PARTIES:	VITO SENA
	v
	BRIAN MICHAEL GOBLE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY AT ALICE SPRINGS
FILE NO:	JA3 of 1996
DELIVERED:	27 September 1996
HEARING DATES:	
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Appellant:	Self
Respondent:	I Rowbottom

Solicitors:

Appellant:	N/A
Respondent:	Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	MIL96023
Number of pages:	11

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

No. JA 3 of 1996
(9513935)

BETWEEN:

VITO SENA
Appellant

AND:

BRIAN MICHAEL GOBLE
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 27 September 1996)

The appellant, Vito Sena, was charged in the Court of Summary Jurisdiction with the following offences:

1. On 23 June 1995 at Hermannsburg, drove an unregistered motor vehicle, namely a green Holden sedan SA, SVV-050, on a public street, namely an unnamed dirt road in Hermannsburg.

   Contrary to s 33(1) of the *Traffic Act*.

2. On the same date and place drove a motor vehicle, namely a green Holden sedan SA, SVV-050, on a public street, namely an unnamed dirt road in Hermannsburg without being licensed to do so.

   Contrary to s 32(1) of the *Traffic Act*.

The complaint contained two averments as follows:

1. The motor vehicle had at the time been in the Northern Territory continuously for a period in excess of 28 days.

2. That Vito Sena was at the time a resident of the Northern Territory.

Section 33 of the *Traffic Act* provides relevantly as follows:

"33 DRIVING UNREGISTERED VEHICLE

(1) A person shall not -

(a) drive; or

(b) employ, permit or suffer a person to drive,

on a public street or a public place a motor vehicle which is not registered.

Penalty: $2,000 or imprisonment for 12 months.

(5) For the purposes of subsection (1), a motor vehicle shall be deemed to be not registered, notwithstanding that it is registered under a law of another country or of another State or Territory of the Commonwealth relating to the registration of motor vehicles, where it is being driven by a person who is -

(a) a resident of the territory; and

(b) the owner of the vehicle,

and the vehicle has been in the Territory continuously for -

(c) more than 28 days; or

(d) where the Registrar has, under section 8A(1) of the *Motor Vehicles Act*, exempted the vehicle from the requirement for registration for a period, for more than that period.

(6) For the purposes of subsection (5)(b), but without limiting that subsection, a person shall be deemed to be the owner of a motor vehicle if it is registered under a law of another country or of another State or Territory of the Commonwealth in the name of that person or in the name of the spouse, a dependant or parent, who is a resident of the Territory, of that person.

(7) In a prosecution for an offence against subsection (1) in respect of a motor vehicle which is deemed not to be registered by virtue of subsection (5), an averment in the complaint that -

(a) the person is a resident of the Territory; or

(b) the vehicle in respect of which an alleged offence was committed had been in the Territory continuously for a specified period,

is prima facie evidence of the matters averred."

Section 32 of the *Traffic Act* provides relevantly as follows:

"32 DRIVING WHILE NOT LICENSED

(1) A person shall not drive a motor vehicle on a public street or public place -

(a) unless that person -

(i) holds a licence;

(ii) is temporarily in the Territory and holds a licence or permit to drive a motor vehicle granted in -

(A) the country or a state or other Territory of the Commonwealth in which that person usually resides; and

(B) when required, holds a current international driving permit granted in accordance with the terms of the 1949 United Nations Convention on Road Traffic;

(iii) holds a learners licence; or

(iv) is temporarily in the Territory and holds a licence or permit (however referred to) granted in the country or the State or other Territory of the Commonwealth in which that person usually resides which permits the person to drive a motor vehicle to gain experience for the purpose of obtaining a licence to drive a motor vehicle,

and is driving in accordance with the conditions, if any, of the licence or permit, and the motor vehicle is one which the person is permitted by the licence or permit to drive.

(3) For the purposes of subsection (1)(a) or (2), a person who is a resident of the Territory shall be deemed not to hold a licence to drive a motor vehicle unless that person is, under section 8A(3) of the *Motor Vehicle Act*, exempted from that requirement to be licensed, notwithstanding that that person is the holder of a licence to drive that motor vehicle granted under a law of a country or of a State or another Territory of the Commonwealth relating to the licensing of persons to drive motor vehicles.

(4) In a prosecution for an offence against subsection(1)(a) or (2) relating to a person who is deemed not to hold a licence to drive a motor vehicle by virtue of subsection (3), an averment in the complaint that the person is a resident of the Territory is prima facie evidence of that fact."

At the hearing before the learned Magistrate, Mr Sena was unrepresented. He appears to be a migrant of Italian extraction. He appears to have a reasonable understanding of English but he has a very heavy accent and when he speaks rapidly he is difficult to understand. The transcript of the proceedings before the learned Magistrate contains a number of passages which do not fully record everything that the appellant said because of this difficulty. Nevertheless, I think the facts have become reasonably clear.

The prosecutor called two witnesses, the first being Constable Brian Goble who said that he had been stationed at Hermannsburg Police Station for a period of thirteen months, i.e. from about November 1994. He said that he

knew the appellant and had met him shortly after he had arrived at Hermannsburg Police Station. He said that he had been present at Hermannsburg Police Station on 20 June 1995 when the appellant attended the police station on that day and had a conversation with First Class Constable Godwin, who was stationed at Hermannsburg at that time. He said that the appellant had come to the police station to apply for a temporary permit for his motor vehicle to drive it between Hermannsburg and Alice Springs. Constable Goble believed that the appellant did not fit the relevant criteria for the issue of a temporary permit and refused it to him. The appellant was warned that his vehicle was unregistered and he ought not to drive it.

On 23 June 1995 at 4.40 pm he said that he was in the vicinity of the Finke River Mission Store when he apprehended the appellant driving his Holden sedan and he had a conversation with him which he taped. The transcript does not make it clear, but it appears that there was a transcript made of the tape recording which was handed to Her Worship and the tape itself was played. Neither the tape nor the transcript was marked as an exhibit. Nevertheless, a copy of the transcript with some alterations to it made in the handwriting of the learned Magistrate is on the court file. Because neither of those documents were marked as exhibits and there is no transcription in the official transcript of proceedings of what the Magistrate heard on the tape, they are not able to be considered by me in this appeal except by consent: see s 176 of the *Justices Act*. The appellant was not asked to give his consent, and accordingly I am unable to consider that evidence.

In cross-examination Mr Goble said that he had first seen the vehicle in question in Hermannsburg at least two and a half to three months before the date of the offences. The thrust of his evidence was that the appellant had lived in Hermannsburg since Constable Goble had been there; the appellant had six children who lived there and attended school there, he works part time in the resource centre and he had seen him being involved within the community with family activities and with other members of the community in the whole time that he had been there.

The next witness called for the prosecution was the Aboriginal Community Police Officer, Jimmy Watson. He said that he had known the appellant since he moved to Hermannsburg over six years ago and that he had seen him living in Hermannsburg during that period of time. He said that he lived in a particular house with his wife and children. He was familiar with the appellant's Holden motor vehicle and knew that it had a South Australian number plate. He also said that he had seen the appellant driving the motor vehicle in the last six or seven months, i.e. since May or June of 1995.

The appellant gave evidence and tendered a number of documents in order to show that he had not lived in the Northern Territory for a period of three months immediately prior to the offence. It appears that he claimed that he lived in Adelaide and from time to time would travel to the Northern Territory to visit his wife and children who were living in Hermannsburg. When he visited Hermannsburg he stayed in the same house with his wife and children and tended to stay for fairly extended periods of time. From the documents it

would appear that on 25 November 1994 a solicitor for the appellant's wife wrote to the appellant at Hermannsburg concerning an alleged assault by the appellant upon his wife. The solicitor's letter indicated that the appellant's wife no longer wished the appellant to live with her and did not want the appellant to be living in Hermannsburg. It appears that thereafter, probably in about January 1995, the appellant moved to Adelaide where he had a post office box. At the time he was staying in a hostel at 260 South Terrace, Adelaide. On 17 April 1995 the appellant purchased the Holden sedan and registered it in South Australia. The vehicle still had current South Australian registration at the date of the alleged offences. On the same date the appellant obtained a South Australian driver's licence, which was also current at the time of the alleged offences. After purchasing the vehicle the appellant drove back to Hermannsburg and resumed residing with his wife and was still so residing at the time of the alleged offences.

Two certificates were also tendered on behalf of the prosecution pursuant to s 119 of the *Motor Vehicles Act* to the effect that the appellant was not licensed to drive a motor vehicle in the Northern Territory on 23 June 1995 and that the appellant's vehicle was not registered pursuant to the *Motor Vehicles Act* on 23 June 1995.

So far as the offence against s 33(1) of the *Traffic Act* is concerned it was not disputed and the evidence clearly established that the appellant was the owner of the motor vehicle and that the vehicle had been in the Territory continuously for more than twenty-eight days prior to the offence. The issue

was whether the appellant was a resident of the Territory. That expression is defined by s 3(1) of the Act to mean "a person who had resided continuously in the Territory for not less than three months". The appellant's case was that he had not so resided because when he returned to the Northern Territory, it was something in the order of two and a half months before the alleged offence.

So far as s 32(1) is concerned, on the evidence it is clear that the appellant did not hold a Northern Territory driver's licence, and on the facts before the learned Magistrate it is apparent that in terms of s 32(1)(a)(ii) the appellant was not temporarily in the Territory at the time, as he had apparently returned to the Territory permanently, even on the appellant's account. However, the learned Magistrate approached the matter by reference to s 32(3) which deemed the appellant to be unlicensed if he was "a resident of the Territory".

The learned Magistrate found that the appellant was a resident of the Territory and that he had been such a resident for more than three months at the time of the offences. Her Worship accepted that the appellant returned from South Australia in April, and she seems to have accepted that the appellant had been in South Australia for at least a few months prior to that. She nevertheless considered that his absence from the Northern Territory did not affect his status as a resident of the Northern Territory. Accordingly, the learned Magistrate found the appellant guilty on both counts and on the charge of driving an unregistered motor vehicle imposed a fine of $150, in default,

four days imprisonment, and on the charge of driving whilst unlicensed she imposed a fine of $20, in default, three days imprisonment. The learned Magistrate allowed four months to pay both fines.

The appellant, who was unrepresented when he appeared in this Court, had lodged a notice of appeal on the following grounds:

> "1. Refusal to be given permit to drive car to Alice Springs for repair and registration change over.
>
> 2. At the time of conviction I was not a residence(sic) of Hermannsburg."

It is well established that on an appeal under the *Justices Act*, this Court can only interfere if the appellant is able to show error on the part of the learned Magistrate. It is not sufficient that if I had been deciding the case myself at first instance, I might have reached a different conclusion from that of the Magistrate.

As to the first ground of appeal, the fact that the appellant had been refused a permit by the police a few days prior to the offences, is not relevant to whether or not the learned Magistrate was correct in arriving at her decision that the appellant was guilty of the offences as charged on 23 June 1995. Nevertheless, it may be relevant to sentence, and I will return to ground 1 of the notice of appeal in a moment.

As to ground two of the notice of appeal, in my opinion it was open to the learned Magistrate to reach the conclusion which she did. A person who has

established himself as a resident in the Northern Territory does not lose his status as a resident simply because he leaves the Territory for a period of time. There was no evidence before the learned Magistrate that when the appellant left the Northern Territory to go to South Australia, that he at that stage abandoned any intention that he had to remain as a resident in the Northern Territory. The appellant, on the evidence, does not seem to have established a permanent home in Adelaide as he was living in a hostel. This suggests that his departure from the Northern Territory was not intended to be permanent. I think it was open to the learned Magistrate to reach the conclusion that the appellant remained at all times a resident of the Northern Territory and that consequently he was guilty of both offences.

In view of the fact that the appellant is unrepresented, I took the opportunity of reading the transcript of the discussion which the appellant had with the police when he was stopped in case there were matters by way of explanation in what the appellant had told the police which may have assisted the appellant on this appeal had the tape recording been properly marked as an exhibit. Further, I permitted the appellant to tell me from the bar table precisely what his history of living in the Northern Territory was prior to the offences, why he had gone to Adelaide, and so on, with a view to seeing whether any of that material would assist him and with a view to seeing whether, if it did assist him, the Crown was prepared to consent to the admission of fresh evidence pursuant to s 176 of the *Justices Act* or pursuant to s 176A of the *Justices Act*. It is not necessary to set out the additional material available to me. Suffice it to say that I was not persuaded that that

material would have assisted the appellant. On the most generous view of that additional material it may have been argued that the appellant at all material times resided in both South Australia and in the Northern Territory at the relevant time, see *Buric v Transfield PBM Pty Ltd* (1992) 17 MVR 234. There was nothing in any of the material put to me to suggest that at the time when the appellant left the Northern Territory to go to Adelaide, that it was his intention to abandon his residence in the Northern Territory and take up living in South Australia as his only place of residence.

Returning to ground one of the notice of appeal, I take that ground to be a complaint that the penalties imposed were excessive. This Court can only interfere if the penalties imposed by the learned Magistrate were manifestly excessive. It is not sufficient that I might have imposed a lesser penalty had I heard it myself at first instance. I do not consider that either of the penalties imposed by the learned Magistrate were manifestly excessive.

Accordingly, the appeal is dismissed and the conviction and sentences imposed by the learned Magistrate are confirmed.

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