Henda v Cahill [2009] NTSC 63

PARTIES:	TOMMY HENDA
	v
	LEIGH CAHILL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 39 of 2009 (20927697)
DELIVERED:	26 November 2009
HEARING DATE:	26 November 2009
JUDGMENT OF:	RILEY J

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellant:	G Lewer
Respondent:	G McMaster

Solicitors:

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

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

Henda v Cahill [2009] NTSC 63
No. JA 39 of 2009 (20927697)

BETWEEN:

TOMMY HENDA
Appellant:

AND:

LEIGH CAHILL
Respondent:

CORAM: RILEY J

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 26 November 2009)

[1] On 14 September 2009 the appellant was convicted in the Court of Summary Jurisdiction of five offences. He was sentenced to an aggregate term of imprisonment of three months for driving a motor vehicle with a blood alcohol content of 0.132% (count 2) and driving whilst disqualified (count 5). He was also subjected to a fine in the sum of $750 and he was disqualified from driving for 12 months with an Alcohol Ignition Lock period of 12 months in relation to offences of resisting police, driving an unregistered vehicle and driving an uninsured vehicle (counts 1, 3 and 4).

[2] The appellant challenges the sentence of imprisonment imposed in relation to counts 2 and 5 on the ground that it was manifestly excessive. In support

of that ground he contends that the learned sentencing Magistrate erred in failing to pay sufficient regard to the principle that imprisonment is an option of last resort and also failed to consider alternatives to a term of imprisonment. There is no challenge to the sentences imposed on counts 1, 3 and 4.

[3] The principles applicable to such an appeal are well known[1]. 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 excessive. It interferes only if it be shown that the sentencing Judge 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 Judge 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.

The circumstances of the offending

[4] The offending occurred on 20 August 2009 when, at about 2:50 am, the appellant was driving in the suburb of Gray. The appellant was required by

[1] *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.

police to undertake a breath test and, whilst in the custody of police, he ran in an attempt to escape. Police gave chase and located him hiding under a nearby vehicle. He initially refused to participate in a breath test and when subsequently tested recorded a reading of 0.132% BAC. It was later discovered that the motor vehicle was unregistered and uninsured and that the appellant did not hold a driver's licence having been disqualified from driving for 12 months from 5 January 2009.

[5] The record of convictions applicable to the appellant was placed before the learned sentencing Magistrate. He had convictions for driving unlicensed in 1999, 2002, March 2004 and February 2009. In addition, he had convictions for driving under the influence of alcohol in 2002, 2004 and February 2009. Whilst he had four convictions for driving unlicensed the offending on this occasion constituted his first conviction for the more serious offence of driving whilst disqualified. He had no prior convictions of any other kind.

[6] In the course of submissions the court was informed that the appellant was aged 30 years and, at the time of the offending, was driving members of his family home from a birthday party. The sentencing magistrate was informed that the appellant was "a full-time carer for his uncle who suffers from Alzheimer's and liver dysfunction". It was also submitted that he had "some job interviews coming up". It was submitted that the matter should be dealt with "by way of either home detention or a suspended sentence for a non-custodial disposition".

[7] His Honour made the following observations prior to imposing the sentences to which I have referred:

> The Supreme Court has said on several occasions that unless there is some mitigating or exceptional reason or emergency reason for driving disqualified, people like you should go straight to jail. It is still a matter of discretion though. People who break and show defiance to court orders not to drive need to be taught a lesson it is said. In your case there is no good reason or mitigating reason why you drove and you drove for the (fourth) time over 0.8. ... And you haven't been able to be deterred from drink-driving again even though you are under a disqualification order from this court. I take into account the matters eloquently put to me by your barrister and all the principles and guidelines of the *Sentencing Act* and I have considered fully whether or not a prison sentence can be or should be suspended. In my view it should not be suspended.

[8] The usual disposition for an offender who drives whilst disqualified is by way of a sentence of imprisonment even for a first offence[2]. Whilst that is the usual sentencing disposition it must be emphasised that the sentencing discretion is not circumscribed and each case must be treated on its merits according to the circumstances of the offender and of the offence[3]. It has been pointed out by this court on other occasions that there is no “hard and fast rule” that a person who is convicted for the first time of driving whilst disqualified must go to prison to serve an actual sentence of imprisonment. Such a penalty has been described as "not an unusual outcome" but it has been emphasised that each case must be considered on its individual merits.[4]

[9] It is plain from the sentencing remarks referred to above that the sentencing magistrate did not regard himself as being bound to impose an actual term of

[2] *Arnold v Trenerry (*1997)118 NTR 1 at 7; *Hales v Garbe* [2000] NTSC 49 at [12].
[3] *Carcuro v Norris* [2007] NTSC 18 at [25] and the authorities therein identified.
[4] *Ross v Toohey* [2006] NTSC 92 at [14] and the authorities therein identified.

imprisonment but, in the circumstances of the particular offender and of the particular offence, his Honour regarded a term of actual imprisonment as the appropriate response. It is apparent from the sentencing remarks that the experienced sentencing Magistrate considered dispositions other than a term of actual imprisonment. His Honour concluded that the sentence should not be suspended.

[10] An appellate court is entitled to assume, when considering ex tempore reasons for sentence delivered by magistrates in busy courts, 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 and that is particularly so where, as here, alternative dispositions have been raised in the course of submissions. 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 did not consider all of the options[5].

[11] In this case the sentencing Magistrate expressly observed that he had considered whether or not the prison sentence should be suspended and concluded that it should not be suspended. In my opinion, the submission that the learned Magistrate erred in failing to give sufficient regard to the principle that imprisonment is an option of last resort and, further, erred in failing to consider alternatives to a term of imprisonment to be served, is not made out.

[5] *Kuiper v Brennan* [2006] NTSC 54 at [33]; *Simon v Garner*[2007] NTSC 33 at [12]

[12] The issue then to be addressed is whether the sentence imposed was manifestly excessive in all the circumstances. The maximum penalty for the offence of driving a motor vehicle with a medium range blood alcohol content in the circumstances of this matter is a fine of 20 penalty units or imprisonment for 12 months[6]. The maximum penalty for the offence of driving whilst disqualified is imprisonment for 12 months[7]. The appellant pleaded guilty to those offences in the circumstances I have described. He came before the court with what is acknowledged to be a poor history for driving matters. In 2002 he was convicted of driving with a blood alcohol reading of 0.138%. In 2004 he was convicted of driving with a blood alcohol content of 0.230%. In February 2009 he was convicted of driving with a blood alcohol content of 0.143%. In 1999, 2002, 2004 and 2009 he was convicted of driving a motor vehicle whilst unlicensed. The offending with which we are now concerned occurred on 20 August 2009, just six months after his most recent conviction for driving unlicensed and with a medium range blood alcohol content. On this occasion his blood alcohol content was a reading of 0.132% and he was driving in defiance of the court order disqualifying him from so doing.

[13] There was no suggestion of any compelling reason for him to drive. There was no medical emergency. There was no exceptional circumstance. It was not suggested that no other person was able to drive or that there was no other alternative transport available. It seems the appellant drove simply as

[6] s 22(1) *Traffic Act*
[7] s 31 *Traffic Act*

a matter of convenience. In so doing he drove with others in the vehicle placing them at risk along with the risk he posed to other road users.

[14] In the circumstances the learned magistrate was required to impose a sentence which placed significant, indeed paramount, emphasis upon the need for deterrence both personal and general[8]. The sentence should, inter alia, endeavour to ensure the maintenance of the integrity and effectiveness of disqualification orders imposed by the courts.

[15] The submissions put in mitigation referred to him being a carer for his uncle who suffers “Alzheimer's and liver dysfunction”. It was not suggested that others could not take on the caring role and it was submitted that the appellant was also looking for employment which suggests some other caring arrangement was available. Contrary to the submission put to the magistrate it could not be said that the appellant had "good prospects of rehabilitation" in light of the offending history.

[16] Whilst the sentence imposed upon the appellant might be described as stern, and whilst I may have imposed a different sentence, it has not been established that the sentence was manifestly excessive. The appeal will be dismissed.

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