PARTIES:	TIGER MARSHALL
	v
	DAVID JOHN LLEWELLYN
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NOS:	No. JA 3 of 1995
DELIVERED:	Alice Springs, 3 May 1995
HEARING DATES:	11 and 28 April 1995
JUDGMENT OF:	Kearney J

CATCHWORDS:

CRIMINAL LAW - sentence - prior criminal history - relevance to sentencing

Nabanardi v Minner (1992) 62 A Crim R 325, followed
R v Spicer, (unreported, Court of Criminal Appeal, 7 April 1994), followed
Veen (No.2) v The Queen (1988) 164 CLR 465, applied
Veen (No.1) v The Queen (1979) 143 CLR 458, applied
Hoare v The Queen (1989) 157 CLR 348, applied
R v Mulholland (1990) 102 FLR 465, considered
R v Omar (1991) 55 A Crim R 373, considered
Punch v The Queen (1993) 9 WAR 486, followed
R v McInerney [1986] 42 SASR 111, followed
Baumer v The Queen (1988) 166 CLR 51, applied

CRIMINAL LAW - sentence - manifestly excessive - desirability of providing the Court with suficient relevant statistical information

Clair v Brough (1985) 83 FLR 319, followed
Mason v Pryce (1988) 34 A Crim R 1, followed
Gadatjiya v Lethbridge (1992) 106 FLR 265, followed

PRECEDENTS - binding effect of obiter dicta of Court of Criminal Appeal

Hepburn v TCN Channel Nine [1984] 1 NSWLR 386, followed

REPRESENTATION:

Counsel:

Appellant:	D. Bamber
Respondent:	C. Roberts

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of Department of Public Prosecution

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

No. 3 of 1995

IN THE MATTER of the Justices Act

AND IN THE MATTER of an appeal against a sentence imposed by the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

TIGER MARSHALL
Appellant

AND:

DAVID JOHN LLEWELLYN
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 3 May 1995)

The appeal

Pursuant to s163(1) of the Justices Act, by Notice of Appeal dated 6 January 1995 the appellant challenged the severity of an effective sentence of 9 months imprisonment imposed on him by the Court of Summary Jurisdiction at Alice Springs on 3 January 1995. On pleading guilty he had been convicted that day of 2 offences: driving a motor vehicle on 7 September 1994 whilst having a blood alcohol concentration exceeding 0.08 (.286), and driving at that time whilst

disqualified from holding a driver's licence. These are offences contrary to ss19(2) and 31(1) of the Traffic Act (herein "the Act"); each carries a maximum penalty of 12 months imprisonment. The Court sentenced the appellant to 3 months imprisonment for the former offence, 6 months for the latter, and ordered that the second sentence be served cumulatively upon the first, an effective sentence of 9 months.

There are 4 grounds of appeal set out in the Notice of Appeal, viz:-

(1) that in all the circumstances the effective sentence of 9 months imprisonment was manifestly excessive;

(2) that the prior criminal record of the appellant was given undue weight in his sentencing;

(3) that the effective sentence of 9 months imprisonment was not proportional to the objective circumstances of the offences; and

(4) that his Worship erred in directing that the individual sentences be served cumulatively.

Mr Bamber of counsel for the appellant did not expressly rely on ground (3); however, it was raised implicitly in his submissions on ground (2). I turn first to the lower Court proceedings.

The facts and the sentencing remarks

The admitted facts were as follows:-

> "- - - at about quarter par 4pm on Wednesday, 7 September the defendant was driving - - - north along South Terrace. He turned left into Strehlow Street where he was stopped for the purpose of a random breath test. His breath test was positive and he was taken to the police station where a breathalyser produced a reading of .286 per cent.

> Police inquiries revealed that he was disqualified from holding or obtaining or having a driver's licence from 9 September 1993 until 9 March 1995. He agreed that he was a disqualified driver when it was put to him by police".

Mr Bamber then made submissions in mitigation. The prisoner was in his mid-20's, a Luritja man living at Mount Davies, married with 2 children. He had little schooling, may have sustained some damage from petrol sniffing, and had worked from time to time. On the day in question he had been drinking, and sought a lift from a relative to collect his pay. He was driven to a store not far from where he had to go, and told by the relative to drive on in the vehicle to collect his pay. He was doing so, when the Police stopped him.

> When sentencing the appellant his Worship said:-
>
> "- - - This is [your] third 'drive disqualified'. To deal with you in any other way [than immediate imprisonment] would distort the fines [quaere, findings] of worst cases and you clearly fall into one of the categories of 'worst case'.
>
> The third time drive disqualified; all [three of them] coupled with driving under the influence - - - you [first] appeared before the court in January 1993 [on a charge that possibly in] 1992 you drove whilst disqualified. The [second time in Court] was September 1993. You have been imprisoned every time. Some derisory days [sentences of 7 days and 6 weeks respectively] in prison and this third and last time now - I am going to impose imprisonment upon you. You are convicted [as] charged in each case. For the exceed .08 - another high reading [.286] - you are sentenced to 3 months imprisonment.
>
> For the 'drive disqualified' during the period of disqualification [commencing 9 September 1993] which - - - terminated on 9 March 1995, you are sentenced to 6 months imprisonment cumulative, a total of 9 months. You are disqualified from driving; your licence is cancelled. You are disqualified from

holding or obtaining a licence or a renewal of a licence for a period which expires on 9 September 1996 - - - ." (emphasis mine)

I deal with the grounds of appeal on p2 in the order (2), (4) and (1).

(1) Ground (2): undue weight given to prior criminal record

(a) The submissions

Mr Bamber submitted that this ground was made out on a proper construction of his Worship's sentencing remarks on p3. He submitted that those remarks disclosed that his Worship:-

(i) had erroneously placed this case of driving while disqualified and exceeding 0.08%, in the "worst case" category of such cases - "you clearly fall into one of the categories of 'worst case'". This was because he had erroneously treated the admitted fact that these were the appellant's third convictions for these combined offences since January 1993, as by itself rendering the present offences a "worst case";

(ii) had imposed a sentence which involved double punishment in that, in categorizing the earlier sentences for similar prior combined offences as "derisory", his Worship must have treated those sentences as inadequate for those offences, and imposed the present effective sentence, in part, as further punishment for those offences. His Worship was "sentencing for the record", as it is colloquially put.

I note that double punishment would be a separate ground of appeal on its own, but it was raised under ground 2.

Mr Roberts of counsel for the respondent submitted as to (ii) above:-

> "- - - although [his Worship] used the word 'derisory', - - - he was not using that term in the sense that the sentences that had been imposed [for the 2 previous offences of the same type] were too low. In my submission he was using that term as a term of art in the sense that the penalties that had been imposed to date had not seemed to have had an effect upon the defendant before him in relation to specific deterrence, inasmuch as - - - given - - - reappearances before the court on identical matters with increasing prescribed contents of alcohol readings within a short period of time [those sentences] have not had a specific deterrent [effect on the appellant].
>
> And 'derisory' in that context - - - would help your Honour to understand why he imposed a period of 6 months cumulative in this particular case; - - - he was referring to [the need for] specific deterrence, not - - - to any undue leniency afforded to [the appellant] in the past". (emphasis mine)

In reply, Mr Bamber submitted that his Worship's sentencing remarks (p3) did not address or purport to address the need for the specific deterrence of the appellant, as Mr Roberts had suggested.

(b) Conclusions on ground (2)

In support of submission (i), Mr Bamber relied on *Nabanardi v Minner* (1992) 62 A Crim R 325 at 330-332. That case involved an appeal against the severity of a sentence for a third 'drive while disqualified' offence on the ground,

inter alia, that too much weight had been given to the offender's prior convictions. The learned Magistrate had there held that "the third 'drive disqualified' - - - should attract the maximum"; he imposed a sentence of 6 months imprisonment. At p332 Mildren J said:-

> "The appellant's prior convictions were obviously relevant to illuminate his moral culpability or to show a need to impose condign punishment to deter him and others from offending again, and it was not without significance that his last prior conviction for this offence occurred only some 21 months previously when he was sentenced to three months imprisonment and released after serving one month upon a good behaviour bond for two years. However, there is no principle that a conviction for a subsequent offence must of necessity result in a more severe sentence than had previously been imposed in the past. Such an approach would result in the imposition of a fresh penalty for past offences rather than the imposition of a penalty which reflects the gravity of the offence." (emphasis mine)

See also *R v Spicer,* (unreported, Court of Criminal Appeal, 7 April 1994), at pp33-35 per Priestley J. Mildren J considered, and I respectfully agree, that the passage emphasized above flowed from what the majority of the High Court said in *Veen (No.2) v The Queen* (1988) 164 CLR 465 at 477-8, viz:-

> "There are two subsidiary principles which should be mentioned. The first is that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences: *DPP v Ottewell* [1970] AC 642 at 650; (1968) 52 Cr App R 679 at 688. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender

> has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent criminal history was relevant only to a prisoner's claim for leniency. That is not and never has been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties.
>
> The second subsidiary principle material to this case is that the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed: *Ibbs* (1987) 163 CLR 447 at 451-452; 27 A Crim R 465 at 468. That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognisably outside the worst category." (emphasis mine)

It follows, I think, from the passage emphasized above that "the gravity of the instant offence" which, in accordance with the proportionality principle stated in Veen (No.1) v The Queen (1979) 143 CLR 458 controls the upper limit of the sentence which may be imposed, is to be assessed without taking into account "the antecedent criminal history of [the] offender". The gravity of an offence is assessed by reference to its "objective circumstances"; see *Hoare v The Queen* (1989) 157 CLR 348 at 354. They set the limit to the sentence which may be imposed; within that limit:-

> "- - - the interplay of other relevant favourable and unfavourable factors - such as good character, previous offences, repentance, restitution, possible rehabilitation and intransigence - will point to what is the appropriate sentence in all the circumstances of the particular case"

as Deane J put it in *Veen (No.2) v The Queen* (supra) at 491.

The "objective circumstances" exclude matters personal to the offender such as his prior criminal history. Insofar as the analysis by Angel J in *R v Mulholland* (1990) 102 FLR 465 at pp477-9, with which Asche CJ agreed, may involve treating a prior criminal record as one of the "objective circumstances" of an offence, thereby raising the upper limit of the sentence which may be imposed, I respectfully disagree with it. I do not think those observations are binding on me; see *Hepburn v TCN Channel Nine* [1984] 1 NSWLR 386 at 390-1. I take the same approach to observations by the Full Court of the Federal Court in *R v Omar* (1991) 55 A Crim R 373 at 379-380 on the sentencing significance of a prior criminal record. However, I bear in mind the problem of semantics which bedevils this topic.

A prior criminal record, alone or combined with other "unfavourable factors" may result in the offender receiving a sentence which is the same as that which is proportional to the "objective circumstances" of the offence - the upper limits of the sentence which may properly be imposed - but no more. See generally *Punch v The Queen* (1993) 9 WAR 486 at 493-6, per Murray J.

The references to the significance to sentencing of "antecedent criminal history" in *Veen (No.2) v The Queen*

(supra) (see p7) are consistent with the views of King C.J. in *R v McInerney* [1986] 42 SASR 111 at 113, viz:-

> "The cardinal rule is that while good character may operate to reduce the sentence which the facts of the crime would otherwise attract, bad character cannot increase it. A person is not to be punished, or punished again, for crimes other than the crime for which sentence is being passed. Offences committed prior to sentence for the offence under consideration may affect the sentence in two ways. They may diminish or abrogate any leniency by reason of good character. They may, moreover, lead to a greater sentence than would otherwise be imposed, although within the proper limits indicated by the facts of the immediate crime, for the purpose of personal deterrence; the prisoner's record may indicate that greater punishment is needed to protect the public by deterring him from further crime. Where the other offences have been committed before the commission of the immediate offence, their relevance is clear in the generality of cases. The offender has committed the offence not as a first offender but as a person whose character is affected by previous offending. He must be sentenced against the background of his record: *Director of Public Prosecutions v Ottewell* (1968) 52 Cr. App. R. 679 at 681. The effect of the prior offences is more cogent if they have been the subject of conviction before the immediate offence. In such cases, the offender has committed the immediate offence notwithstanding the formal judgment and condemnation of the law in respect of the earlier offences and notwithstanding the warning as to the future which the conviction experience implies." (emphasis mine)

In that case his Honour was concerned with the significance to sentencing of offences committed after the offence in question, but his remarks are of a general character.

Where the upper sentencing limit determined by the proportionality principle is to be raised because of antecedent criminal history, specific legislation to that end

is required. See, for example, s5A of the Sentencing Act 1991 (Vic) dealing with the sentencing of recidivist serious sexual and violent offenders; ss19 and 20 of the Act, providing for an increased penalty for second or subsequent liquor-related driving offences; and the 'habitual criminal' and 'uncontrollable sexual offender' provisions in ss397-400A and 401-404 of the Criminal Code. Absent such a legislative provision, as the High Court put in *Baumer v The Queen* (1988) 166 CLR 51 at 57:-

> "It would be clearly wrong if, because of the record, his Honour was intending to increase the sentence beyond what he considered to be an appropriate sentence for the instant offence."

In light of the foregoing, I uphold Mr Bamber's submission (1)(a)(i) at p4. It is clear from his Worship's sentencing remarks at pp3-4 that he fell into the error exposed in *Nabanardi v Minner* (supra). I reject submission (1)(a)(ii) at p5; his Worship's use of the word "derisory" to categorize sentences which were never appealed was unfortunate and inappropriate, but does not carry the conclusion that he proceeded to engage in double punishment. Undoubtedly, his Worship was concerned with the need for the deterrence of the recidivism which the appellant exhibited.

(2) Ground of appeal (4): error in accumulating the sentences

(a) The submissions

Mr Bamber submitted that notwithstanding the very different societal values protected by each of the 2 offences of which the appellant was convicted (see pp1-2), they formed part of a single criminal episode and should be dealt with as such. That is, the fact that the appellant had an excessive

blood-alcohol level when he drove (the criminality being in the resulting potential or actual danger to the public) was really a circumstance aggravating his offence of driving whilst disqualified (in its essence, a form of contempt of court). Mr Bamber submitted that where offences constitute a single criminal episode a Court "nearly always" imposes concurrent sentences for those offences; see *Lade v Mamarika* (1986) 83 FLR 312 at 316 and *V.T. v Winzar* (1992) 106 FLR 306 at 312. Consequently, as his Worship gave no reason for departing from the usual sentencing practice in such a case, it should be concluded that accumulating the sentences involved error in the sentencing process. In support Mr Bamber relied on *Clair v Brough* (1985) 83 FLR 319 at 325, viz:-

> "When sentencing in relation to offences revealed by the one set of facts, attention is properly concentrated on the offender, not each particular offence. The charges here were properly laid, and properly heard together. In such a situation, separate sentences may be imposed, but they should be concurrent. - - - it is the overall picture that matters, and accordingly the ordinary rule that each sentence must be appropriate to the offence yields to the totality principle, that the total punishment must be appropriate to the cumulative extent of the wrong-doing." (emphasis mine)

Further, accumulating the sentences was erroneous because it resulted in an effective sentence which was manifestly excessive, when the totality of punishment (9 months imprisonment) is measured against the appellant's criminality; see under (3) below.

Mr Roberts submitted that the Court was not bound to order that the 2 sentences be served concurrently. It had a discretion in that regard and, in the circumstances of the

case, his Worship had not erred in ordering cumulative service see further his submission under (3) below at pp15.

(b) Conclusions

I consider that the appellant's offending is properly characterized as a single criminal episode. In such a situation, the sentencer's objective is to ensure that the totality of the sentences imposed properly reflects the totality of the offending in that episode. In the light of that primary concern the question whether the individual sentences should be cumulative or concurrent, or partially so, is determined by the answer to the prior question: what should be the punishment for the totality of the offending? It cannot be said that the accumulation of sentences as such, amounted to error; I accept Mr Robert's submission that that was a discretionary matter, and whether the discretion was properly exercised depends on the answer to the prior question, best dealt with in (3) below.

(3) Ground (1): effective sentence manifestly excessive

(a) The submissions

Mr Bamber conceded that the 3 months sentence for driving with an excessive blood-alcohol level was "within the [normal] range of sentences" for that offence. He did not concede that the 6 months sentence for driving whilst disqualified was within the normal sentencing range for that offence.

He submitted that the punishment, in its totality, was not proportional to the totality of the appellant's

offending; see *Lade v Mamarika* (supra) at 316 and *Gage v The Queen* (1992) 62 A Crim R 134 at 139. In support he relied, inter alia, on submissions under grounds (2) and (4).

Mr Roberts submitted that, in light of the appellant's prior history of similar offending, committed "within a relatively short period of time", the individual sentence for 'drive while disqualified' (6 months) was "not excessive on the face of it", when viewed in light of:

(a) the maximum penalty of 12 months for the offence; and

(b) what Rice J said in *Pryce v Foster* (supra) at pp27-28, viz:-

> "The appellant in *Smith v Torney* (1984) 29 NTR 31 - - - pleaded guilty to a charge of driving a motor vehicle whilst disqualified from so doing and was sentenced to imprisonment for six weeks, - - - Despite the fact that his Honour [Muirhead J] found - - - that the appellant's previous conduct and character were exemplary, he said at p36:
>
> > "But then it is necessary to pay regard to the nature of this offence which has traditionally been regarded as a serious offence",
>
> and then proceeded to cite the further remarks of Forster CJ in *Daniels v Nichol* [unreported, 13 August 1976] when dealing with the offence of driving under disqualification, viz:
>
> > "for the offence of driving while disqualified from holding a driving licence imprisonment is the appropriate penalty save in exceptional circumstances. ... Such driving is a serious contempt of the court and I am quite unable to say that a sentence of three months is manifestly excessive."

His Honour then went on to lay down what might be termed a cautious approach to sentencing principles in a case of this sort, and I set them out hereunder reminding myself that I must bear them steadily in mind when dealing with the present appeal:-

> "Of course any deliberate breach of an order of the court is serious and it has traditionally been regarded as such, but I consider care must be taken (as recent decisions on contempt illustrate) to ensure infringements are treated on their merits. There is a danger of injustice if an individual is treated as one of a class of offenders; it is necessary that each person be sentenced as an individual. Every sentence must be determined on its own facts. I prefer to classify the seriousness of driving whilst under disqualification on broader grounds.
>
> "(1) The disqualification power is a vital weapon in the armoury of courts of summary jurisdiction. Magistrates, amongst their many responsibilities, judicially administer statutes such as the Traffic Act which are designed, not only to regulate traffic, but to combat the appalling toll of killed and injured on our roads.
>
> "(2) It is only an effective weapon if it is strictly enforced, but such orders are, by circumstances, difficult to supervise and enforce.
>
> "(3) The only practical method of obtaining maximum compliance with such orders is to ensure that those subject to such orders understand that the consequences of a breach will almost inevitably be grave and imprisonment must, in this regard, be the general sanction.""

Further, Mr Roberts submitted, in the absence of adequate comparative sentencing information, the anecdotal evidence relied on, as far as it went, showed that in the circumstances of the case the sentence of 6 months imprisonment was within the normal range. Mr Roberts continued:-

> "If Your Honour accepts that in the absence of tariff evidence - - - the sentences individually would not warrant the term 'manifestly excessive', in my submission the real question is whether or not in this particular case the total [effective sentence] by virtue of the accumulation is [manifestly excessive]. In my submission [the resolution of] that [question] goes back to general principle, as to why the Act has the penalties it has. Graduated scales have been tried in relation to [the appellant].
>
> On a simple graduation [that is, 7 days, 6 weeks and 9 months imprisonment] of the penalties [the effective sentence] could not be said to be 'manifestly excessive', given the element of contempt [see *Pryce v Foster* (supra)] which - - - puts [the offence of 'drive whilst disqualified'] more into the category of a [breach of a] suspended sentence or a breach of parole or a breach of probation. Where there is an order of the court [of any of those types] and - - - a subsequent conviction - - - it is not uncommon for sentences to be accumulated, in relation to breaches of parole, breaches of probation or [of a] suspended sentence. [So to] accumulate them in this particular case is within discretion; and, as such, cannot be said to be a misuse of that discretion.
>
> But I would have to concede, Your Honour, that I have seen cases - - - where [the sentences for offences of this type] have been ordered to be served concurrently. - - - I cannot point to a specific case which says they must be served cumulatively."

(b) Conclusions

Although the offences in question are commonly committed together, and are typical 'tariff' offences as far as sentencing goes, Mr Bamber was unable to adduce sufficient sentencing information to establish the current sentencing 'tariff'. See *Clair v Brough* (supra) at 322-4, *Mason v Pryce* (1988) 34 A Crim R 1 at 7-8, and *Gadatjiya v Lethbridge* (1992) 106 FLR 265 as to the desirability of providing the Court with sufficient relevant statistical information when it is contended that a sentence for a common offence is "manifestly excessive". Regrettably, it appears that the present IJIS computer software has not yet shown an improvement on the former PROMIS software, in that respect; cf. the comprehensive sentencing information now routinely and immediately available to all criminal courts in New South Wales as a guide, via the Sentencing Information System (particularly the Penalties Statistics Database) described in (1991) 65 ALJ 45.

Mr Bamber provided the Court with some details of sentencing by the Court of Summary Jurisdiction in 10 recent offences of this type. This information was of limited utility; for example, it did not disclose whether any of the defendants had a prior history of similar offending, as here.

In my opinion, the appellant has failed to establish that the sentence of 6 months for 'drive whilst disqualified' was so very obviously excessive as to be unreasonable or plainly unjust, in circumstances where it was the appellant's third such offence in a relatively short period. Accordingly I do not consider that that sentence was manifestly excessive, in the circumstances. It is conceded that the 3 months sentence was not manifestly excessive. However, I consider that the effective sentence of 9 months imprisonment is

manifestly excessive. I therefore uphold ground of appeal (1).

Conclusions on the appeal

The appellant has established error in that his Worship gave undue weight to the appellant's previous convictions, by treating them as increasing the gravity of the present offences so as to place them in the 'worst category'. There was nothing in the objective circumstances of the offences, taken together, which placed them in that category. The conclusion that the effective sentence is manifestly excessive, together with the error in the approach to sentencing means that the appeal must be allowed, the effective sentence quashed, and the appellant re-sentenced.

In my opinion, the appropriate effective sentence for the totality of the offending, in the circumstances, is 7 months imprisonment. The sentences of 3 months and 6 months imprisonment (each within the sentencing discretion) are affirmed. In order to arrive at the appropriate effective sentence, it is ordered that of the sentence of 3 months, 2 months be served concurrently with the sentence of 6 months, and 1 month cumulatively upon it.

Orders accordingly.