*George v Parsons* [2009] NTSC 66

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| PARTIES: | PRESTON LEE GEORGE<br><br>v<br><br>MATTHEW ALAN PARSONS |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 46 of 2009 (20932407) |
| DELIVERED: | 9 December 2009 |
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| JUDGMENT OF: | RILEY J |

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

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| Appellant: | I Rowbottam |
| Respondent: | M Thomas |

*Solicitors:*

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

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

*George v Parsons* [2009] NTSC 66
No. JA 46 of 2009 (20932407)

BETWEEN:

**PRESTON LEE GEORGE**
Appellant

AND:

**MATTHEW ALAN PARSONS**
Respondent

CORAM: RILEY J

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 9 December 2009)

[1] On 3 November 2009, following his guilty plea, the appellant was convicted of driving a motor vehicle with a high range blood alcohol content and driving whilst unlicensed. In addition to a period of disqualification from holding and obtaining a driver's licence he was sentenced to imprisonment for a period of two months. The appellant appeals against the imposition of the term of imprisonment on the grounds that the learned magistrate failed to consider alternative dispositions to an actual term of imprisonment, the sentence was manifestly excessive and the learned magistrate took into account irrelevant considerations.

[2] The offending occurred on 25 September 2009 when the appellant was stopped by police and subjected to a roadside breath test. It was not suggested that his driving attracted the attention of police. He returned a positive reading and was subsequently determined to have a blood alcohol content of 0.170%. The court was informed that the appellant did not have any good reason for driving.

[3] The appellant has a relevant history of convictions. He has two convictions for driving whilst unlicensed and two convictions for driving whilst disqualified. The court was advised that the appellant informed police that he had never held a driver's licence. Of significance for present purposes is the fact that he has four prior convictions for driving whilst under the influence of alcohol. He has convictions for blood alcohol readings of 0.088% (1997), 0.155% (2001), 0.264% (2001), and 0.115% (2004). His reading on the occasion of this offending, his fifth offence, was 0.170%. In relation to two of the offences of driving whilst under the influence of alcohol he had been sentenced to suspended sentences of imprisonment. The criminal history of the appellant also revealed that he had served time in prison for other offences.

**The reasons for decision**

[4] In sentencing the appellant the learned magistrate referred to the prior convictions of the appellant which he described as "a considerable history of driving under the influence". His Honour correctly pointed out that driving

under the influence is a common cause of motor vehicle accidents in this community and that the maximum penalties reflect the seriousness with which such offending is to be regarded. His Honour indicated that general deterrence is a significant consideration in determining an appropriate sentence.

[5] The appellant complains that the magistrate failed to consider alternative dispositions to an actual term of imprisonment and, further, that his Honour took into account irrelevant considerations.

[6] The reasons for decision were given immediately after submissions by both counsel had been completed. Consistent with the nature of the proceedings and the circumstances in which the hearing was conducted the reasons were not expansive. It was apparent from the sentencing remarks that the learned magistrate placed emphasis upon the need for general deterrence, the seriousness of the offending and the significant relevant criminal history of the appellant. I see no error on the part of his Honour in his approach to these matters.

**Alternative dispositions**

[7] It is true, as the appellant submitted, that the learned sentencing magistrate did not explicitly address alternative dispositions. When considering ex tempore reasons for sentence in relation to commonplace offences delivered by magistrates in busy courts, an appellate court is entitled to assume that the magistrate has considered all matters which are necessarily

implicit in the conclusion reached. It is to be assumed that magistrates are well aware of sentencing options open to them. It should not be inferred that, merely because a magistrate failed to specifically mention a particular sentencing option in the course of ex tempore sentencing remarks, he or she did not consider all of the options[1]. In my opinion this ground has not been made out.

**The learned magistrate took into account irrelevant considerations**

**(a) The driver's licence**

[8] The information provided to the learned sentencing magistrate was that the appellant told police that he had never held a driver's licence. In the course of submissions to his Honour the prosecutor confirmed that: "Mr George has never held a licence. He has been disqualified previously, but he has never held a licence". Counsel who appeared on behalf of the appellant in the Court of Summary Jurisdiction did not challenge the claim which, it seems, was consistent with her client's instructions. The learned magistrate proceeded to sentence on that basis.

[9] In this court it was, for the first time, submitted on behalf of the appellant that he must have had a driver's licence and passed a driver's test because, in 1997, he was convicted of an offence of driving without 'P" plates and exceeding the speed limit as a "P" plate driver. Other than to point to the apparently inconsistent conviction from 1997 the appellant has not, on

[1] *Kuiper v Brennan* [2006] NTSC 54 at [33]; *Simon v Garner*[2007] NTSC 33 at [12]; *Henda v Cahill* [2009] NTSC 63

appeal, sought to lead evidence that he has at any time been licensed or to explain his assertion to police that he had never held a licence. Section 176A of the *Justices Act* permits the receipt of evidence before the Supreme Court. If the appellant wished to lead evidence that the unchallenged information provided to the court below was incorrect and to explain the surrounding circumstances he had the means to do so.

[10] In any event, if it be so, the fact that the appellant held a licence requiring him to display a "P" plate some 12 years before the present offending would not have served to alter the penalty imposed. If, as is now suggested, the appellant may have held a licence to drive under another name at some point of time it would, in my opinion, not have served to alter the penalty imposed. The circumstances of the offending, including the offending history, required a penalty of the order in fact imposed.

**(b) Driving disqualified**

[11] The appellant complains that the magistrate erred in considering that driving unlicensed should be equated with driving disqualified. Reference to the sentencing remarks reveals that the magistrate referred to the history of the appellant driving unlicensed and also driving disqualified. With respect there is nothing in those remarks which suggests that the magistrate considered driving unlicensed should be equated with driving disqualified. Further, there is nothing to support the submission of the appellant that his

Honour placed the appellant in "the same category of offender as drink drivers who drive whilst disqualified". The complaint is without foundation.

**(c) Passing remarks**

[12] The appellant also complains that the magistrate erred when, in referring to the period since the last conviction of the appellant for driving whilst under the influence of alcohol, his Honour said that "going five years to that previously convicted does not always mean that he has never done it for five years". Those remarks were of a throwaway kind made in the course of discussion with counsel. The remarks were not repeated in the course of sentencing and there is nothing to suggest that his Honour proceeded to sentence on the basis that the appellant had offended in the intervening period.

[13] It has not been demonstrated that his Honour took into account irrelevant considerations. This ground of appeal is dismissed.

**Manifest excess**

[14] The principles applicable to an appeal based upon the ground that a sentence imposed upon an offender is manifestly excessive are well known[2]. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or

[2] *House v The King* (1936) 55 CLR 499 at 503; *Cransen v The King* (1936) 55 CLR 509; *Liddy v The Queen* [2005] NTCCA 4.

excessive. It interferes only if it be shown that the sentencing magistrate was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing magistrate said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, and not just arguably, excessive.

[15] In this case the appellant was driving in circumstances where he did not have a driver's licence. He had previously been dealt with for driving a motor vehicle whilst unlicensed and he had also previously been dealt with for driving a motor vehicle whilst disqualified. He had been subject to significant penalties for driving offences including terms of imprisonment albeit wholly suspended. He must be taken to have been aware of the seriousness of his actions and the possible consequences when he elected to drive on this occasion. There was no suggestion of any compelling reason for him to drive. There was no medical emergency. There was no exceptional circumstance. The learned magistrate was informed that the appellant drove in order to "have some intimate time" with his partner. It was not suggested that there was any pressing need for the appellant to drive in order to spend such time with his partner or that the partner was not herself able to drive. There was, as his counsel acknowledged, no "good reason for driving". It seems the appellant simply and deliberately ignored

the law and drove as a matter of choice and convenience. In so doing he drove whilst unlicensed and with a high range blood alcohol content and with his partner in the vehicle placing her at risk along with the risk he posed to other road users. This was a flagrant breach of the law.

[16] The appellant had the criminal history to which I have referred. That history was relevant to show that these offences were not an uncharacteristic aberration on the part of the appellant and, further, that he manifested in his commission of the offences a continuing attitude of disobedience of the law. As has been observed by the High Court[3] it is legitimate to take account of the 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."

[17] The appellant has an unfortunate history of driving offences. In relation to such offending he had previously been dealt with by way of fines, disqualification and suspended sentences of imprisonment. In addition he had served terms of actual imprisonment in relation to other offending. There was no suggestion that he had learned from his experience or that he would not offend in the same way in the future. In the circumstances the learned magistrate was required to impose a sentence which placed

[3] *Veen v The Queen (No2)* (1987/1988) 164 CLR 465 at 477.

significant, indeed paramount, emphasis upon the need for deterrence both personal and general[4].

[18] In my opinion it has not been established that the sentence was manifestly excessive.

[19] The appeal is dismissed.

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[4] *Eldridge v Bates (*1989) 8 MVR 394 at 395 & 396.