Cincaid v Cahill [2009] NTSC 40

PARTIES:	CINCAID, JANINE
	v
	CAHILL, LEIGH
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM A COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA27 of 2009
DELIVERED:	6 August 2009
HEARING DATES:	23 July 2009
JUDGMENT OF:	OLSSON AJ
APPEAL FROM:	COURT OF SUMMARY JURISDICTION AT DARWIN

CATCHWORDS:

Sentence -- Appellant pleaded guilty to offence of, being the holder of a Learner Licence, she drove a vehicle without having another person occupying the front seat of the vehicle who was a licence holder -- Justices imposed nominal fine but disqualified appellant from obtaining a licence for five months -- Appellant had long history of convictions for driving unlicensed and driving unregistered and uninsured vehicles, as well as a prior offence similar to that before the court, albeit that she had had not offended for some three years -- Whether Justices had power to disqualify in the circumstances -- Whether disqualification manifestly excessive -- Whether Justices erred as to weight to be attributed to subjective circumstances of appellant or as to the facts.

REPRESENTATION:

Counsel:

Appellant:	M Byrne
Respondent:	G McMaster

Solicitors:

Appellant:	North 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

Cincaid v Cahill [2009] NTSC 40
No. JA 27 of 2009 (20909566)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against the sentence of the Court of Summary Jurisdiction at Darwin

BETWEEN:

CINCAID, JANINE
Appellant

AND:

CAHILL, LEIGH
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 6 August 2009)

Introduction

[1] This is an appeal against the sentence imposed on the appellant on 27 May 2009 by justices of the peace constituting the Court of Summary Jurisdiction at Darwin.

[2] The appellant had pleaded guilty to a charge that, on 12 March 2009 at Knuckey Lagoon, being the holder of a Learner Licence, drove a motor vehicle, namely a Holden Commodore NT 929-496, on a road, namely

Agostini Road, without having another person occupying the front seat of that motor vehicle who was a licence holder, contrary to Regulation 12 (6) of the Traffic Regulations.

[3] The justices recorded a conviction against the appellant, imposed a fine of $200 plus a $40 victims levy and disqualified the appellant from obtaining a driver's licence for five months pursuant to the provisions of s 98 of the Sentencing Act.

[4] In imposing sentence the justices actually said “Under s 98 we are going to put in a disqualification from driving for 5 months”. I assume that, in so pronouncing, the justices purported to exercise a power perceived to have been vested in them by subparagraph (b) of the section.

[5] I make that assumption by reason of the fact that the phrase “driver's licence” is defined in s 3 of the Sentencing Act as meaning "a licence to drive a motor vehicle granted under the Motor Vehicles Act".

[6] Section 10 of the Motor Vehicles Act confers on the Registrar general power to grant a person "a licence to drive a motor vehicle" of specified classes. At the relevant time the appellant did not possess such a licence. What she did possess was a licence issued pursuant to s 9 of the Motor Vehicles Act.

[7] The last mentioned section empowers the Registrar to grant a "learner licence" which "permits the holder of the licence to learn to drive a vehicle

of a class specified in the licence". Such a licence may only be issued in accordance with certain stipulations set out in the statute.

[8] A question arises as to whether a "learner licence" is intended to constitute a licence to drive a motor vehicle as contemplated by the provisions of the Sentencing Act to which I have referred. If it was so intended then, if s98 applied to the circumstances, the appropriate order that ought to have been made was one cancelling the relevant licence and disqualifying the appellant from obtaining one during a stipulated period. I will return to a consideration of the statutory provisions in due course.

[9] On 9 June 2009 the appellant filed a notice of appeal against the sentence imposed upon her. This was amended on the hearing of the appeal.

[10] As amended, the notice of appeal is limited to a challenge to the propriety of the order of disqualification made by the justices. The specified amended grounds of appeal are expressed as follows:

(1) That the Justices made an error of law and were not empowered to order the disqualification;

(2) That the sentence was manifestly excessive with respect to the order of a disqualification from driving;

(3) The sentence did not take into account the subjective circumstances of the appellant; and

(4) The Justices of the Peace were in error as to facts concerning the offender.

Relevant narrative facts

[11] The prosecutor informed the court that, on Thursday 12 March 2009 at approximately 4:20 p.m., the defendant was observed driving a green Holden Commodore displaying NT registration plates 929-496. She was seen to drive her vehicle out of Knuckey's Lagoon community and turn right onto Lagoon Road. She then proceeded along that road until she turned left on to Agostini Road.

[12] The prosecutor further stated that the appellant's vehicle was apprehended a short time later on Agostini Road for the purpose of a licence and registration check. Police computer checks revealed that she was the holder of a current NT learner licence. It was ascertained that, at the time of the check, the front seat passenger in the vehicle driven by the appellant was not the holder of a current driver's licence, as required by the provisions of Regulation 12 (6) of the Traffic Regulations.

[13] The court was further informed that it was noted that there were also two children as passengers in the rear passenger seat. At the time of the offences Agostini Road was open to and used by the public. The road was sealed and dry and the traffic was light.

[14] Those basic facts were not in dispute. However, counsel for the appellant made the following submissions to the justices after the prosecutor had stated them:

(1) the appellant's offending was not aggravated by any speeding or dangerous or untoward driving, nor was she intoxicated at the time;

(2) she was merely driving to the shops and back;

(3) she needed her licence to continue her then current part-time employment as a casual teachers assistant;

(4) she had a previous substantial work history;

(5) she was a single mother with two children and reliant on both CentreLink payments and income from her casual teaching assistant position which, in aggregate, produced an income of about $680 per fortnight; and

(6) she had taken positive steps towards obtaining a full licence and had "a single prior" for this type of offending.

[15] In response to a question asked by the justices of the appellant the latter conceded that she had been aware of her obligation to only drive whilst in the company of a person possessing a full driver's licence.

[16] When the appellant's antecedent record was tendered by the prosecution the justices challenged the accuracy of what had been said to them concerning the appellant's prior record of offending. In effect they pointed out that the

antecedent record exhibited a long record of numerous offences of driving a motor vehicle while unlicensed.

[17] This in fact extended back to 1989 and included no less than nine prior offences of driving a vehicle whilst unlicensed as well as multiple offences of driving an unregistered or uninsured vehicle. There was also a conviction in 2005 for an offence similar to that now under consideration. A stage had been reached at which, in April 2007, a court had imposed an actual custodial sentence of one month imprisonment for an offence of driving a motor vehicle while unlicensed.

[18] When challenged by the justices as to the accuracy of what had been put to them, counsel for the appellant strove to draw a distinction between a single previous offence of breaching the condition of a learner licence, on the one hand, and driving unlicensed on the other. In essence the justices were unimpressed by that suggested difference and made the point that the various convictions for driving unlicensed demonstrated that the appellant had shown a disregard for the law over a long period.

[19] It is true that the justices suggested that, despite the dearth of relevant convictions over almost the last three years, the appellant may well have been continuing to offend but had not been apprehended. As was properly pointed out to them, there was no evidence that this was correct and that

they ought not to draw such an inference. The transcript suggests to me that they ultimately accepted that proposition.[1]

[20] There is not the slightest doubt that the justices were very concerned at the implications arising from the appellant's long history of driving unlicensed and, in particular, the obvious continuing disregard by the appellant of the law.

[21] In imposing sentence they, *inter alia*, had this to say:

> "What we are trying to do is make sure that whether you've a learner's licence or you're unlicensed that you don't come before court again. We are looking at the fact that you know that you're breaching the law when you do these things. What we want you to do is to take control and not do that. We understand, too, that obviously with the two children and the single mum there are restraints as to how much you can pay back…….
>
> …… We've taken into account your plea of guilty. Find you guilty and we're convicting. We're fining $200 and a levy of $40. But we want to bring home the seriousness of what's been happening in the past and to try and make you think in the future and that you don't reoffend. Under s 98 we're going to put in a disqualification from driving for five months.
>
> Now, what happens is, if you are caught driving you will go to gaol and we are trying to give you this strong message that, you know, we're not -- society is not going to tolerate people driving around unlicensed. And it's wholly to do with your record that you're obviously not learning every time you come to court. So that's why we're putting this in place……."

Issues arising on the appeal

[22] In presenting submissions counsel for the appellant accepted that that it is well settled that the onus was on him to demonstrate either error of law or

[1] Hearing transcript page 8.1.

that the disqualification imposed was clearly and obviously excessive, that the sentencing discretion had improperly been exercised or that there had been some misapprehension of the relevant facts.[2]

[23] It was initially contended in written submissions on behalf of the appellant that the making of the order of disqualification in the circumstances constituted an error of law and that the justices had no power to do what they did.

[24] This contention was based on the proposition that there is no general or specific power to disqualify or cancel a licence consequent upon a conviction for a breach of the Traffic Regulations. It was argued that s 41 of the Traffic Act was limited in its operation to offences against that statute and did not apply to breaches of the regulations under it.

[25] The appellant further submitted that s 98, in terms, was applicable only to situations "Where a person [is] found guilty or convicted of an offence [and] used a motor vehicle when committing it to facilitate the commission of the offence…". It was contended that the events to which the appellant pleaded constituted a regulatory offence under the Traffic Regulations and did not fall within that description.

[26] The riposte of Ms McMaster of counsel for the respondent in her submissions was that the words employed in s 98 fall to be interpreted in

[2] Cransen v The King (1936) 55 CLR 509, R v Morse (1979) 23 SASR 98, Gumurdul v Reinke [2006] NTSC 27.

their normal English sense and clearly embrace the situation now under consideration. This was, she said, a situation in which an offence had been committed and that a motor vehicle had been used to commit it. The fact that it was a regulatory offence in no sense detracted from that situation.

[27] Moreover, she submitted that particularly when Regulation 94 of the Traffic Regulations was born in mind, s 41 of the Traffic Act could also be called in aid as conferring power to make an order of disqualification notwithstanding that the justices specifically referred to s 98 of the Sentencing Act. I took her to base that contention on the provisions of s 21 of the Interpretation Act.

[28] In my opinion both of those contentions are plainly correct having regard to the ordinary rules of statutory interpretation. There is no substance in the first ground of appeal.

[29] For the sake of completeness, I also consider that the power of disqualification does extend to a learner licence. Whilst I accept that the topic of learner licences is dealt with in the Motor Vehicle Act separately from general licences to drive, this type of licence is no less a licence to drive a motor vehicle than a general driver's licence issued under s 10 of the statute.

[30] The next point advanced by the appellant was that, absent any aggravating circumstances related to speeding, intoxication, dangerous or untoward driving, the order of disqualification was manifestly excessive in the

circumstances. Mr Byrne, of counsel for the appellant, sought to argue that the justices had, in effect, impermissibly sought to punish her again for her past offences.

[31] The short answer to that suggestion is that, quite apart from the fact that the impugned order was part of an overall sentencing package that involved the imposition of a quite nominal fine having regard to such circumstances of mitigation as were identified, the justices were entitled to form the view that the time had arrived at which considerations of both general and personal deterrence demanded the imposition of a penalty recognising the undeniable fact that the offence under consideration was yet another example of a continuing and appalling disregard for the law, even given that there had been some modest period in respect of which the appellant had not relevantly offended and that the appellant had been attempting to obtain a full licence.

[32] Of course, the appellant was not to be further penalised in respect of past offences for which she had already been punished. However, their significance was that their very existence demonstrated the long-standing attitude of the appellant toward offending of this generic type (despite the gap of three years earlier referred to) and the obvious need to impress upon her that her cavalier attitude could not be tolerated.

[33] It is to be remembered that the appellant had singularly failed to demonstrate before the justices any situation of urgency or emergency that

might have mitigated her conduct and that she readily conceded that she full well appreciated that she had not been entitled to drive without a licensed driver accompanying her.

[34] This ground of appeal has not been made good.

[35] The appellant next complained that the justices had not taken into account what were described as her subjective circumstances. These were identified as under:

(1) the appellant had gone to the time and effort to obtain a learner's licence since her last driving offence;

(2) she had a real requirement to have a licence to enable her to continue working as a casual teachers assistant;

(3) she had a good work history; and

(4) there had been a period of almost three years of what was described as nil offending.

[36] Particular emphasis was sought to be placed on the period of nil offending referred to. As I construe the relevant antecedent record, the appellant came before the court in April 2007 in respect of a series of offences said to have been committed in early 2006. There is no explanation concerning the very considerable time lapse between the offence and hearing dates respectively.

[37] Attention was drawn to what was said by members of this court in cases such as *Munungurr v R*[3] and *Kurawul v Hales*.[4] The point was there made that, where there has been a significant period free from conviction, this will normally justify substantial mitigation of a sentence to be imposed.

[38] It was asserted that the justices had simply not recognized and given due weight to that principle.

[39] The transcript of proceedings indicates to me that the justices were well aware of the situation identified by the appellant, but were concerned at what appeared to be a relapse to what had been old persistent habits.

[40] It could not be ignored that the appellant had a very long and unhappy history of generically like offending and the complete absence of mitigatory circumstances surrounding the commission of the further offence did not breed any degree of confidence that she had learnt appropriately from her past court experiences. This was a deliberate and blatant disregard for the law that suggested a reversion to prior habits.

[41] I remain unconvinced that the situation confronting the justices was such as to demand the degree of leniency suggested by counsel for the appellant. A period of disqualification was clearly within a permissible sentencing strategy.

[3] (1994) 4 NTLR 63 at 74-75.
[4] [2003] NTSC 95.

[42] Finally, complaint was made that the justices were in error as to certain facts concerning the appellant. Considerable stress was placed on the interchanges that took place concerning the prior offending history of the appellant. It was asserted that the justices had confused the offence of driving unlicensed and driving on a learner's licence without a licensed passenger.

[43] Attention was drawn to the fact that the justices had commented that there was no difference in driving without a licence regardless of whether you have got a learner's permit or a licence. There was also reference to the fact that, whereas the court had been told that the appellant had not previously held a licence, she had nevertheless previously been convicted of driving a motor vehicle unlicensed.

[44] It must be conceded that the transcript appears to record some rather confused discussion between counsel for the appellant and the justices. Nevertheless, at the end of the day, the point that the justices were endeavouring to emphasise is quite clear. They were seeking to stress the significance of the appellant's long history of flagrantly disregarding the licence requirements of the legislation and repeatedly driving vehicles in circumstances in which it was unlawful for her to do so, as she obviously well appreciated at the times in question.

[45] With all due respect, this ground of appeal is nothing short of grasping at straws. It has no substance.

Conclusion

[46] None of the grounds of appeal have been made good save that it seems to me that, under both s 98 of the Sentencing Act or s 41 of the Traffic Act, the justices ought to have proceeded to first cancel the appellant's learner licence and then disqualify her from obtaining one for five months. Accordingly, the appeal should be allowed for the purpose of correcting the form of the impugned order, but otherwise be dismissed.

[47] If it be considered that I am incorrect in my assessments that the justices did not impermissibly draw an inference as to possible conduct of the appellant in the three years preceding the offence now under consideration and did not, in effect, punish the appellant again for prior offences, then on any view, this is a situation that patently falls within s 177(2)(f) of the Justices Act. On the facts placed before the justices, the impugned disqualification was amply justified.

[48] The formal order of the court will therefore be:

(1) Appeal allowed for the purpose of setting aside the order of disqualification made by the justices and substituting for it orders to the following effect --

> "Order that the learner licence issued to the appellant be cancelled and that the appellant be disqualified from obtaining one for a period of five months".

(2) Appeal otherwise dismissed and sentence confirmed.

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