Campbell v Meredith [2005] NTSC 13

PARTIES:	CAMPBELL, Stephen James
	v
	MEREDITH, Andrew John
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	81 of 2004 (20421146)
DELIVERED:	16 March 2005
HEARING DATES:	2 and 18 February 2005
JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW
Appeal – Justices Appeal – appeal against sentence – driving whilst disqualified from holding a driver's licence – principles of parity and consistency – observations or statements made during submissions are not considered reasons for sentence – tariff in sentencing – fresh evidence – counsel misunderstood Magistrate – appellant unfairly disadvantaged – admission of fresh evidence – sentencing discretion exercised afresh – appeal allowed.

Justices Act 1928 (NT)

REPRESENTATION:

Counsel:

Appellant:	M Carter
Respondent:	S Geary

Solicitors:

Appellant:	Michael Whelen
Respondent:	DPP

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

Campbell v Meredith [2005] NTSC 13
No. 81 of 2004 (20421146)

BETWEEN:

STEPHEN JAMES CAMPBELL
Appellant

AND:

ANDREW JOHN MEREDITH
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 16 March 2005)

[1] This is an appeal against a sentence imposed for driving whilst disqualified from holding a driver's licence. The learned Magistrate imposed a sentence of two months imprisonment and ordered that the sentence be suspended after the appellant had served one month.

[2] On 18 December 2003 the appellant was convicted in the Katherine Court of Summary Jurisdiction of failing to supply a sufficient sample of breath. A fine of $250 was imposed. In addition, the appellant was disqualified from holding a driver's licence for a period of 12 months.

[3] On 13 September 2004, approximately nine months into the twelve month period of disqualification, the appellant was seen driving his utility in

Ngukurr. Police spoke to the appellant on the following day. The appellant told police that he drove because the phone lines were down and he needed to get to the Ngukurr store of which he was the manager. When asked if he understood that he was disqualified from driving until 18 December he replied "Yes, but I needed to get to the store". Upon being informed that he might receive a summons for the matter, the appellant said:

> "You've got to be kidding me. How about a bit of give and take, how am I supposed to do my job."

[4] The appellant is 48 years of age. In September 2004 he was the manager of the Ngukurr store. He had been employed at the store for approximately six and a half years.

[5] The Magistrate was told that on the day of the offence the appellant's wife was at the store, but the appellant was unable to make contact with the store or police because the phone lines were out. The appellant knew that in those circumstances the EFTPOS facility at the store would not operate. He became concerned for his wife and another woman who were in the store. In the appellant's experience the failure of the EFTPOS facility could cause customers to become aggravated by reason of their inability to withdraw money. The appellant also knew that customers could try to take advantage of the absence of a male person in the store. It was in those circumstances that he decided to drive the one and a half kilometres to the store.

[6] During submissions counsel for the appellant advised the Magistrate that the appellant did not walk to the store because it required him to walk past approximate 50 to 60 dogs. He was concerned that by walking he might be at risk from attack by the dogs. The appellant had made a practice of keeping dogs out of the store by using an electric prod.

[7] The Magistrate was unimpressed with the reason advanced by the appellant. During submissions his Worship said:

> "Do you want to say anything about that because I don't really – I suppose Mr Wheelan I should give you the opportunity. There are a number of things here that concern me. One is that I find it difficult to believe your submission that the dogs frighten him to the extent that he's not prepared to walk."

[8] Counsel for the appellant was on notice that the Magistrate was unlikely to believe the reason advanced for driving rather than walking. He sought to address that issue by relating a personal experience at Maningrida when he had been menaced by camp dogs while walking along the road. Counsel said he could understand the experience would be unpleasant and somewhat frightening and added:

> "But without the calling of evidence I can't really say more than that, your Worship."

[9] The topic was not mentioned again. Counsel did not make any application to call evidence about the dogs or any other topic. In his brief extempore remarks concerning penalty, the Magistrate did not mention the issue of dogs.

[10] The Magistrate observed that the offence of driving while disqualified is prevalent in the Northern Territory. In observations that are criticised by counsel for the appellant, his Worship referred to remarks in this Court that the ordinary sentence for driving while disqualified is imprisonment. The appellant also complains that his Worship erred in approaching sentence on the basis that to suspend the sentence or impose home detention would send a "bad and destructive message to the community" because a white store manager would be receiving a suspended sentence when "nine out of ten or 99 out of 100 Aboriginal people go to gaol".

[11] During submissions the Magistrate referred to the principle of "parity" in sentencing. In that context he posed the question for counsel that if he was to give the appellant a suspended sentence and every other member of the Ngukurr community received a sentence of imprisonment to be served, that principle would be offended. The grounds of appeal complain that his Worship erred in considering the "parity" principle as that principle had no application to the circumstances before his Worship.

[12] The reference by the Magistrate to the parity principle occurred during submissions. Observations or statements made during submissions are not to be read as considered reasons for sentence.

[13] Strictly speaking, the circumstances before the Magistrate did not give rise to a question of "parity" as that word has been used in the context of sentencing principles. However, the Magistrate's remarks during

submissions and on sentencing plainly demonstrate that his Worship was concerned with the important issue of consistency in sentencing. It was entirely appropriate for his Worship to take into account the general approach of sentencing courts to sentences for driving while disqualified and to take into account the requirement that courts be consistent and not impose inconsistent sentences in the absence of circumstances justifying different penalties. The misuse of the word "parity" does not amount to an error of principle.

[14] The appellant also complains that the Magistrate erred in approaching the question of sentence on the basis that there was a tariff that required almost every offender to be sentenced to imprisonment. In particular counsel emphasised the remarks of the Magistrate that nine out of ten or 99 out of 100 Aboriginal people go to gaol.

[15] As to the question of a tariff, the Magistrate made the following observation:

> "The Supreme Court has made it clear over the years that the ordinary sentence for this is to be gaol and that not that it needs exceptional circumstances not to go to gaol but it needs some sort of particular circumstances, there needs to be a proper reason to distinguish your case from many other cases."

[16] There is no error in those remarks. First, it must be remembered that the Magistrate was sitting in a busy Court of Summary Jurisdiction in Katherine. The remarks were extempore and made immediately following the conclusion of submissions. They are not to be read as a considered

essay on the principles of sentencing. They are remarks designed to explain to an offender in lay language reasons why a particular penalty is being imposed. In that context his Worship was explaining to the appellant that, generally speaking, those who drive while disqualified must expect to go to gaol unless there are particular circumstances which justify a different sentence.

[17] Similarly, the Magistrate was not speaking literally when he said that 99 out of 100 Aboriginal people would go to gaol for this offence. He was sending the message to the appellant in language which would be understood by the appellant that the majority of Aboriginal people are sentenced to imprisonment for driving while disqualified and that absent particular circumstances to justify a different course, the appellant had to expect equal treatment. His Worship was anxious, with good cause, to send the message through his brief remarks that those who are disadvantaged within our community will not be treated differently by reason of their disadvantaged position. His Worship emphasised that empowered persons within the community should not receive more lenient treatment than those who are disempowered under difficult circumstances.

[18] When the Magistrate's remarks are read in their entirety, it is plain that he did not regard himself as bound by some tariff to impose a sentence of imprisonment. His Worship did not approach the matter on the basis that imprisonment had to be imposed unless there were exceptional

circumstances. He did not approach the question of sentence on the basis that his discretion was fettered.

[19] The Magistrate considered whether the particular circumstances advanced by the appellant as justifying immediate release. His Worship recognised that, "overall", the appellant had previously been a person of good character and that other factors also tended to support the appellant's case for immediate suspension of the sentence. His Worship reached the view, however, that factors such as general deterrence and the need for consistency in sentencing, outweighed those matters advanced by the appellant and that a short period of imprisonment should be served.

[20] Some Magistrates might have considered that the appellant's inability to contact his wife or the police and his concern about the welfare of his wife and the other female person in the shop amounted to circumstances that demonstrated a sufficient basis for not requiring the appellant to serve a sentence of imprisonment. On the other hand, bearing in mind the appellant's response to the police when he spoke about a bit of give and take and "how am I supposed to do my job", some Magistrates may have been sceptical about the reason advanced by the appellant during submissions. Significantly, the Magistrate rejected the submission that the appellant did not walk because of his fear of dogs.

[21] In my opinion on the material before him the Magistrate did not err in principle. In addition, I am not persuaded that the penalty was, in any

respect, manifestly excessive such as to demonstrate error. While there were reasons that could have justified a different course, it was within the range of the sentencing discretion to decline to suspend the sentence entirely.

[22] In the absence of further material justifying interference with the order of the Magistrate, I would have dismissed the appeal.

[23] At the outset of the appeal, counsel for the appellant sought to tender an affidavit of the appellant dated 31 January 2005. In the affidavit the appellant sought to expand upon his reasons for driving rather than walking:

> "1. I state that when I drove to the shop I manage at Ngukurr in the Northern Territory on the 13th September 2004 I drove rather than walked due to the large number of camp dogs that inhabit the route from my house to the shop.
>
> 2. The dogs regularly attack people. I am informed and verily believe that they have attacked members of my staff who have had to beat the dogs back with sticks. (I say I was bailed up by a dog at age 10 for over an hour and have since avoided strange dogs).
>
> 3. I have lived in Ngukurr for six and a half years and am aware that people are regularly attacked by dogs which sometimes results in them having to be treated at the Ngukurr Health Clinic.
>
> 4. I also drove as I was anxious to get to the shop as I knew that after 12.00 noon the male attendant would be absent on lunch. When there are no eftpos facilities as was the situation, then people often tend to be aggressive with female staff when they cannot access eftpos facilities."

[24] The reception of evidence on appeal is governed by s 176A of the Justices Act. That section provides that the court shall, unless satisfied that the evidence, if received, would not afford a ground for allowing the appeal, admit the evidence if a number of conditions are met. First, it must appear to the court that the evidence is likely to be credible and would have been admissible in the proceedings before the Magistrate. Secondly, where the evidence was not adduced in the proceedings before the Magistrate, the court must be satisfied that there is a "reasonable explanation for the failure to adduce it." At the first appearance on the appeal the appellant had not advanced any explanation for the failure to adduce the evidence which the appellant then sought to tender.

[25] Thirdly, s 176A requires a court to be satisfied that the appellant has complied with the requirements of subs (2) and (3) of s 176A. Subsection (2) provides that the appellant shall not tender evidence to this Court unless the appellant has, not less than seven days before the hearing of the appeal, given written notice to the other party. Such notice had not been given, but the respondent waived this requirement.

[26] During submissions, it was apparent that the absence of any explanation for the failure to adduce the evidence before the Magistrate created a substantial difficulty for the appellant. I pointed out that on the material before me counsel had been alerted to the likelihood that the Magistrate would reject the explanation related to the dogs, but counsel had not sought to lead any evidence from the appellant. At that time there was no basis upon which I

could have drawn an inference as to whether the failure to lead the evidence was a deliberate choice or an oversight. I invited counsel to consider whether the appellant wished to apply to lead evidence explaining why the appellant did not call evidence before the Magistrate. The appellant then sought and was granted an adjournment to enable the appellant to consider his position.

[27] On the resumption of the appeal, the appellant sought to tender three additional affidavits. First, an affidavit of the appellant dated 11 February 2005 containing a detailed account of the events of the day in question. In substance, the appellant said that he first became aware of the difficulty with the EFTPOS facility at about 7.45am that morning when he was unable to use the facility for a customer. He called the Roper Bar store and ascertained that they were also having difficulty. Signs were put up explaining the problem.

[28] The appellant said that during the morning his wife drove him to their residence about one and a half kilometres from the store. He worked at home until about 11.55am when he tried to ring his wife at the store. He kept getting the engaged signal. It was then the appellant realised that because the male assistant at the store would be absent for about an hour during his lunch break, the safety of the appellant's wife might be at risk. According to the appellant, violent situations occur when EFTPOS facilities are unavailable and the violence is more likely to occur when there is no male at the store.

[29] As to driving rather than walking, in the affidavit of 11 February 2005 the appellant gave the following explanation:

> "9. I say I drove the distance to the store as I am absolutely terrified of dogs. In this regard I refer to my affidavit of 31st of January 2005 filed herein. I say I did not believe that carrying a stick or broom handle would have been an effective defence if I walked the distance. I estimate there are about 50 to 60 camp dogs on the route from my residence to the shop. The dogs always operate in groups of 5 to 6 and do attack people. In the shop I have a cattle prod but I did not have that at home with me. Given the circumstances and the fear I have of dogs I did not regard a stick or a broom handle as an adequate defence. I was also anxious to get to my wife and the other female staff member and did not want to waste time locating a suitable stick etc which I believed would not serve to adequately defend me from the dogs."

[30] The appellant stated that when a police officer first spoke to him about driving he explained that he did not want to leave the two women in the shop by themselves in case something happened. He said he did not tell the officer about his fear of dogs as he regarded the fear as a sign of personal weakness. The officer indicated he would think about what he was going to do. It was the following day when another officer spoke to the appellant and told him he would be charged.

[31] The appellant stated that he gave instructions to his counsel concerning his reason for driving. He said he was unaware that he should have given evidence when the Magistrate expressed doubts about the explanation and the fear of dogs. He said counsel did not seek instructions from him about giving evidence during the hearing.

[32] The second affidavit upon which the appellant sought to rely was an affidavit of the proprietor of the Roper Bar store, dated 11 February 2005. The proprietor was in Darwin at the relevant time. By reason of the failure of the EFTPOS facility at the Roper Bar store on the same day, she became very concerned about the welfare of her female store manager and made arrangements to fly out of Darwin to assist the manager.

[33] The affidavit of the Roper Bar store proprietor also related a conversation between the proprietor and the manager that occurred on a later occasion. That evidence was inadmissible.

[34] The purpose of the balance of the affidavit of the proprietor was to demonstrate that the appellant was not the only person concerned for the welfare of those serving in the stores affected by the EFTPOS failure. It was aimed at enhancing the credibility of the version given by the appellant. In my view, however, it was too remote from the appellant's circumstances to be of any assistance.

[35] Finally, the appellant sought to tender an affidavit dated 11 February 2005 of his counsel before the Magistrate. Counsel stated that after the exchange with the Magistrate in which counsel concluded by saying that without calling evidence he could not really say anymore, he meant to convey to the Magistrate that if his Worship did not accept the submission concerning the problem with the dogs, he would seek his client's instructions concerning the calling of evidence. He said that if the Magistrate had stated that he still

did not accept the evidence, he would strongly have recommended that his client give evidence about his fear of dogs. He said he did not seek instructions about giving evidence as he believed the explanation proffered in answer to the questions by the Magistrate had been accepted.

[36] The respondent did not challenge the reliability of counsel's affidavit. I have no reason to doubt the explanation given by counsel. It accurately reflects his state of mind.

[37] Counsel before the Magistrate misunderstood the situation. The Magistrate had indicated his scepticism about the explanation based on fear of dogs. The cryptic comment by counsel that without the calling of evidence he could not really say anymore would not have been understood by the Magistrate as giving an indication of a desire to call evidence. Counsel should have plainly stated to the Magistrate that if his Worship did not accept the explanation he had proffered, either he had instructions to call evidence or he wanted the opportunity to obtain instructions on that matter. There was nothing in the conduct of the Magistrate that could reasonably have led counsel to believe that the Magistrate had accepted the explanation. Further, there was no obligation on the Magistrate to give any additional indication as to his views. It was clearly a matter for counsel to make his position clear and he failed to do so.

[38] The difficulty facing this Court was the fact that the failure of the appellant to give evidence concerning his explanation was not brought about by the

fault of the appellant. It was caused by a misunderstanding on the part of his counsel. In a serious matter involving the appellant's liberty, the appellant should not be unfairly disadvantaged as a consequence of such a misunderstanding.

[39] Having regard to the requirements of s 176A of the Justices Act, I admitted the two affidavits of the appellant and the affidavit of his counsel. It appeared to me the evidence was likely to be credible and I was satisfied it would have been admissible in the proceedings before the Magistrate.

[40] I was also satisfied that there was a reasonable explanation for the failure to adduce the evidence. As I have said, it arose out of a misunderstanding by counsel for the appellant.

[41] Counsel for the respondent objected to the admission of the bulk of the appellant's affidavit dated 11 February 2005. He correctly pointed out that the issue about which the appellant required the adjournment to consider calling further evidence related to his fear of dogs and why evidence had not been led before the Magistrate on that issue. Much of the affidavit dealt with other aspects of the day in question.

[42] Strictly speaking, the respondent's submission was correct. Notwithstanding that background, however, I admitted the affidavit in its entirety because the particular issue of the reason for not walking was an intrinsic part of the overall explanation for driving while disqualified and it

would have been somewhat artificial to admit only that section of the affidavit without the context of the balance of the explanation.

[43] The appellant was cross-examined. The only area of his evidence that was challenged with any enthusiasm concerned the likelihood of dogs attacking him while walking. The appellant impressed me as a straightforward and candid witness. I have no hesitation in accepting his evidence that he held a genuine fear of dogs and believed, with good cause, that if he walked from his residence to the store he was at significant risk of being threatened or attacked by dogs. I also have no hesitation in accepting his evidence that, with good cause, he was genuinely concerned for the welfare of his wife and a female assistant who were in the shop without the presence of a male person.

[44] These matters were of considerable significance in the exercise of the sentencing discretion. An intrinsic part of the explanation of importance to the sentencing discretion was advanced only through oral submissions by counsel and was rejected by the Magistrate. His Worship did not have the benefit of evidence from the appellant. In these circumstances, on the basis of the fresh evidence presented to me which was not available to the Magistrate, I have decided to allow the appeal and to exercise the sentencing discretion afresh.

[45] Counsel for the respondent urged that a sentence of imprisonment was the appropriate penalty and that some part of the sentence should be served.

Counsel highlighted the need for consistency in penalty as reflected in the remarks of the Magistrate.

[46] As mentioned, the Magistrate properly had regard to consistency in sentencing. In particular his Worship was understandably concerned to avoid treating the appellant, a person occupying a relatively advantaged position within the Ngukurr community, in a manner which was in fact, or gave the impression of being, more favourable than the treatment generally given to the relatively disadvantaged members of the Ngukurr community in similar circumstances of offending. A sentencing court must, however, be careful to impose a penalty appropriate for the particular offending and offender. If the circumstances require a penalty that is less than the penalty imposed in other cases of similar offending, the lesser penalty must be imposed notwithstanding the difficulty of explaining to a particular community or the community at large why a lesser penalty is being imposed. The court must do what it can to explain reasons for distinguishing between offences and offenders and a difficulty in that regard must not lead to the imposition of a penalty heavier than the penalty which is appropriate in the particular circumstances.

[47] In making those remarks, I am not suggesting that the Magistrate fell into this error. He did not. As I have said, but for the fresh evidence I would not have allowed the appeal.

[48] The appellant is a person who occupies a responsible position and is otherwise a person of good character. He breached the order for a specific and cogent reason. He did not engage in a blatant disregard for the order of the Court for no reason. This was not a case in which the appellant acted with contumelious disregard for the Court order. The driving occurred approximately nine months into the twelve month disqualification and was over a short distance in a remote outback community. The appellant's actions did not involve the commission of any other offence; nor did they endanger any other person.

[49] The combination of the circumstances of the offending and matters personal to the appellant has persuaded me that this is not the usual or average case of offending which ordinarily requires the imposition of a sentence of imprisonment to be served. Exercising my discretion afresh, I have reached the view that the appropriate penalty is a sentence of six weeks imprisonment to be suspended immediately on condition that the appellant enter into a home detention order. The appellant has been assessed as suitable for such an order and suitable arrangements are in place for him to reside at Lot 238 Ngukurr Community. The conditions of the home detention order are that for a period of two months commencing Saturday 19 March 2005 the appellant must reside at those premises and not leave those premises between the hours of 8pm and 6am unless for a medical or other emergency or for a purpose approved by and for a period specified by the Director of Correctional Services or the Director's nominee.

[50] In addition the appellant will be disqualified from holding a driver's licence for a period of six months commencing 12.01am on Saturday 19 March 2005.
