Salzgeber v Balchin [2010] NTSC 05

PARTIES:	SALZGEBER, William
	v
	BALCHIN, Vivien Lynette
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 40 of 2009 (20913636)
DELIVERED:	Wednesday 10 February 2010
HEARING DATES:	1 December 2009 and 3 February 2010
JUDGMENT OF:	MARTIN (BR) CJ
APPEAL FROM:	Mr V Luppino SM

CATCHWORDS:

APPEAL – APPEAL AGAINST SENTENCE
Whether disqualification periods were manifestly excessive – applicability of alcohol ignition lock scheme to learner drivers – no error by Magistrate except in relation to the minimum applicable disqualification period – appeal allowed for limited purpose of substituting alcohol ignition period.

Traffic Act 1987 (NT), Div 2 Pt V; *Traffic Legislation (Alcohol Ignition Locks) Amendment Act 2008* (NT); *Motor Vehicles Act 1949* (NT).

REPRESENTATION:

Counsel:

Appellant:	M Byrne
Respondent:	A Holland

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

Salzgeber v Balchin [2010] NTSC 5
No. JA 40 of 2009 (20913636)

BETWEEN:

WILLIAM SALZGEBER
Appellant

AND:

VIVIEN LYNETTE BALCHIN
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 10 February 2010)

Introduction

[1] This is an appeal against a sentence imposed following pleas of guilty to driving with a medium range blood alcohol content, namely, 0.144 percent and driving while disqualified from holding a driver's licence. The learned stipendiary Magistrate, Mr Luppino, imposed an aggregate sentence of four months imprisonment which was suspended immediately. In addition, for the first offence his Honour imposed a licence disqualification of two years to be followed by an alcohol ignition lock for a period of 18 months. On count 2, a licence disqualification of three years was imposed.

[2] The appeal against the suspended sentence was abandoned, as was an application to call fresh evidence. In substance the appellant complains that the disqualification periods were manifestly excessive and that the alcohol ignition lock scheme was inapplicable. For the reasons that follow, the appeal is allowed for the limited purpose of reducing the ignition lock period to 12 months.

Facts

[3] At about 10.30pm on Friday 17 April 2009 the appellant was driving a sedan south on the Stuart Highway at Batchelor. He was stopped for the purpose of a random breath test and returned a reading of 0.144 percent. Traffic conditions at the time were light and there were four other persons in the vehicle.

[4] As to his reason for driving after he had been drinking alcohol, the appellant said, “I just felt like driving”. The appellant informed police he did not have a current driver’s licence. He had been disqualified on 26 February 2009.

[5] The appellant is 20 years of age. He was educated to year 10 level at school in Darwin and has worked in the building industry. At the time of the offending the appellant was employed full time in the CDEP program at Adelaide River and was the Captain of the Daly River Volunteer Fire Service where he had been a volunteer for 12 months. Counsel informed the Magistrate that the CDEP program had enabled the appellant to undertake

significant training and learning skills. He has obtained a Certificate II in land management.

[6] As to the offending, counsel explained that the appellant had been in Palmerston for a few days visiting family and his cousin had come from Adelaide River to give him a lift back to Adelaide River. Unfortunately, the appellant's cousin consumed alcohol and became intoxicated. When it was time to head home, the appellant offered to drive. It was put that the appellant did not realise he was committing such a serious offence and he thought that by driving unlicensed he would be fined.

[7] The problem facing the appellant and the Magistrate was the appellant's poor driving record. On 14 and 15 February 2008 he drove while unlicensed on two occasions for which he was dealt with on 24 April 2008 by way of a fine of $600.

[8] An offence of particular significance was committed on 16 January 2009. The appellant held a learners permit and drove with a medium range blood alcohol content of 0.107 percent. On 26 February 2009 the appellant was fined a total of $320 and, for the offence of driving with a blood alcohol content, he was disqualified from holding a driver's licence for a period of six months.

[9] The offences under consideration were committed only seven weeks after the appellant had been disqualified. Counsel accepted that the appellant

would have been warned not to drive when disqualified on 26 February 2009, but suggested the warning had not sunk in.

Contentions

[10] Emphasising the appellant's youth, good work record and acceptance of responsibility, counsel for the appellant submitted that the disqualification periods were manifestly excessive. On count 1, the two year disqualification was double the minimum period of 12 months. No minimum applied with respect to count 2 but, given that the appellant is now the subject of a suspended sentence of four months with an 18 month operational period, the requirements of punishment and personal deterrence have been met and the three year period is manifestly excessive for such a young offender.

[11] In respect of the period of disqualification on count 1, counsel endeavoured to extract from an exchange during submissions an error on the part of the Magistrate in referring to the blood alcohol reading as a "high enough reading". In addition, during his sentencing remarks the Magistrate referred to a "high reading" being involved.

[12] In my view, these remarks do not suggest error on the part of the Magistrate. In the exchange with counsel, his Honour specifically spoke of the reading as "mid-range". The full context of his Honour's remarks were as follows:

> "I would be happy to consider suspended sentence if it was just to the drive disqualified on its own, but when you look at that with what

> I call, consider a high enough reading. I know it is still considered mid-range, but it is .144."

[13] The Magistrate was well aware that the reading of 0.144 percent was a mid-range level for the purposes of the *Traffic Act*. In speaking of that level of blood alcohol as involving a "high reading", his Honour was speaking generally of a young person driving. Speaking generally, in my view it is correct to say that a reading of 0.144 percent is a high reading.

[14] I am unable to discern any error in the approach of the Magistrate. Given the brevity of the reasons, it is not to be expected that this Honour would refer to all the matters personal to the appellant and it was not an error of principle to fail to identify an allowance for the pleas of guilty. In the absence of any basis to imply the contrary conclusion, this Court is entitled to assume that his Honour considered all relevant matters.

[15] The periods of disqualification have caused me concern. The appellant is a young person with a good work record who has also demonstrated commendable community spirit with his work in the Daly River Volunteer Fire Service. He possesses skills and the potential to develop into a respected and worthwhile member of the community. However, he committed the current offences only seven weeks after being disqualified and he did so for no sensible reason. In addition, the appellant drove after consuming a significant quantity of alcohol and 0.144 percent is at the top end of the mid-range level for the purposes of the *Traffic Act*.

[16] It must be remembered that the fixing of a disqualification period involves the exercise of a sentencing discretion and there was a proper range of periods available to the Magistrate. It is not for this Court to interfere if the periods fixed, although longer than this Court might have imposed, are within the proper range of the discretion.

[17] Not without hesitation I have reached the view that the periods of disqualification were not manifestly excessive.

[18] As to the period for the operation of the ignition lock, it appears from the brief sentencing remarks that his Honour erroneously thought that 18 months was the minimum period. The minimum was 12 months. In these circumstances, this part of the sentencing discretion has been affected by error.

[19] In addition to the question of error by the Magistrate, the appellant challenged the application of the alcohol ignition lock provisions. This scheme involves an interaction between the *Traffic Act* and the *Motor Vehicles Act* and the applicant submitted that it does not apply to the appellant who has not previously held a full licence.

[20] Division 2 of Pt V of the *Traffic Act* is concerned with penalties for the offence of driving with an excess amount of alcohol in the blood. A "high range blood alcohol content" means a blood alcohol content of 0.15 percent or greater and a "medium range blood alcohol content" means a blood alcohol content of 0.08 percent or greater, but less than 0.15 percent. A

"low range blood alcohol content" means a blood alcohol content of 0.05 percent or greater, but less than 0.08 percent.

[21] The alcohol ignition lock scheme applies to an offence of driving a motor vehicle with a high or medium range blood alcohol content if the offence is a second or subsequent offence in the sense that the offender has previously been found guilty of driving with a high or medium range blood alcohol content, or other specified offences such as driving under the influence of alcohol or a drug or failing to provide a sufficient sample of breath for breath analysis and failing to give a sample of blood for analysis. In the event that the offence is a second or subsequent offence, ss 21 and 22 provide for automatic cancellation of the offender's licence and disqualification from obtaining a licence for periods of not less than 18 months (high range offence) or 12 months (medium range offence). In addition, if the period of disqualification imposed is less than five years, the legislation requires the imposition of a further period of disqualification from obtaining a licence other than an alcohol ignition licence ("the additional period"). The additional period must be at least 12 months and not more than three years. During the additional period the offender may obtain an "AIL licence" which enables the offender to drive a motor vehicle but only if the vehicle is fitted with an alcohol ignition lock.

[22] In the case of the appellant, the relevant provision is s 22(3)(b)(ii). Section 22(3) is as follows:

"(3) If a court finds a person guilty of a relevant offence, [a second or subsequent offence] the person's licence to drive is automatically cancelled and the person is disqualified from:

(a) for a first offence – obtaining a licence for a period that is at least 6 months; and

(b) for a second or subsequent offence:

(i) obtaining a licence for a period (***mandatory period***) that is at least 12 months; and

(ii) if the mandatory period is less than 5 years – obtaining a licence other than an AIL licence for an additional period (***AIL period***) immediately after the mandatory period that is at least 12 months and not more than 3 years.

Notes

1 This means the person may be able to drive a motor vehicle fitted with an alcohol ignition lock during the AIL period after being disqualified for the mandatory period (see sections 29AAYB and 29AAYC).

2 If the mandatory period is 5 years or more, no AIL period applies to the person and the person cannot obtain an AIL licence."

[23] The scheme is obvious. If a person commits a relevant second or subsequent offence, not only will the person be subjected to a period of total disqualification, but an additional period of disqualification must be imposed during which additional period the only licence that can be obtained is an AIL licence.

[24] The difficulty for the appellant is that he is not eligible to apply for an AIL licence. Section 10(4)(B) of the *Motor Vehicles Act* provides that the

Registrar of Motor Vehicles may grant an AIL licence, but only if, within five years immediately before the application, the applicant held a licence to drive a motor vehicle that was not a learner licence or its equivalent in another jurisdiction. The only licence the appellant had previously held was a learner licence and, therefore, the Registrar was not empowered to grant the appellant an AIL licence.

[25] The appellant submitted that the legislature cannot have intended that s 22(3)(b)(ii) apply to a person in the position of the appellant because the operation of the section would be unfair. While the appellant would suffer a full disqualification for the additional period because he could not obtain such an AIL licence, an eligible person has the option of obtaining an AIL licence during that additional period and is, therefore, treated more leniently.

[26] The first difficulty facing the appellant's contention is the plain wording of the relevant provisions. Both the *Traffic Act* and the *Motor Vehicles Act* were amended by the *Transport Legislation (Alcohol Ignition Locks) Amendment Act 2008* which introduced the AIL licence scheme and the relevant provisions were meant to complement each other. There is no ambiguity and the effect about which the appellant complains cannot have escaped the attention of the legislature.

[27] Secondly, the explanatory statement accompanying the Amendment Bill and the Second Reading Speech make it plain that the exclusion of previously

unlicensed drivers from the scheme was not an oversight. In her Second Reading Speech, the Minister for Infrastructure and Transport said:

> "An AIL will not be available for people who have been unlicensed for five years or more, whether they have been disqualified, have not held a licence or their licence has lapsed and not been renewed, or a combination of factors, including licence suspension for any reason. The reasoning is that these people would have to re-commence the licensing system as an entry level driver by applying for a learner's licence and progress through the various licensing stages."

[28] To the extent that an offender who has held a relevant licence within the previous five years is given the option of obtaining an AIL licence during the additional period, but a person who has not held a relevant licence within the previous five years is deprived of that option, the person who has previously held the licence is placed in a better position. Such a person has the option to serve a lesser period of full disqualification. However, the legislature has made a deliberate decision to deprive the person who has not previously held the relevant licence of that option and to require that person to start again by applying for a learner's licence.

[29] For these reasons, in my opinion s 22(3)(b)(ii) applies and the Magistrate was required to fix an additional period of between 12 months and three years. As I have said, it appears that his Honour erroneously thought that the minimum period was 18 months and in these circumstances it is appropriate to set aside that part of the order and to impose the minimum period of 12 months.

[30] The appeal is allowed for the limited purpose of setting aside the alcohol ignition period of 18 months and substituting a period of 12 months.
