driving and aggravated dangerous driving occasioning death or grievous bodily harm) should be exceptional and almost invariably confined to cases involving momentary inattention or mis-judgment".

[14] Ms Spowart also emphasised the appellant's relatively minor criminal record (disobeying a red traffic signal and driving an uninsured/unregistered vehicle) and personal circumstances as the sole carer for his 15 year old son. While the matter had proceeded as a contested hearing, the learned magistrate acknowledged that the case involved a "real jury question". The appellant had also saved time and some expense in electing to have the matter disposed of in the Court of Summary Jurisdiction rather than the Supreme Court.

[15] In all the circumstances of the offence and the offender, Ms Spowart submitted that the sentence was manifestly excessive in suspending the 12 month term of imprisonment on the condition that the appellant enter into a home detention order for a period of 3 months.

[16] Ms Austin for the Crown emphasised the fundamental principles applicable to an appeal against sentence. It is unnecessary to repeat such well known and accepted principles in any detail for present purposes. It is sufficient to acknowledge that it is incumbent on the appellant to show that a sentence is not just excessive, but manifestly so (*Cranssen v The King* (1936) 55 CLR 509 at 520). The presumption is that there is no error in the sentencing: an appellant must demonstrate that the sentencer erred, either by acting on a wrong principle, or in misunderstanding or wrongly assessing some relevant feature of the evidence (*Raggett* (1990) 50 A Crim R 41 at 42).

[17] Ms Austin noted that the maximum sentence for the appellant's offence is 10 years imprisonment (s 154(3) *Criminal Code*) or upon being found guilty summarily, 5 years imprisonment (s 122 *Sentencing Act*). The learned magistrate was required to exercise his discretion in relation to the maximum of 10 years imprisonment (*Kumantjara v Harris* (1992) 109 FLR 400) and if His Worship considered that the offence warranted a greater sentence than he was permitted to impose, he was obliged to refer the matter to the Supreme Court for sentence (*Maynard v O'Brien* (1991) 78 NTR 16).

[18] In Ms Austin's submission, there is no generally recognized tariff for sentencing in the case of dangerous act offences where the circumstance of aggravation is a death arising from the use of a motor vehicle – at least where the offender is not under the influence of an intoxicating substance.

[19] Ms Austin emphasised that the appellant was not entitled to a discount by reason of entering a plea of guilty and that any saving of time and expense by reason of the appellant's election to have the matter dealt with by the Court of Summary Jurisdiction was not a substantial matter of mitigation.

[20] In Ms Austin's submission, the learned magistrate exercised leniency in not disqualifying the appellant from driving. He chose to restrict the appellant's capacity to drive only during the three month term of the home detention order. In Ms Austin's submission the learned magistrate's reasons demonstrated that he had taken into account all the subjective mitigating factors advanced on behalf of the appellant and that the sentence was well within the range of a sound exercise of sentencing discretion.

Consideration and Decision

[21] In support of her submission that the appellant's offence was one of "momentary inattention", Ms Spowart referred to the following observation of Lawton LJ in *R v Guilfoyle* (1973) 57 Cr App R 549 at 552 concerning road traffic offences involving accidents, especially causing death by dangerous driving:

> "Cases of this kind fall into two broad categories; first, those in which the accident has arisen through momentary inattention or misjudgment, and, secondly, those in which the accused has driven in a manner which has shown a selfish disregard for the safety of other road users or of his passengers, or with a degree of recklessness. A sub-division of this category is provided by the cases in which an accident has been caused or contributed to by the accused's consumption of alcohol or drugs."

[22] In *Guilfoyle*, the UK Court of Appeal (Criminal Division) suggested that offenders within the first category (momentary inattention or misjudgment) should normally be fined and disqualified from driving. Their Lordships indicated that the length of driving disqualification should vary according to the good, bad or indifferent driving record of the offender. In contrast, for offenders within the second category (selfish disregard for the safety of others or who had driven recklessly), their Lordships considered a custodial sentence with a long period of disqualification may well be appropriate.

[23] The Court of Appeal (Criminal Division) returned to the issue in *R v Boswell* (1984) 79 Cr App R 277. It was noted that since *Guilfoyle*, the offence had been narrowed by requiring recklessness and the maximum penalty had been increased from two years to five years imprisonment. This made it clear that, under the new offence, offenders would fall within the more serious (second) category identified in *Guilfoyle*. In relation to the new offence, Lord Lane CJ held at p 281:

> "To be guilty, the defendant must have created an obvious and serious risk of injury to the person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it."

[24] The judgment in *Boswell* went on to identify a list of aggravating and mitigating factors for the offence. The approach in *Boswell* has been adopted broadly in the guideline judgment of the NSW Court of Criminal Appeal in *R v Jurisic*, supra, for sentencing in cases of dangerous and

aggravated dangerous driving occasioning death or grievous bodily harm contrary to s 52A of the *Crimes Act* (NSW).

[25] One of the mitigating factors identified by Lord Lane CJ in *Boswell* was: "If the offence was caused by a momentarily reckless error of judgment". The reference to a "momentarily" reckless error of judgment was not intended to detract from the general proposition that offences under the new English provision fell within the more serious category of offences identified in *Guilfoyle*. For conviction, an offender had to be guilty of *recklessness*, whether momentarily or otherwise.

[26] The offence of which the appellant was convicted, contrary to s 154 of the *Criminal Code*, is of course quite different in form from the offences considered in *Guilfoyle*, *Boswell* and *Jurisic* and not specifically aimed at driving. Section 154(1) provides:

> "Any person who does or makes any act or omission that causes serious danger, actual or potential, to the lives, health or safety of the public or to any person (whether or not a member of the public) in circumstances where an ordinary person similarly circumstanced would have clearly foreseen such danger and not have done or made that act or omission is guilty of a crime and is liable to imprisonment for 5 years."

[27] In *Sanby v R* (1993) 117 FLR 218 at 221 Angel J held:

> "Section 154 of the *Criminal Code* is very broad in scope and covers all manner of conduct: *Baumer v The Queen* (1988) 166 CLR 51 at 55, *Attorney-General v Wurrabadlumba* (1990) 101 FLR 414. Whilst the act or omission giving rise to the danger needs to be voluntary, the danger created thereby need not be an intended consequence, nor a consequence actually foreseen by the perpetrator of the particular act or

omission in question. The section creates an offence regardless of consequences beyond the danger, actual or potential itself. The section relates to voluntary conduct constituted by acts and/or omissions which objectively cause serious actual or potential danger irrespective of any consequential harm. The deliberate use of the words 'serious' and 'clearly' is significant. The offence created by s 154 is a lesser crime than manslaughter which, under the Code, relevantly requires actual foresight of the possibility of death. Section 154 addresses the question of foresight in terms of an ordinary person in similar circumstances to the accused clearly foreseeing a serious danger being caused by the accused's voluntary acts and/or omissions. I am of the opinion the use of 'serious' and 'clearly' is intended to permit juries to say in any given case where the line should be drawn between dangers which may be characterised as ordinary incidents of modern life, and dangers caused by plainly blameworthy conduct. In my opinion, s 154 is not directed at conduct which causes dangers which are ordinarily accepted as incidents of modern life, or, conduct which, even if giving rise to civil liability in negligence, would not widely or generally be regarded as 'criminal'. The use of 'serious' and 'clearly', in my view, requires the jury to say in any given case on which side of the line between an acceptable or an unacceptable risk of danger to others, the case before them falls. Questions of foreseeability are inevitably addressed in hindsight and as Lord Pearce said in a different context in *Hughes v Lord Advocate* [1963] AC 837 at 857: '… to demand too great precision in the test of foreseeability would be unfair … since the facets of misadventure are innumerable …'

The jury's task in approaching these matters is a practical and commonsense one. The terms of s 154 enable due allowance to be made for errors of judgment, momentary lapses of attention and the like which no reasonable person would label 'criminal'".

[28] Mildren J similarly emphasised at p 231 the rigorous requirements which need to be established beyond reasonable doubt for a conviction under s 154:

"… it is, in my opinion, clear that the section requires more than proof of conduct which, in a civil court, might be sufficient to sound in damages for negligence. First, the section requires proof of an act or omission that causes *serious* danger, actual or potential, to the life, health or safety of another. Although the act or omission need not be of a quality that it causes any actual danger, so long as there is a potential danger, (it is in this sense that the offence may be comparatively trivial) nevertheless the danger, whether actual or

> potential, must be 'serious'. Obviously this is a question of degree calling for an evaluation of the severity of the risk. If the danger is 'serious', the quality of the seriousness of the risk is to be judged by the requirement that the danger must be *clearly* foreseeable by an ordinary man, and of such a quality, that the ordinary man would not have taken it. The use of the word 'clearly' indicates, as does the word 'serious', that the risk must not be too slight, too remote, too improbable or unlikely; but that is not to say that only risks that are fanciful or far-fetched are outside of the section. In my opinion the test of foreseeability of risk is not the same as reasonable foreseeability of risk of injury in the law of civil negligence. The test to be applied is that of the 'ordinary person similarly circumstanced' in contradistinction from that of a 'reasonable person similarly circumstanced': cf s 31(2) of the Code. This is another indication that the proper test is a higher one than the standard of care of the reasonable man on the Clapham omnibus. The test of the 'ordinary man similarly circumstanced' who must 'clearly' foresee the risk, is an indication that the section intends to make allowance for ordinary human fallibility – the sort of common place errors of judgment and inadvertent acts of carelessness that happen because the risk is outside of normal human experience, because the wrongdoer's attention is distracted, because the wrongdoer makes the wrong choice when confronted with the need for sudden decision, or because of other similar factors. But to say that is not to substitute a different test from that required by the section. The jury must be satisfied beyond reasonable doubt that the act or omission caused serious danger to the life, health or safety of some other person in circumstances where an ordinary person, similarly circumstanced to the appellant, would clearly have foreseen such danger and not have done or made that act or omission."

[29] In the appellant's case, the learned magistrate was satisfied beyond reasonable doubt that the appellant's act caused *serious* actual danger and that an ordinary person similarly circumstanced would have *clearly foreseen* such danger and not have acted in the manner of the appellant. Accordingly, contrary to the submission of Ms Spowart, it is clear that the appellant's act was not one of "momentary inattention" or some commonplace error of judgment or inadvertent act of carelessness. The learned magistrate was

satisfied that the appellant's driving had fallen so far below the standard required as to be deserving of criminal sanction.

[30] The appellant has not appealed against his conviction. In context of s 154 of the *Criminal Code*, the submission that the appellant's offence was one of "momentary inattention" runs directly contrary to the fact of conviction. I would add that the submission is also at odds with the facts found by the learned magistrate. His Worship's finding that the appellant did not observe the forward view of the road upon which he was travelling at 90 kph (25 metres per second) towards oncoming traffic travelling at 115 kph (32 metres per second) does not suggest some momentary lapse or distraction. As the learned magistrate calculated, two vehicles travelling towards each other at these speeds would need to be more than 300 metres apart if they were not to collide or cross each other's path.

[31] In the circumstances, the appellant's act in not observing the forward view of the road for some 150 metres while travelling at speed in the face of oncoming traffic travelling somewhat faster was a serious act of recklessness with tragic consequences.

[32] Ms Spowart on behalf of the appellant did not submit that the head sentence of twelve months imprisonment is excessive. The absence of such a submission is, at least to my mind, somewhat inconsistent with the submissions that I have rejected above to the effect that the offence was one of momentary inattention. However, whether I am correct in that or not,

I am in no doubt that a head sentence of 12 months imprisonment for an act of dangerous driving causing death is well within the range of a sound exercise of sentencing discretion in the circumstances of the appellant's case.

[33] There is no tariff sentence for cases of the present kind. The very large majority of s 154 cases involving driving which cause death involve offenders who are affected by alcohol to a greater or lesser extent. Such cases almost always, in my experience, result in the imposition of a sentence of imprisonment. Many offenders are required to serve a period of actual imprisonment. In some cases, sentences are partly suspended, while in others, a non parole period is set. An important consideration in such cases is the offender's driving record with particular reference to any past history of driving under the influence of alcohol. On occasions, persons guilty of s 154 offences where alcohol is involved have received fully suspended sentences.

[34] Cases under s 154 where death has been caused by acts of dangerous driving at the hands of a sober driver are few and far between. I do not consider any useful purpose would be served by referring to particular examples of sentences imposed in such cases. The circumstances in which dangerous acts of driving causing death can, and have, occurred are so variable that comparisons between particular cases are not helpful. For example, in the appellant's case, the driving of the vehicle might properly be termed reckless while in other cases the reckless nature of the act has often been

related not only to the act of driving but also the unroadworthy state of the vehicle due to gross over-loading or mechanical or other defects. No meaningful comparison can be made between such cases.

[35] The gravamen of the appellant's complaint is not that he was sentenced to twelve months imprisonment but that this was not fully suspended.

[36] In this context, it is important to keep in mind that a suspended sentence should not be imposed unless the sentence of imprisonment of that length would be appropriate in the circumstances (*Simmons* (1997) 93 A Crim R 589; *McKaye* (1982) 7 A Crim R 96; *Marsh* (1983) 35 SASR 333). An immediate sentence of imprisonment is, of course, more severe than a suspended sentence, but it must be recognised that an offender may be called upon to serve the entire sentence in prison.

[37] The exercise of the discretion to suspend, in whole or in part, a sentence of imprisonment depends upon a number of factors which, in my view, cannot be conveniently listed or subject to strict guidelines. With respect, I agree with the observations of Perry J in *Wacyk* (1996) 66 SASR 530 at 536:

> "It will never be possible to isolate any single factor in a given case as being determinative of the exercise of the discretion whether or not to suspend. The exercise of that discretion one way or the other must turn upon a careful evaluation of the overall circumstances of the particular case, which will include consideration of the circumstances of the offending and the circumstances personal to the offender."

[38] A sentencing court is placed in a difficult position in determining whether or not to suspend or partly suspend a sentence of imprisonment. First, a sentencer is required to consider whether a sentence of (actual) imprisonment is the appropriate sentence in the light of all the circumstances of the offence and the offender. If so, the sentencer is required to consider again those same circumstances of the offence and the offender to determine whether all or part of it need not be served in custody. On occasions, some courts have endeavoured to adopt a formal two-stage process, for example, Wright J (CCA, Tasmania) in *Jonceski* (1992) 60 A Crim R 189 at 193 held:

> "… a suspended sentence involves a two-stage approach. First, there is the necessity to fix an appropriate term of imprisonment for the crime in question. It is then necessary to turn to the individual circumstances of the offender to consider whether those circumstances justify suspension, see *Percy* [1975] Tas 62 at 72."

[39] Other courts (notably those in Victoria: *Young* [1990] VR 951) have emphatically rejected attempts to divide the sentencing process into stages based on a distinction between the objective character of the crime and mitigating factors personal to the accused. In the Northern Territory, different judges have favoured one side or the other of the debate (see, for example, *Mulholland* (1991) 102 FLR 465 where Gallop J at 474 preferred the Victorian view in *Young*, while Angel J at 479-80 did not consider that there was "really much to debate"; *Ireland* (1987) 49 NTR 10 at 22-24 where Nader J adopted a two-stage approach; *Jabaltjari* (1989) 64 NTR 1 at 20 where Martin J referred to a sentence commencing at an objective

starting point "not often disclosed"; and more recently, *Kelly* (2000) 113 A Crim R 263 where the Court of Criminal Appeal (Martin CJ, Angel and Mildren JJ) encouraged an express indication of the weight given to a plea of guilty as a mitigating factor).

[40] For my part, in the context of suspended and partly suspended sentences, whether expressly stated or not as part of a two-stage approach, I consider that subjective mitigating factors may be afforded greater weight in the decision whether to suspend or partly suspend a sentence than in relation to the fixing of a head sentence. Some support for this may be seen in *Kelly*, supra at 270:

> "… it may be appropriate in the circumstances, rather than reduce the head sentence, to give effect to the value of the plea by other means such as a partially suspended sentence or home detention order, or by the imposition of a fine, to mention only some of the obvious examples."

[41] In the appellant's case, he was not entitled to a discount for a guilty plea, albeit the learned magistrate took into account the appellant's election to proceed in the Court of Summary Jurisdiction had saved some time and expense in relation to a case which involved a "real jury question". The learned magistrate took into account that the appellant's criminal history was minor; that he had the sole care of his 15 year old son; that he had a supportive employer who was prepared to retain him as a driver and that the appellant was deeply remorseful. The learned magistrate imposed a sentence which permitted the appellant to financially support and care for

his son while continuing to work as a professional driver. The appellant's driving licence was restricted only during the three month term of the home detention order. He imposed no financial penalty on the appellant (albeit he acknowledged the appellant's concern at the indirect expense of telephone calls to advise his whereabouts to the supervisor of his home detention order).

[42] Other sentencers may have acted differently. I may have adopted a different approach. It is particularly noteworthy that the appellant was not disqualified totally from driving for a substantial period – an order almost invariably imposed in cases of the present kind. It is not to the point that other sentencers may have sentenced the appellant in some other way. The issues are whether the sentence imposed is within the limits of a sound exercise of sentencing discretion and whether there has been some misapprehension of fact or law which led to the imposition of the sentence.

[43] I do not consider that any error of fact of law is disclosed in the reasons of the learned magistrate. I am satisfied that the sentence imposed was within the range appropriate to all the circumstances of the offence and the offender.

[44] I am unable to agree that the sentence was "manifestly excessive". On the contrary, I would venture to suggest that the learned magistrate displayed a good deal of compassion in carefully constructing a sentence which had

the potential for the appellant to remain out of gaol and to continue supporting his son while the appellant worked as a professional driver.

Order

[45] The appeal is dismissed.

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