Qadir v O'Neill [2012] NTSC 54

PARTIES:	QADIR, Mohammad Nawaz v O'NEILL, Wayne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 11 of 2012 (21101131)
DELIVERED:	8 August 2012
HEARING DATES:	27 June 2012
JUDGMENT OF:	BARR J
APPEAL FROM:	TRIGG SM

CATCHWORDS:

CRIMINAL LAW – APPEAL – EVIDENCE ON APPEAL
Tender of fresh evidence on appeal – statutory requirements – discretion to admit – reasonable explanation as to why evidence was not adduced below – fresh evidence, if received, would afford a ground of appeal – evidence admitted – appeal allowed

CRIMINAL LAW – APPEAL – NEW EVIDENCE
New evidence admitted on appeal – relevant information and supporting documents were not provided to magistrate – not necessary for appellant to show "an error or mistake" – appeal allowed

Justices Act (NT) s 176A, s 177
Sentencing Act (NT) s 98

Leany v Bell (1992) 108 FLR 360, followed

Hook v Ralphs (1987) 45 SASR 529; *Pagett v Hales* [2000] NTSC 35; *Smith v Torney* (1984) 29 NTR 31, considered

REPRESENTATION:

Counsel:

Appellant:	Self-represented
Respondent:	D Jones

Solicitors:

Appellant:	Self-represented
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

Qadir v O'Neill [2012] NTSC 54
No. JA 11 of 2012 (21101131)

BETWEEN:

MOHAMMAD NAWAZ QADIR
Appellant:

AND:

WAYNE O'NEILL
Respondent:

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 8 August 2012)

[1] The appellant was a taxi driver at the time of offending in December 2010 and continued to work as a taxi driver until his licence to drive a commercial passenger vehicle was suspended by the Deputy Registrar of Motor Vehicles with effect from 7 July 2011.

[2] On 15 December 2010, the vehicle driven by the appellant struck and caused serious injury to a 61-year-old pedestrian, who was walking on Manunda Terrace, Karama. The appellant was 21 years old at the time.

[3] On 12 December 2011, the appellant pleaded guilty before the Court of Summary Jurisdiction to a single count of hit and run contrary to s 174FA *Criminal Code*, committed by him on 15 December 2010. The precise

charge was that, being the driver of a vehicle which was involved in an incident which involved serious harm to a person, he, as the driver, failed to stop the vehicle at the scene of the incident and give any assistance to the person that was reasonable in the circumstances.

[4] Relevant to this appeal, the agreed facts[1] in the Court of Summary Jurisdiction were as follows:-

> At around 7.30pm during the evening of 15 December 2010, the offender was at home at 3 Kybra Court Karama with his brother Mr Nasar Qadir.
>
> At about 7:30pm the offender left the family home to travel to his girlfriend's place in Karama driving a Tarago Taxi Van NT Registration 963942, taxi 800 ("the vehicle").
>
> The offender drove the vehicle along Manunda Terrace towards the Bauer Road intersection. At that point the victim in this matter Mr Henry Yarmirr, a 61-year-old indigenous man was walking on Manunda Terrace.
>
> As the offender drove the vehicle he hit Mr Henry Yarmirr with the left passenger side of the vehicle. This caused Mr Yarmirr to hit the windscreen and travel over the roof of the vehicle as it travelled underneath him. He then landed on the surface of the road.
>
> The offender continued driving stopping a short distance away. He attempted to call '000' but did not. He then did a u-turn on Manunda Terrace and then drove the vehicle back past where Mr Yarmirr lay and continued driving home without stopping. The reasonable assistance the offender could have made in the circumstances was calling '000'; and keeping other oncoming vehicles away from the victim as the victim's body was still positioned in the middle of the road.

[1] Taken from exhibit P1.

> Mr Yirrmarr was attended to by other persons at the roadside and later taken to hospital by ambulance. .....
>
> Meanwhile back at the accident scene the victim in the matter was conveyed to Royal Darwin Hospital. He had sustained the following injuries: a mild traumatic brain injury; small left side pneumothorax; Left 3rd-8th rib fractures; left clavicle fracture; left humerus fracture.
>
> He spent some time in the high dependency unit and had a brace applied to his left arm.
>
> The victim would later develop a radial nerve palsy for which he subsequently underwent radial nerve exploration and neurolysis and an open reduction internal fixation of his left humerus fracture. He had no post operative complications. He was in hospital for approximately 8 days and was in rehabilitation for 2 months. .....
>
> The offender voluntarily contacted police via mobile telephone on 17 December 2010. He went on to make the following spontaneous admissions "I just freaked out, nothing like that has happened to me before, he just jumped out in front of me". He went on to advise he wished to seek legal advice prior to handing himself to police.
>
> On 23 December 2010 the offender attended at the Casuarina Police Station and participated in an electronically recorded interview, where he made full admissions to being the driver of the vehicle at the time of the crash, and of leaving the scene immediately.
>
> At the conclusion of the record of interview he was advised that he would be summonsed to appear.
>
> A plea (of guilty) was indicated by the offender's Counsel on or about 26 September 2011.

[5] On 10 February 2012 the magistrate convicted the appellant for the hit and run offence and sentenced him to 15 months imprisonment, suspended forthwith with a three-year operational period. The magistrate referred to the appellant's "very poor and criminal decision" to depart the scene without

offering any assistance to the injured person. The magistrate disqualified the appellant from holding or obtaining a licence or renewal of a licence or driving for a period of 12 months, pursuant to s 98(a) *Sentencing Act*. His Honour's sentencing remarks, relevant to the disqualification, were as follows:

> "The question then is whether there should be a licence disqualification and if so for how long. Clearly, there was nothing about the defendant's actual driving which would warrant a licence disqualification, but as [*counsel*] rightly concedes, it was the actions of the defendant immediately after the incident which fell well short of what is expected of a reasonable road user. In those circumstances I think that a licence disqualification is necessary to send a message to others that they must not leave the scene of an accident.
>
> In addition, on charge 1, the defendant is disqualified from holding or obtaining a licence or renewal of a licence or driving for a period of 12 months from today. …"

[6] It can be seen that general deterrence was a significant and indeed the only expressed concern on the part of the magistrate in relation to suspension of the appellant's licence. His Honour acknowledged that the appellant's actual driving was not such as to justify disqualification, but wanted to send a message to deter other drivers from leaving the scene of an accident.

[7] This appeal is concerned only with the disqualification. The Notice of Appeal, signed by the appellant on 8 March 2012, reads relevantly as follows:

> "I have already had my taxi licence suspended for 8 months, so I could not work due to this matter. I would wish to gain my licence so that I could go back to the workplace."

[8] The appellant tendered two letters sent to him by the Deputy Registrar of Motor Vehicles, one dated 27 April 2011 (exhibit A-2) and another dated 30 June 2011 (exhibit A-1). In brief, the letters confirm the suspension of the appellant's licence to drive a commercial passenger vehicle (with effect from 7 July 2011), and throw light on the administrative process leading to the suspension.[2] The letters also establish that the suspension was as a result of the hit and run charge (and another charge pending as at July 2011), arising out of the incident on 15 December 2010.

[9] Pursuant to s 176A *Justices Act*, I have decided to admit the two letters as evidence on appeal. There is no challenge to the authenticity of the letters. There is thus no preliminary issue under s 176A(1)(a) that the evidence is likely to be credible in the sense that it is capable of belief.[3] Further relevant to s 176A(1)(a), the evidence would have been admissible in the sentencing proceedings from which this appeal has been brought, to establish the administratively imposed licence suspension. The fact that the offender had already served a licence suspension which prevented him earning his living as a taxi driver was relevant to the two questions posed by his Honour on the suspension issue: whether there should be a licence disqualification and, if so, for how long.

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[2] See s 102(2)(da) *Motor Vehicles Act* (NT). Under that provision, the Registrar may suspend a person's licence, for such period as the Registrar thinks fit, where in the opinion of the Registrar, having regard to, inter alia, "previous conduct" of the person, the public will be, or is likely to be, placed at risk by that person continuing to drive.

[3] See *Hook v Ralphs* (1987) 45 SASR 529 at 535, referred to by Mildren J in *Pagett v Hales* [2000] NTSC 35 at [46].

[10] I turn to consider s 176A(1)(b) *Justices Act*, and in that context, whether there is a reasonable explanation for the failure to adduce the evidence in the sentencing proceedings before the magistrate. There is no issue that the evidence was not adduced in the Court of Summary Jurisdiction: the magistrate was not informed that the appellant's licence to drive a commercial passenger vehicle had been suspended seven months earlier, nor that the suspension was ongoing.

[11] The appellant gave evidence at the appeal hearing and was very vigorously cross-examined by Mr Jones, counsel for the respondent. The appellant said that he had given the relevant correspondence to his lawyer at the Northern Territory Legal Aid Commission. There was some confusion in his cross-examination because the appellant had seen three lawyers at the Commission. My understanding of his evidence was that he initially provided the correspondence in order to obtain legal advice on the proposed administrative licence suspension, but that the legal aid lawyer to whom he spoke told him that the Commission would not be able to act for him on what was a civil matter. The appellant was told that he would have to appeal the administrative suspension himself. He detected some "negative energy" in the way his lawyer spoke and decided not to initiate an appeal against the administrative decision. In other words, he accepted and did not challenge the suspension. The appellant said that he later provided the correspondence to lawyers representing him in the criminal proceedings (or that he discussed with those lawyers the correspondence which was already

contained within their file). The appellant said that his expectation was that his licence suspension would be referred to by his counsel and brought to the attention of the magistrate.

[12] There was some imprecision in the evidence of the appellant, and the cross-examination did not necessarily clarify all matters. However, there are a number of reasons or possible reasons why the correspondence was not brought to the attention of the magistrate in sentencing submissions. First, the appellant did not have the one lawyer assigned to his case throughout; he had three. Indeed, there was a change of lawyer shortly before sentencing submissions. This Court is aware that, even where a firm's or organisation's record-keeping is of an efficient standard, information provided by a client to one lawyer might not come to the attention of a subsequent lawyer, or its full relevance might not be appreciated by the subsequent lawyer. That is more likely to happen where a client initially seeks advice and provides the documents in connection with a civil matter, and then becomes a client in a related criminal matter. Another reason is the possible failure on the part of the appellant to communicate effectively with his lawyers: his instructions may not have been clear, notwithstanding that he thought they were.

[13] The appellant explained in evidence that, although the period of suspension imposed by Deputy Registrar of Motor Vehicles was stated to be for a period of six months,[4] the appellant was subsequently informed by the Deputy Registrar that the suspension would continue in force. The appellant

[4] letter from the Deputy Registrar of Motor Vehicles dated 30 June 2011, exhibit A-1

understood that he remained under suspension even though the initial six months had ended. This is consistent with the complaint he made in his Notice of Appeal, referred to in par [7] above, that he had already had his taxi licence suspended for 8 months.

[14] I am satisfied that the documents were in existence at the time sentencing submissions were made to the magistrate. I accept the appellant's evidence that he wanted his licence suspension to be brought to the attention of the magistrate, and that he attempted to facilitate this by providing his lawyers with the relevant information and copies of the documents. It is unclear exactly what was discussed between the appellant and his lawyers. No evidence has been given on appeal by any of the lawyers involved. I draw no inferences from this, because the appellant is self-represented. However, even if the appellant did not adequately instruct the lawyers who acted for him in the criminal proceedings in relation to his licence suspension, it remains that relevant information and supporting documents were not provided to the magistrate, and that there is a reasonable explanation (or combination of explanations) for that not happening.

[15] Once the preliminary statutory requirements are established for the admission of the new evidence, this Court is required to receive the new evidence unless it decides on balance that it "would not afford a ground for allowing the appeal". This is a test of relevance to the issues on the appeal.[5]

[5] *Smith v Torney* (1984) 29 NTR 31 at 33, per Muiread J.

[16] In my assessment, the evidence, if received, would afford a ground for allowing the appeal, and I am so satisfied. I therefore admit the evidence.

[17] Because new evidence has been admitted on the appeal, it is not necessary for the appellant to establish under s 163(1) *Justices Act* that there was "an error or mistake", whether of fact, or of law, or both. Rather, the position is as summarised by Kearney J in *Leaney v Bell* (1992) 108 FLR 360 at 369:

> "As this is a case where fresh evidence was received on appeal, the function of this Court is as described by O'Leary CJ in *Seears v McNulty* (1987) 89 FLR 154 at 160: "… to form its own independent opinion of the evidence on the material put before it, and give judgment as if it were sitting as a court of first instance."

[18] I allow the appeal and, pursuant to s 177(2)(c) *Justices Act*, quash the order for licence suspension made by the Court of Summary Jurisdiction on 10 February 2012.

[19] I turn to consider whether any, and if so, what order should be made in relation to licence disqualification.

[20] In my view, some licence disqualification is called for under s 98 *Sentencing Act*. Counsel for the appellant conceded as much in the Court of Summary Jurisdiction. But for the administratively imposed suspension of the appellant's taxi (commercial passenger vehicle) licence, twelve months would have been within the appropriate range of possible suspensions. However, taking into account the fact of the taxi licence suspension and the effective length thereof, I cancel the appellant's driver's licence and

disqualify the appellant from obtaining a licence for a period of six months commencing 10 February 2012.

[21] The court-imposed suspension will thus expire on 10 August 2012.

[22] In the circumstances of this case, the combination of a sentence of 15 months imprisonment, fully suspended with a three-year operational period, and a court-imposed licence suspension of six months is a sufficient penalty and will serve the necessary interests of general deterrence, special deterrence and protection of the public.

[23] I will hear the parties as to any consequential orders, including costs.
