Ivinson v Parsons [2011] NTSC 19

PARTIES:	IVINSON, Kevin Robert
	v
	PARSONS, Matthew Alan
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 45 or 2010 (21009049)
DELIVERED:	4 March 2011
HEARING DATES:	17 December 2010
JUDGMENT OF:	BLOKLAND J
APPEAL FROM:	Ms Morris SM

CATCHWORDS:

TRAFFIC OFFENCES – Drive with a medium range blood alcohol content - Appeal against sentence – what is an early plea – sufficient weight to be given to plea – principles concerning reduction in sentence on a plea of guilty – value of plea – Magistrate not in error – sentencing discretion not miscarried – Appeal Dismissed.

Traffic Act (NT) ss 22(1),

Bryce Jabaltjari Spencer v The Queen [2005] NTCCA 3; *Cameron v The Queen* (2001-2002) 209 CLR 339; *DF v The Queen* [2006] NTCCA 13;; *Kelly v The Queen* (2000) 10 NTLR 39; *R v Oinonen* [1999] NSW CCA 310; *Wright v The Queen* [2007] NTCCA 5; referred.

REPRESENTATION:

Counsel:

Appellant:	Ms Roussos
Respondent:	Ms Taylor

Solicitors:

Appellant:	Northern Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ivinson v Parsons [2010] NTSC 19
No. JA 45 of 2010 (21009049)

BETWEEN:

KEVIN ROBERT IVINSON
Appellant

AND:

MATTHEW ALAN PARSONS
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 4 March 2011)

Introduction

[1] This appeal raises the issue of how a plea of guilty should be characterized when it is entered on the day of a scheduled contested hearing in the Court of Summary Jurisdiction. More particularly, the circumstances concern charges that have been resolved between the parties at a prior time. The point arose in the context of multiple traffic charges being reduced to one count of drive with a Medium Range Blood Alcohol level (.134%)[1]. The Appellant pleaded guilty to that one remaining count after all other counts were withdrawn. He was convicted and fined $800. He was also disqualified from driving for 12 months. A further 12 month alcohol

[1] Section 22(1) *Traffic Act* (NT).

ignition lock license was imposed and a victims' levy of $40 was ordered. The disqualification period and alcohol ignition lock license are mandated orders; a twelve month order on each was the minimum available to the learned Magistrate.[2]

[2] The Appellant alleges error occurred because, he argues, the learned Magistrate characterized his guilty plea as a "late plea"[3] and "insufficient weight" was given to his plea of guilty.[4] In effect it is the level of the fine the Appellant appeals against. All other sentencing orders reflect the statutory minimum. The maximum fine available at the time was $2660.[5]

[3] The date of the offending was 16 March 2010. The plea was entered on 1 September 2010. My reading of the transcript does not reveal the learned Magistrate actually made a finding this was a "late plea". On the other hand it is difficult to see how the plea to a summary traffic charge could be regarded as "early" when it is formally entered five and a half months after the date of the offence. It is not surprising that in her extempore remarks the learned Magistrate stated:

> I also take into account however, that this matter has been disputed and it has taken till today when on the morning of the hearing for you to enter a plea of guilty in relation to this particular charge. So in relation to this charge it's not an early plea, but I note that other charges have been withdrawn, but there's nowhere on the file where it appears that you intended to enter a plea of guilty in relation to this matter.

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[2] Section 22(3)(b)(i)(ii) *Traffic Act* (NT).
[3] Ground 1, Notice of Appeal 26 September 2010.
[4] Ground 2, Notice of Appeal 26 September 2010.
[5] Section 22(1) *Traffic Act* (NT), 20 penalty units.

[4] The approach taken by counsel for the Appellant during the plea negotiations has been explained on appeal. In my view counsel was constructive throughout. Although I have the impression the learned Magistrate may not have appreciated the efficient isolation of the issues and the candid solution offered by counsel for the Appellant in the negotiations with the prosecutor prior to the contest mentions and hearing, I have concluded it was open to the learned Magistrate to reason as she did. She did not give the plea the status of an "early plea" for sentencing purposes. For reasons which will be explained it was open to the learned Magistrate to infer that despite constructive negotiations, the Appellant's willingness to facilitate justice was not a highly significant factor in his favour in this particular case.

History

[5] Some history is required to properly assess the merits of the Appellant's argument. The Appellant was originally charged with drive while disqualified, drive an unregistered motor vehicle, drive an uninsured motor vehicle as well as the count he pleaded guilty to - drive with a medium range blood alcohol content.

[6] Relevant parts of the chronology, contest mention transcript and correspondence are as follows:

16 March 2010	Date of offending.
1 April 2010	Summons Issued.

6 April 2010	First mention Darwin Court of Summary Jurisdiction. Appellant self represented. Adjourned to 27 April 2010.
27 April 2010	No appearance by Appellant. Adjourned to 5 May 2010. Warrant to issue.
5 May 2010	Adjourned to 26 May 2010 to Jabiru Court, warrant to lie.
6 May 2010	Appellant appears in Darwin Court of Summary Jurisdiction having surrendered himself. Mr Bellach of NAAJA is engaged as his solicitor. Instructions were received. Adjourned for contest mention to 23 June 2010 and hearing 1 September 2010. Bail granted. The Jabiru Court mention date of 26 May 2010 is vacated.
22 June 2010	Email from Mr Bellach to the Prosecution on behalf of Appellant stating:

> This matter is for contest mention on 23 June 2010. There are four charges. Would you accept a plea of guilty to count 4 in full satisfaction?
>
> My argument would be that, as a matter of law, for counts 1, 2 and 3, the prosecution would need to prove an act of driving which would require more than the defendant being in the driver's seat with the engine on. On the brief, there is no evidence of an act of driving.
>
> Being in the driver's seat with the engine on is sufficient to make out count 4 – section 19 of the Traffic Act defines "drive" for the purposes of Part V of the Traffic Act to include starting the engine of a vehicle. However this definition is only for Part V. Counts 1, 2 and 3 are offences which occur in Part VI of the Traffic Act under the title

	"Offences". My argument would be that a different definition of drive would apply for the purposes of those offences. There is case law to support different definitions of "drive" depending on the circumstances: Tink v Francis [1983] 2 VR 17.
23 June 2010	First Contest Mention. (Court of Summary Jurisdiction). The Appellant was not present at Court. His counsel advised the Court that he had made some efforts to contact him and was not sure why he was not there. He also advised the Court that late the night before he put a proposal to the prosecution and had a discussion with the prosecutor to attempt to resolve the matter based on a view of the law. The prosecutor indicated to the learned Magistrate that he would need some time to consider the offer. He also explained the issue was about what conduct constituted driving as relevant to the different charges. Discussion continued on whether the hearing could proceed on the basis of agreed facts. The prosecutor agreed there was potential for the case to be resolved and asked for an opportunity to consider the representations without going through the contest mention process at that particular time. The contest mention was adjourned to 21 July and a warrant was to lie to that date.[6]
20 July 2010	Email from the prosecutor to defence counsel stating he would respond to the representations by tomorrow morning before Court.
21 July 2010	The Appellant appeared. A different prosecutor appeared and advised the Court that the representations were still being considered by the prosecution. Counsel for the Appellant requested that the matter be adjourned to the hearing date of 1 September 2010 and that if the representations he had made were rejected the matter would go to hearing. The prosecutor advised the Court that the representations had been rejected, however there was still some documentation that the prosecution

[6] Transcript 23 June 2010, pages 1-4.

	was looking at. She advised the matter would continue to hearing unless "something else comes up and then we can bring that matter on". Counsel told the Court he would have discussions with the prosecutor about the agreed facts. The warrant that was to lie on 23 June 2010 was vacated. The Court noted the defence and prosecution would agree on facts in issue and the hearing was confirmed for 1 September 2010.[7]
11 August 2010	A prosecutor emailed defence counsel asking whether the proposal was still on offer and if so indicating the prosecution was inclined to accept it. Defence counsel emailed back on the same date stating it was still on the table and "if you can confirm you will accept it in full satisfaction we can then indicate a plea and vacate the hearing".

Proceedings on 1 September 2010

[7] On the morning of the scheduled hearing the learned Magistrate was advised the matter had resolved in accordance with the original offer put before the contest mention. Charges 1, 2 and 3 were withdrawn and charge 4 was proceeded with. After entering the plea of guilty agreed facts were read. The facts disclosed the Appellant was in control of his parked car. He was seated in the driver's seat, the key was in the ignition, the engine was running with the headlights and interior lights on. When the Appellant was apprehended he was breath tested and returned a reading of .134%.

[8] A previous conviction was tendered showing the Appellant had been convicted on 4 March 2010 for a medium range blood alcohol drink driving offence and was fined $550 plus a victims' levy and was disqualified for driving for six months. The learned Magistrate queried why the Appellant

[7] Transcript 21 July 2010, pages 1-3.

was not being dealt with for drive disqualified. Submissions were made about the differences in the definition of driving as relevant to the charges. Her Honour acknowledged the prosecution had accepted the legal position as put on behalf of the Appellant.

[9] As to the Appellant's explanation for his offending it was explained he had been drinking and was waiting to see a friend. He was inside the car, he started to feel hot while he was waiting and felt uncomfortable. He turned the engine, lights and the air-conditioning on. He was waiting for his friend when police apprehended him. The fact the offending occurred soon after a previous conviction was acknowledged.

[10] The learned Magistrate was told the Appellant had sold his car so the risk of driving was reduced. It was submitted his conduct was at the lower end of objective seriousness as he had not been driving on the road but had been found stationary in a car park. Given he was in employment and contributing to society it was submitted the Court should go no further than fining and disqualifying him for the minimum term of 12 months. The Court was told he was earning approximately $700 per week and paying $200 a week for the care of children.

[11] The learned Magistrate indicated she would take into account that the actual danger to the public was not significant because the Appellant had not moved the car however she noted he was sitting in the driver's seat with the engine on. As noted she referred to the fact the plea was not entered until

the morning of the hearing and said it was not an “early plea”. She noted the other charges were withdrawn. Defence counsel interjected and reminded Her Honour that a plea had been indicated at the contest mention. Her Honour recalled the contest mention and the notation of representations having been made but also said there was no indication there would be a plea of guilty to the particular count.

[12] Counsel explained that the representations which had been initially rejected were that the Appellant would plead guilty to count 4 if counts 1, 2 and 3 were withdrawn. The learned Magistrate responded that the Court had set aside the whole day for the hearing but no application had been made until the morning to vacate the hearing. Counsel advised Her Honour the representations were accepted about two weeks previously and that he had made efforts to contact the Appellant but had been unable to do so because the Appellant’s mobile phone number had changed. Counsel told the Court that he could not confirm the position that had been reached in negotiations; he thought it was proper to contact his client first as “it would be remiss of me to simply go ahead and vacate the hearing until I confirmed with him that the representations had now been accepted and was he happy to proceed on that basis”. The learned Magistrate again noted the Court had not been advised the hearing would not be proceeding and that there was no indication that a charge had been admitted. She proceeded to sentence the Appellant.

Arguments on Appeal

[13] The broad principles concerning reduction in sentence on a plea of guilty have been acknowledged by both counsel. Section 5(2)(j) *Sentencing Act* (NT) provides a sentencing Court must take into account: "Whether the offender pleaded guilty to the offence and, if so, the stage in the proceedings at which the offender did so or indicated an intention to do so". An early plea of guilty can be taken into account for both its utilitarian value and as indicative of remorse and a sentence should be sufficiently discounted to reflect those matters.[8] Further, a number of authorities were relied on for the proposition that in determining what weight should be given to an offer to plead, it is necessary to consider all of the circumstances in which the offer is made. The question to be examined is whether the offer is deserving of real reduction of the sentence on the basis that it demonstrated a "willingness to facilitate the course of justice".[9]

[14] In *Bryce Jabaltjari Spencer v The Queen,*[10] the Appellant had been convicted of manslaughter as an alternative to murder in circumstances where the plea to manslaughter had been offered but rejected by the Director of Public Prosecutions on two previous occasions. He was convicted of the manslaughter count after a trial by jury for murder. Riley J (as he then was) summarised the position as follows:[11]

[8] *DF v The Queen* [2006] NTCCA 13; *Wright v The Queen* [2007] NTCCA 5.
[9] *Cameron v The Queen* (2001-2002) 209 CLR 339 at 343.
[10] [2005] NTCCA 3.
[11] At para [10] – Martin (BR) CJ and Thomas J agreed.

It was further submitted that the offer was deserving of a real reduction of sentence as it demonstrated a "willingness to facilitate the course of justice" (citing *Cameron v The Queen*).

The learned Judge was required to give this aspect weight quite separately from any considerations of remorse or acceptance of responsibility. It was argued that the jury verdict demonstrated the Appellant's offers to plead guilty to manslaughter were soundly based. The offers to plead were said to have been bona fide and sincere attempts to avoid a trial on the count of murder and, had they been accepted, would have avoided the need for two trials and an appeal.

The fact that an offender pleads guilty to an offence is a matter to be taken into account in the sentencing process. By operation of s 5(2)(j) of the *Sentencing Act* a Court is required to consider the stage in the proceedings at which the offender did plead or indicated an intention to do so. There was no dispute between the parties that an offender's unaccepted offer to plead guilty to the offence of which he is ultimately convicted is relevant when considering sentence. The issue for determination is what weight should be given to the offers in the particular circumstances of this case. The Appellant accepted that the Director of Public Prosecutions acted reasonably in refusing to accept the offer on each occasion but correctly maintained that this does not deprive the offer of or weight: *R v Marshall* [1995] 1 QD R 673.

In determining what weight should be given to an offer of this kind it is necessary to consider all of the circumstances in which the offer is made, including any terms attached to the offer, the time at which it is made and the prospects, assessed at the relevant time, of conviction in relation to more serious offences on the indictment. Factors that will determine the extent at which leniency may be accorded those who plead guilty will include whether the plea demonstrates remorse, the utilitarian benefits that flow from the plea, the strength of the Crown case, and the extent to which the plea serves the self interest of the accused. It may also be significant that the offender, whilst indicating a preparedness to plead guilty to one or more, but not all, charges on an indictment, subsequently pleads not guilty to all counts and fully contests the proceedings. Such was the case in this matter. Notwithstanding the letter written on 23 April 2001 and January 2003 offering to plead guilty to the offence of manslaughter, when the offer was rejected the Appellant did not do so. At each trial the Appellant had the opportunity to plead not

> guilty to murder but guilty to manslaughter but did not do so, electing to preserve his chance of an outright acquittal. In such circumstances an indication by an accused of a willingness to plead to a particular charge should not be equated with that person in fact pleading guilty to that charge.

[15] His Honour concluded the Appellant in that case was entitled to credit for his offer to plead to the offence of which he was ultimately convicted. His Honour stated however that given the conditional nature of each offer, the circumstances in which the offers were made including the strength of the Crown case and that fact of choosing to place all matters in issue at trial indicated the Appellant's willingness to facilitate the course of justice was quite limited. It was held there was no error on the part of the learned sentencing Judge in those circumstances to accord little weight to the plea. It is acknowledged that here, although the Appellant's offer initially was conditional on withdrawal of other charges, there was an indication of a willingness to plead to count four. This was made clear to prosecution, but not clear to the Court, although the negotiations were discussed at the contest mentions.

[16] In *DF v The Queen*[12] the Court of Criminal Appeal (NT) found a sentencing Judge to be in error for describing a plea as "belated" when that Appellant had entered his plea after the victim had given evidence. It was accepted the reason for his failure to plead at an earlier time was because the Crown would not accept a plea to a lesser charge until the evidence of the victim had been taken. The Court of Criminal Appeal took into account the

[12] [2006] NTCCA 13.

Appellant was willing to negotiate a plea but was unable to do so because the Crown was not then interested in negotiating. The reluctance of the Crown to negotiate prior to the taking of evidence of the Complainant was based on its assessment of the Crown's case. The situation changed following the evidence being taken. In those circumstances it was said an Appellant's willingness to negotiate a resolution and the fact there was a subsequent negotiated settlement is to be considered in his favour.[13]

[17] In *R v Oinonen*[14] the trial Judge allowed a discount for an offer to plead to manslaughter that had been rejected but a guilty verdict was returned to that count after a trial for murder. The New South Wales Court of Criminal Appeal held:

> There has been a long practice, however, in this Court and in trial Courts to take into account the offer of a plea of guilty which matches the crime for which a person is ultimately convicted.
>
> The offer of that plea of guilty or in usual circumstances, the actual plea of guilty, is of benefit to the person charged broadly in two ways: It is taken as an indication of remorse and contrition for the offence committed: and, there is what is described as the utilitarian value of the plea; this includes the relief of the State from having to call witnesses and, indeed, the reliefs to the various witnesses of the burden of having to give evidence and potentially being cross-examined.
>
> [The Appellant was] deprived of any benefit that he might expect for what I have described as the utilitarian value of his plea.
>
> In my view the Appellant should have been given that benefit.

[13] Other authorities referred to indicative of the value of plea: *Kelly v The Queen* (2000) 10 NTLR 39; *Wright v The Queen* [2007] NTCCA 5.
[14] [1999] NSW CCA 310.

[18] As mentioned at the outset in these reasons counsel for the Appellant in my view has been impeccable in putting a timely, constructive offer to the prosecution to resolve the hearing. On the authorities, the Appellant deserves credit for this. Although the offer to plead was initially contingent on the withdrawal of the other charges, on the authorities examined, the Appellant may still receive credit for pursuing resolution of the charges. This Court was told that no witnesses, (potentially there would have been two police officers), attended Court on the day of the scheduled hearing and this was also to the Appellant's credit.

[19] In relation to those favourable factors however, Her Honour was entitled to assess to what extent they should be reflected in the characterization of the plea and any consequent discount. In assessing those factors the learned Magistrate was also able to have regard to the full record on the court file indicating other conduct informing the question on the desire to facilitate justice including non-appearances on the part of the Appellant on 27 April 2010 and 5 May 2010 and consequent re-listings on account of that. The email correspondence of 11 August 2010 was still in conditional terms: "if you can confirm you will accept it [the plea to count 4] in full satisfaction we can then indicate a plea and vacate the hearing". As it turned out, neither party indicated or advised the Court of the outcome. Counsel for the Appellant could not contact the Appellant in order to finalise the negotiation and vacate the hearing.

[20] From the transcript, it would appear the learned Magistrate expressed some frustration that the Court was not notified of the plea in a timely enough manner to vacate the hearing prior to the date set. Although the Appellant did earlier indicate there would be no need for a hearing if certain conditions were met (both to the prosecution and the Court),[15] the learned Magistrate was also entitled to have regard to the extent to which the plea was indicative of a desire to facilitate the course of justice or whether in fact the course of justice was facilitated. The Appellant's counsel advised the learned Magistrate that the failure to advise the Court was because the Appellant's phone number had changed.

[21] It is acknowledged that the fact of a conditional offer to plead is not determinative of the issue of whether a plea was entered at the earliest opportunity. In *Cameron v The Queen*[16] the majority acknowledged forensic prejudice could be suffered to an accused in abandoning a plea of not guilty to all counts during the negotiations with the prosecution:

> The question whether it was possible for a person to plead at an earlier time is not one that is answered simply by looking at the charge sheet. As was acknowledged in *Atholwood v The Queen* (15) by Ipp J, in the Court of Criminal Appeal of Western Australia, the question is when it would first have been reasonable for a plea to be entered.
>
> In *Atholwood*, the person concerned had been charged with several counts. After a process of negotiation, the prosecution withdrew a number of the charges and the offender pleaded guilty to one of the remaining charges, Ipp J said this:

[15] 21 July 2010.
[16] At 245-6.

> It is particularly important in such circumstances to establish the time when it could first be said that it was reasonably open to the offender to plead guilty to the offence of which he was convicted. Regard should be had to the forensic prejudice that the offender would have suffered were he to have pleaded guilty to counts persisted in by the prosecution while others (that were subsequently withdrawn) remained pending against him. During the period that the prosecution maintains counts that are ultimately abandoned, there is a strong incentive for a person who recognises his guilt on other counts … to persist in a not guilty plea to all counts. In such circumstances it should not be assumed, mechanically, that the offender has delayed pleading guilty because of an absence of remorse, or that, reasonably speaking, he has not pleaded guilty at the earliest possible opportunity.

> The remarks of Ipp J in *Atholwood* reflect what has earlier been said in relation to the rationale for the rule that a plea may be taken into account in mitigation, namely, that, leaving aside remorse and acceptance of responsibility, the operative consideration is willingness to facilitate the course of justice. And once that rationale is accepted, the respondent's suggestion that the extent to which a plea of guilty may be taken into account in mitigation may vary according to whether it was or was not a "fast-track" plea must be rejected. Rather, the issue is to what extent the plea is indicative of remorse, acceptance of responsibility and willingness to facilitate the course of justice. And a significant consideration on that issue is whether the plea was entered at the first reasonable opportunity.

[22] Those principles do not mean however that Her Honour's conclusion on the value of the plea, so much as it can be ascertained, was in error. It was open to Her Honour to infer the value of the plea from the point of view of the facilitation of justice was not as significant as it may have been without the non-appearances of the Appellant, to some degree the conditional nature of the offer, the failure of the Appellant to remain in contact with counsel to finalise the matter and the failure to notify the Court prior to hearing. The learned Magistrate was entitled to consider the setting aside of the Court

time for the hearing, various appearances that confirmed the hearing and the need to encourage efficient use of Court time.

[23] In any event, I am far from persuaded that the learned Magistrate failed to take account of the Appellant's plea to some degree to his benefit. The learned Magistrate acknowledged the Appellant was sitting in the car with the engine running and not "driving" as that term is commonly used but was caught by the particular statutory provisions defining driving in those circumstances. General deterrence was still an issue given the prevalence of drink driving. A reading of .134% is a significant reading in the context of starting an engine, even though the risk to others was not as great as the usual case where the general driving public are specifically endangered.

[24] The offending occurred only twelve days after the Appellant had been convicted and sentenced to a $550 fine, $40 victim levy and a disqualification from driving for six months. In those circumstances the learned Magistrate was entitled to emphasise specific deterrence. The maximum penalty for a second offence is 12 months imprisonment or a fine of $2660.[17] The learned Magistrate went no further than the mandatory minimum disqualification period and the Alcohol Ignition Lock license period. There is a high volume of traffic offences dealt within the Court of Summary Jurisdiction. For pleas to have a high utilitarian value, in that context, there is a need to communicate the intention to plead clearly to the

[17] 20 penalty units, s 22(1) *Traffic Act* (NT).

Court, especially if time has been set aside for a contested hearing. Otherwise the value of the plea in any real sense is in danger of evaporating.

[25] I conclude the learned Magistrate was not in error, neither did the sentencing discretion miscarry.

[26] The Appeal is dismissed. The sentence of the Court of Summary Jurisdiction is affirmed.