PARTIES:	FLOWERS, Nicholas Joseph
	v
	CHUTE, John Henry
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	CIVIL
FILE NOS:	No. 22/93
DELIVERED:	Alice Springs 12 May 1993
HEARING DATES:	7 May 1993
JUDGMENT OF:	Angel J

CATCHWORDS:

Appeal - Justices - Appeal against sentence - Whether mitigating circumstances should have been considered - Section 33 Northern Territory Criminal Code applies to section 31 Traffic Act - Appellant's circumstances not sudden and extraordinary but amount to mitigation - Appellant re-sentenced

Traffic Act ss31, 51

Northern Territory Criminal Code s33

REPRESENTATION:

Counsel:

Appellant: K Kilvington

Respondent: M Carey

Solicitors:

Appellant: Central Australian Aboriginal Legal Aid Service

Respondent: Director of Public Prosecutions

Judgment category classification: B
Court Computer Code:
Judgment ID Number: ang93005
Number of pages: 8

ang93005

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 22/1993

BETWEEN:

NICHOLAS JOSEPH FLOWERS
Appellant

AND:

JOHN HENRY CHUTE
Respondent

CORAM: ANGEL J

REASONS FOR DECISION

(Delivered 12 May 1993)

This is an appeal against an eight month sentence imposed by a Magistrate sitting as a Court of Summary Jurisdiction at Alice Springs on 6 April 1993. The appellant pleaded guilty to a charge of driving whilst disqualified in contravention of s31 of the Traffic Act.

The appellant, a 40 year old Aboriginal man, had three prior convictions for driving whilst disqualified, the first on 17 October 1990 for which he was fined $750.00, the second on 3 June 1991 for which he was imprisoned for three

months and disqualified from holding a driver's licence for four years, and the third on 2 July 1992 for which he received a six month home detention order and was disqualified from driving a motor vehicle for two years. On 17 August 1992, the home detention order was converted into a six month term of imprisonment on account of a breach of the terms of the home detention order by the appellant.

Before the learned Magistrate it was submitted there were strong extenuating circumstances. The learned Magistrate was informed the defendant was a 40 year old married man with five children. The appellant has lived at Santa Teresa community since 1975. The learned Magistrate was informed that the appellant was a mechanic, or "perhaps it might be that he is a mechanic's aide or assistant because ... he only earns $120.00 per week, out of which he supports the whole family." According to the transcript of proceedings counsel then put the following submission to the learned Magistrate:

> "Your Worship, with respect to the circumstances of this offence I'm instructed that in fact Mr Flowers had been demonstrating a strong appreciation of his responsibilities in the days leading up to this. What had happened was that the[sic] had to get in to town to pick up his wife's car and on the Thursday when the car was going to be released he organised a licensed driver, a Mr Greg Palmer, to do the driving and he drove the vehicle back to the community. On the Friday they had to come back in to town to pay the balance of the outstanding bill of $190 and also to do some shopping.
>
> My client's wife's brother was recruited, Mr Geoffrey Ronson, was recruited to do the driving, a licensed driver. My client's wife was unable to drive because she doesn't know how to. Now, Your Worship, I'm

instructed that once they were in town there were a variety of things which the group of people had to do and - for instance the garage had to be paid off, there was some administrative things and also there was some shopping to be done at Piggly Wiggly's, both for Mr Flowers' family and also for Mr Ronson, the driver's family.

Now somewhere along the way Mr Geoffrey Ronson started drinking and at Piggly Wiggly's he also bought some more grog, which was by arrangement to be dropped of[sic] at the Amoonguna community on the way home. I'm instructed that back at Amoonguna there was a problem with the vehicle and my client had to spend some time trying to fix the timing on the vehicle and whilst this was going on Mr Ronson, who was recruited to do the driving, spent his time drinking with the people of Amoonguna who showed their appreciation for him picking up their grog by letting him have as much as he wanted. So he was drinking.

Now I'm instructed it was getting late in the afternoon before they were able to leave Amoonguna and the car was actually going. Mr Ronson did start driving, as he was the licensed driver, and they sought to take the back road. I'm not familiar with those roads, Your Worship, but I'm instructed there is a dirt road from Amoonguna to Santa Teresa, a back road, as my client would call it, and it was perceived that this was the quickest way of getting back there. But my client became alarmed soon after they left the community at the manner of driving of Mr Ronson and so did his children because he had his four children in the car as well. I'm instructed that they were getting upset and crying and my client's wife instructs me that the children were saying that they 'don't want Uncle Geoffrey to drive.' My client found himself in a dilemma when he realised his responsibilities to the community were to drive and at the same time he appreciated his responsibilities to his family to not allow them to continue to be exposed to the dangers of Mr Ronson driving.

I'm instructed that in the circumstances he took the view that it would be a more responsible thing not to let Mr Ronson drive any further. He made him stop. He couldn't get his wife to drive because she has no idea how to drive. He was the only one left and in the circumstances, as I outlined to you, he decided to drive the motor vehicle, Your Worship. I'd ask Your Worship to approach this on the basis of a case with very strong mitigating circumstances. It's not a case - at one end of the scale Your Worship gets cases like one of my matters before you last week where a disqualified driver came back before you 1 week later with virtually no mitigating circumstances, drink

driving without very good reason 1 week later and Your Worship rightly observed that that was a fairly contemptuous instance of the offence."

Counsel's address concluded with the following:

"I'd ask Your Worship to approach this one as being at the other end of the scale where there are very strong extenuating circumstances and if you would accept those facts I'd ask Your Worship to consider that this man, who would otherwise if there were any of the contemptuous circumstances about his offence Your Worship would of course be thinking very strongly about imprisonment for him, and I'd ask Your Worship in this case if you would instead consider that perhaps a fine might be appropriate or if you were driven toward the conclusion of a sentence was what was the proper sentence that you would consider suspending it.

Your Worship, there's no getting away from the fact that he does have a relatively unimpressive history when it comes to these matters. I simply stress that this is an exceptional case."

This prompted the learned Magistrate to say:

"You know you haven't quite got round to suggesting it's the police aide who should be up in front of me, but boy you're getting close. Thank you."

The appellant had been apprehended by a police aide at Santa Teresa.

Having elicited from the prosecutor that the maximum penalty was 12 months imprisonment and disqualification as seen fit by the court, the learned Magistrate addressed the defendant. I quote his entire sentencing remarks.

"You ought to be congratulated. It's gratifying to see that Tolkien is not dead, it really is. You have three priors for drive disqualified, your last one in July last year when you were sentenced to 6 months imprisonment. That was suspended. But then in August on a breach of a home detention order you had 6 months imprisonment, of which you would have served 4 months.

Correct? Yes, which would have taken you up to December, and here you are 3 months later up on your fourth drive disqualified. You know full well what is going to happen if you drive whilst you are disqualified, don't you?

THE DEFENDANT: Yes.

HIS WORSHIP: You're told every time what is going to happen. And what makes you think that it won't happen this time. Surely the community is entitled to expect the orders of the court to be obeyed. The Supreme Court has made it quite clear that where you drive in circumstances such as this a prison sentence is the correct way to go. And indeed you've had prison sentences before, twice, haven't you? I've listened to what has been said to me. You had no real reason for driving. The Supreme Court is quite clear in the case of medical emergencies then there may be some mitigation, but there certainly isn't in this case.

You're convicted and sentenced to 8 months imprisonment. You will be disqualified from driving; you will be disqualified from holding or obtaining a driver's licence for a period of 2 years. I warn you, if you drive and you are convicted then you will go to prison. Bear in mind you have in fact 4 years disqualification in June '91 and now you've got 2 years from today. Is that clear? I think your 4 years will still be going when this 2 years is up. Do you understand? And believe you me, you come back again and you're looking at the maximum of 12 months."

I am of the view the learned Magistrate fell into error when he said: "The Supreme Court is quite clear in the case of medical emergencies then there may be some mitigation, but there certainly isn't in this case."

Counsel for the appellant submitted that the reference to Tolkien suggested the learned Magistrate erred in rejecting the appellant's story. I do not accept that submission. I do not think the learned Magistrate rejected the appellant's version of the facts. I think the reference to Tolkien - which appears to be a reference to romance

rather than allegory - was rather directed at counsel's concluding submission before the learned Magistrate that a fine or suspended sentence would be appropriate. This court has repeatedly stressed the gravity of the offence of driving whilst disqualified and has on numerous occasions stressed that gaol for some period is the most usually appropriate sentence. In the present case with his prior record, the appellant had to look forward to some term of imprisonment. However, in the passage previously referred to, the learned Magistrate refers to medical emergencies. Sudden and extraordinary emergencies excuse people from criminal responsibility by virtue of s33 of the Criminal Code. There is no reason to suppose that section does not apply to s31 of the Traffic Act. Section 31 of the Traffic Act is not a regulatory offence, see s51 of the Traffic Act. There can be no suggestion that the circumstances of the offence constituted a sudden and extraordinary emergency within s33 of the Criminal Code. Nevertheless, though not exculpatory, that version of the events which appropriately are to be treated as the circumstances of the offence do constitute mitigatory circumstances. The appellant was in a dilemma. It was dark on a deserted relatively unused bush road, kilometres away from assistance. The appellant had been responsible enough to organise a licensed driver for a necessary trip, and the licensed driver was drunk. In favour of the appellant it may be inferred the driver became apparently so in the course of the trip; it would be wrong to suppose the appellant would allow an obviously drunk man

to drive his family about. There is no suggestion the appellant himself was drunk, or had been drinking with 'Uncle Geoffrey'. The appellant's wife was unable to drive and he had four young upset and crying children with him. His actions in driving himself were understandable, if inexcusable, and I think it was wrong for the learned Magistrate to say there were no mitigating circumstances present in the case. It follows that this court should interfere and sentence anew.

Although there are the mitigatory circumstances I have already outlined, the case nonetheless warrants a term of imprisonment. It is the appellant's fourth conviction for this offence. At the time of the offence there were two disqualification orders in force. The appellant knew he was in the wrong, he decamped after being stopped by a police aide four kilometres inside the Santa Teresa boundary.

I think justice will be done in the circumstances of this case if the eight month imprisonment term imposed by the learned Magistrate be set aside and a term of four months imprisonment be substituted therefor. The two year disqualification from holding or obtaining a driver's licence will stand. Order accordingly.

It is appropriate to say that the learned Magistrate's concluding remark about the appellant 'looking at the

maximum penalty' in the event of his further reoffending was fully warranted.