*Long v Westphal* [2010] NTSC 55

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| PARTIES: | LONG, Lucy |
| | v |
| | WESTPHAL, Lindsay |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 9 of 2010 (21000538) |
| DELIVERED: | 10 August 2010 |
| HEARING DATES: | 10 August 2010 |
| JUDGMENT OF: | MARTIN (BR) CJ |
| APPEAL FROM: | Mr Neill SM |

**CATCHWORDS:**

CRIMINAL LAW – SENTENCING – ROAD TRAFFIC OFFENCES – DRIVING WHILE UNLICENSED – PROVIDING FALSE PARTICULARS

Appeal against severity of sentence – whether Magistrate erred in failing to consider appellant's financial circumstances in setting fine – disqualification order outside standard range – sentence manifestly excessive – appeal allowed – sentence set aside.

*Sentencing Act* 1995 (NT) s 17(1) and (2)

*Daniels v* R (2007) 20 NTLR 147; *R v Rahme* (1989) 43 A Crim R 81, followed.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | M O'Reilly |
| Respondent: | M McColm |

*Solicitors:*

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| Appellant: | Central Australian Aboriginal Legal Aid Service Inc |
| Respondent: | Office of the Director of Public Prosecutions |

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| Judgment category classification: | B |
| Judgment ID Number: | Mar1017 |
| Number of pages: | 8 |

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Long v Westphal* [2010] NTSC 55
No. JA 9 of 2010 (21000538)

BETWEEN:

**LUCY LONG**
Appellant

AND:

**LINDSAY WESTPHAL**
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered *ex tempore* 10 August 2010)

**Introduction**

[1] This is an appeal against sentences imposed for driving while unlicensed and providing false particulars to police. For the offence of driving while unlicensed the appellant was fined $300 and disqualified from holding or obtaining a license for a period of 12 months. A fine of $300 was imposed for giving false information to police. In essence the appellant contends that the total fine of $600 and the disqualification were manifestly excessive.

[2] For the reasons that follow the appeal is allowed.

**Facts**

[3] The appellant is aged 22 married with one child. She lives in a town camp at Tennant Creek. Having only attended primary school the appellant is not literate and at the time of sentencing was unemployed and about to face a term of imprisonment.

[4] The offences occurred on 4 January 2010. This was not the first occasion on which the appellant had committed offences against the road traffic laws. Of particular significance in her record of offending were four prior offences of driving while unlicensed committed in January and October 2006, August 2007, and January 2009. On each occasion fines were imposed, but no order was made for licence disqualification.

[5] On the occasion in 2007 when the appellant drove while unlicensed she also drove with a blood alcohol reading of 0.129 percent. On 29 December 2008 for the blood alcohol offence the appellant was disqualified for 12 months commencing 21 August 2007. The disqualification period having ended in August 2008, the appellant did not renew her licence and committed the fourth offence of driving while unlicensed on 27 January 2009. Twelve months later she committed the offence under consideration.

[6] The circumstances in which the appellant came to drive on 4 January 2010 are common to many offences of this type. The appellant was at a hotel in Tennant Creek with other family members who were drinking. She was not drinking and the family put pressure on her to convey people home. While

she was driving for this purpose, police stopped the vehicle as it had a broken rear tail light. There was nothing untoward in the driving of the appellant. Once stopped, the appellant was asked to produce her driver's licence and immediately made admissions that she did not possess a licence. When asked her name, she gave a false name because she was scared of getting into trouble.

**Fines**

[7] Section 17 of the *Sentencing Act* provides that where a court determines that a fine is an appropriate penalty, the court shall have regard to the financial circumstances of the offender and I will set out the relevant part of s 17:

> **17 Exercise of power to fine**
>
> (1) Where a court decides to fine an offender, it shall, in determining the amount of the fine, take into account, as far as practicable:
>
> (a) the financial circumstances of the offender; and
>
> (b) the nature of the burden that its payment will impose on the offender.

[8] Although a court is not prevented from fining an offender by reason of lack of information as to the financial circumstances of the offender and the burden that payment of a fine will impose on the offender,[1] nevertheless it was well settled that, where possible, the court should obtain information about the financial circumstances of an offender before imposing a fine.

[1] Section 17(2).

Behind this statutory requirement is a recognition of the principle that fines imposed upon impecunious offenders run the risk of amounting to an unduly harsh penalty and, in some situations, might amount to a de facto term of imprisonment if imprisonment is a consequence of a failure to pay. Commonly, the impecuniosity of an offender will lead to a lower fine than would otherwise be appropriate.

[9] The relevant principles and a number of authorities are discussed in *R v Rahme*.[2] In particular, Finlay J, with whose judgment Studdert J agreed, noted that the fundamental principle applies notwithstanding that failure to pay might not result in imprisonment:[3]

> "It is trite to say that a court generally should not impose a fine which the offender does not have the means to pay, even though these days failure to pay a fine does not lead to imprisonment but to a civil execution for its non-payment."

[10] At the time of sentencing the learned magistrate, Mr Neill SM, restored the balance of a previous suspended sentence, which meant that the appellant was about to be in custody for approximately one month and three weeks. Counsel informed the Magistrate that the appellant was willing to pay a fine upon release, but no information was given to his Honour as to the appellant's capacity to pay a fine other than advice that the appellant received $190 per fortnight in Centrelink benefits. His Honour was also informed that the appellant was unemployed and married with one child.

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[2] (1989) 43 A Crim R 81.
[3] At 86.

The appellant lived in a town camp, she is illiterate and notwithstanding that she is hoping to obtain employment at a child care centre because a number of family members work at the centre, at the time of sentencing her prospects of obtaining significant employment were very poor.

[11] In addition the appellant's record of offending discloses that on 3 February 2009 an aggregate fine of $2,000 was imposed, but was imposed for various offences together with a victim's levy of $240.

[12] No information was given to the Magistrate or to this Court as to whether appellant had managed to pay that large amount, but it is reasonable to assume that the appellant at the time of sentencing and today has no savings and very little prospect of paying a significant fine.

[13] In all the circumstances, bearing in mind the relevant principles, and the policy underlying the *Sentencing Act*, in my opinion the Magistrate erred in imposing a total fine of $600 which the appellant had no prospects of paying. In these circumstances the fine was manifestly excessive and the individual fines of $300 are set aside. In substitution I impose an aggregate fine of $300.

**Licence Disqualification**

[14] As to the question of license disqualification, in support of the contention that the disqualification of 12 months was manifestly excessive, counsel for the appellant provided a schedule of penalties for driving unlicensed imposed in the Court of Summary Jurisdiction between 19 January and

28 July 2010. It was not suggested that the schedule contains all sentences imposed for this offence during that period, rather, counsel has endeavoured to produce a useful representative sample in an effort to demonstrate the current range for offences of this type.

[15] Notwithstanding that many of the offenders had prior convictions for driving without a licence or driving while disqualified, none of the offences of driving while unlicensed contained in the schedule resulted in periods of disqualification. Fines ranged from $80 to $500. Higher fines were imposed by way of aggregate fines for driving without a licence coupled with other road traffic offences.

[16] The appellant has demonstrated that a disqualification for 12 months for an offence of driving without a licence is outside the range of penalties commonly imposed for this offence. However, the mere fact that it is outside the standard range does not necessarily establish that the sentence is manifestly excessive. The proper role of sentencing standards was explained by the Court of Criminal Appeal in the following passage from the joint judgment of Martin (BR) CJ and Riley J in *Daniels v R*:[4]

> "The role of sentencing standards must be properly understood. They do not amount to a fixed tariff, departure from which will inevitably found a good ground of appeal. We respectfully agree with the observations of Cox J in *R v King* (1988) 48 SASR 555 as to the proper role of sentencing standards (at 557):

[4] (2007) 20 NTLR 147.

> … In a word, this case is about sentencing standards, but is it important, I think, to bear in mind that when a standard is created, either by the cumulative force of individual sentences or by a deliberate act of policy on the part of the Full Court, there is nothing rigid about it. Such standards are general guides to those who have to sentence in the future, with certain tolerances built into or implied by the range to cater for particular cases. The terms of approximation in which such standards are usually expressed – 'about' and 'of the order of' and 'suggest' and so on – are not merely conventional. … It follows that a particular sentence will not necessarily represent a departure from the standard because it is outside the usual or nominal range; before one could make that judgment it would be necessary to look at all of the circumstances of the case. Those circumstances will include, but of course not be confined to, the questions whether or not the offences charged are multiple or single and whether the defendant is a first offender with respect to the particular crime charged. That is not to undermine the established standard but simply to acknowledge that no two cases, not even two 'standard' cases, are the same. …"

[17] The circumstances of the appellant's offending in driving without a licence were typical of the numerous cases that come before the Court of Summary Jurisdiction. There was nothing in the circumstances of the appellant's offending to remove it from the 'ordinary' or 'run of the mill' offending of this type.

[18] As I have said there was nothing in the appellant's manner of driving which drew the attention of the police to her vehicle. There was no bad driving, and there was no involvement of alcohol.

[19] Bearing in mind that the current standard or range of penalties for offences of driving while unlicensed does not include the period of licence disqualification even in cases where the offender has previously committed

numerous offences of driving while unlicensed. The appellant has succeeded in establishing that the licence disqualification of 12 months was a manifestly excessive penalty and demonstrative of error by the Magistrate.

[20] For these reasons, the appeal is allowed and the licence disqualification is set aside. The formal orders of the court are appeal allowed, fines of $300 on each count and the licence disqualification are set aside and substitution of an aggregate fine of $300 is imposed. A victim's levy of $40 on each count is fixed.

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