CITATION:	*McPherson v Ball [2008] NTMC 069*
PARTIES:	CRAIG JOHN MCPHERSON v HAROLD ERIC BALL
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Justices Act
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JUDGMENT OF:	Jenny Blokland CM

CATCHWORDS:

REPRESENTATION:

Counsel:

Complainant:	Ms Brown
Defendant:	Mr Wheelan

Solicitors:

Complainant:	ODPP (Summary Prosecutions)
Defendant:	Mr Wheelan

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IN THE COURT OF SUMMARY JURISDICTION
AT KATHERINE IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20803934

[2008] NTMC 069

BETWEEN:

CRAIG JOHN MCPHERSON
Complainant

AND:

HAROLD ERIC BALL
Defendant

JUDGEMENT

(Delivered 1 December 2008)

JENNY BLOKLAND CM:

Introduction

1. This hearing raises an unusual issue in the context of a charge of drive while disqualified, namely, the question of whether in the Northern Territory it is necessary for the prosecution to prove knowledge of the order of disqualification or other mental element for the charge to stand. The defendant, Mr Harold Ball (D.O.B. 3 May 1935) pleaded not guilty to one count of drive while disqualified contrary to s 31 *Traffic Act* (NT). He is also charged with drive unregistered and uninsured – these are not the subject of contested hearing. The offence was alleged to have occurred on 6 February 2008.

2. Most facts are not in dispute. It is common ground the defendant was convicted of driving while over the prescribed alcohol limit on 1 November 2007 before the Katherine Court of Summary Jurisdiction and, (as well as other penalties), was disqualified from driving for a period of twelve

months. On 6 February 2008, police officers apprehended the defendant during the course of operating a breath testing station. The defendant returned a negative result, but various checks revealed he had been disqualified from holding or obtaining a driver's license on 1 November 2007. The defendant was asked by police whether he had a license and he replied "no". He was asked his reason for driving without a license and he replied "because I had come to town to do this shopping". When asked where he was travelling to he replied "out to Tindal Downs". The defendant was arrested for the offence of drive disqualified. (Statement of police officer Ian Wilton, Exhibit P1).

3. The defendant has contested the charge of drive while disqualified on the basis that he did not know he was disqualified, notwithstanding that it is agreed the Court disqualified him from driving on 1 November 2007. Before me by consent is the recording of the proceedings of November 2007 that clearly records the Magistrate announced an order disqualifying him (Exhibit P6). What complicates the facts is Mr Ball has a hearing problem. He gave brief evidence about this. Before the Court also is a report from NT Hearing Services Audiometric Report (Exhibit P7). Mr Ball's evidence in this hearing was that he was aware he was *unlicensed*, but unaware that he was "*disqualified*". As a matter of criminal responsibility, there are fundamental differences between the two offences. The offence of *drive while disqualified* is one of the few offences under the *Traffic Act* (NT) that is not a *regulatory offence*: s 51 *Traffic Act* (NT). Drive while disqualified is *a simple offence* and is not a schedule 1 or "declared offence" under Part II AA *Criminal Code Amendment (Criminal Responsibility Reform Act).* Drive while disqualified attracts the full principles of criminal responsibility under Part II of the *Criminal Code* (NT)). On the other hand, drive without a license, (where there has not been an order of disqualification) is a regulatory offence and is excluded from the full principles of criminal responsibility by virtue of s 22 *Criminal Code* (NT).

The Defendant's Mental State

4. As will be discussed below, in my view the prosecution must prove beyond reasonable doubt the defendant's knowledge of the disqualification. If that is not correct, the prosecution need to negative the excuse of honest and reasonable mistake of fact. One component of the assessment of the defendant's mental state at the time of the commission of the offence, although not the sole component is whether the defendant heard the order of disqualification. Even if he did not hear the order, the offence may still be proved if he was otherwise aware of the order that he was disqualified from driving.

5. The recording of the proceedings at the Katherine Court of Summary Jurisdiction on 1 November 2007 establishes the defendant was present in Court and legally represented when the disqualification was imposed by the Magistrate. The defendant gave evidence in these proceedings that he has experienced hearing difficulties since the age of 20 and has recently acquired hearing aides. He wore those hearing aides in the proceedings before me. He gave evidence that he found it hard to hear what was said when he was in Court on 1 November 2007; that he was lip reading and he pleaded guilty because "I done it". Curiously, he gave evidence that he does not drink. Also before me is the copy of the order suspending the sentence. It was submitted that the suspended sentence supports the defendant's asserted lack of knowledge as there is has no record of the disqualification. I fail to see why the order suspending the sentence of imprisonment that does not include an order disqualifying the defendant from driving is of any great significance. The defendant's evidence is scant on whether this really meant he was unaware of any other order.

6. It is accepted the prosecution must negative any relevant excuse sourced in s 31 or 32 of the *Criminal Code* (NT). In my view the prosecution have successfully negatived a excuse based on lack of awareness or knowledge. I did not find the defendant credible. Although his evidence was that he

couldn't hear anything in the proceedings of 1 November 2007, he entered spontaneous guilty pleas to each of four charges. He says he was lip reading, but there is no detail provided in his evidence about how this was achieved beyond the mere assertion that he was lip reading. Although not fully determinative of the issue, he was represented by counsel and nothing was said to the Court in relation to any hearing difficulties. As mentioned above, he also gave evidence that he doesn't drink, although clearly he accepts he pleaded guilty to a drink driving offence on 1 November 2007, when the reading was .144 mgs alcohol per 100 millilitres of blood. I just do not find him credible. The Community Health Audiometric Report (Exhibit P7) recommends the defendant for referral for a hearing aide and although he has obvious hearing difficulties, it does not raise a doubt in my mind that he did not hear or was not aware of what was said in Court about disqualification.

7. I do not think I should ignore general awareness in the community that disqualification from driving follows a conviction for what is colloquially known as "drink driving". I accept that not everybody is aware of this, but in this instance the recorded proceedings before me indicates that there is likely to be some awareness on the part of this defendant, at least in keeping with the general community's awareness, as the Magistrate when sentencing, noted it was his fourth drink driving offence. The defendant also agreed he knew he was not the holder of a driver's license at the time of this offence.

8. Given the defendant's participation in the Court process on 1 November 2007, I am satisfied beyond reasonable doubt that he was aware of the disqualification order following the conviction for drink driving. There are too many contrary indicators around his assertion that he did not hear the disqualification order to find his version credible. In my view, even if he did not specifically hear the disqualification order, he was aware that following the proceedings for the drink driving charge, he was disqualified from driving. There is no reason to think that this defendant's knowledge of

disqualification is any less than anybody else in the community and indeed he may possess a better level of awareness.

Relevant Principles

9. Although it may not be necessary to decide, I appreciated counsels' efforts in grappling with the relevant principles. As mentioned, I have proceeded on the basis that if a person was unaware of the disqualification order, they could not be found guilty of this offence. The prosecution's argument was that by virtue of s 31 of the *Criminal Code* (NT), *"the act or omission or event"* is the act of *driving*, hence it is simply the driving that must be intended. In my view, this is inconsistent with the way s 31 has traditionally been applied. The relevant jurisprudence is the line of authority from *Pregeljv Manison* (1987) 88 FLR 346 through to cases such as *McMaster* (1994) 4 NTLR 92 and culminating in *Director of Public Prosecutions v WJI* [2003] 219 CLR 43. Recently His Honour Justice Mildren considered s 31 *Criminal Code* in the context of the offence of intimidation of witnesses contrary to s 103A of the *Criminal Code: Barnes v Westphal* [2008] NTSC 41. Following these authorities, albeit in entirely different subject matter, the impugned *act, omission or event* is not driving but is driving in the knowledge of the disqualification. The fact that the charge of drive while disqualified is specifically an offence that attracts full criminal responsibility in the Northern Territory by virtue of s 51 of the *Traffic Act* underlines this conclusion.

10. I appreciate the research undertaken by counsel for the prosecution on this matter, in particular drawing my attention to the fact that in New South Wales in *R v Vlahos* [1975] 2 NSWLR 580 and in South Australia in *Khammash v Rowbottom* 51 SASR 172 and *Police v Pace* [2008] SASC 182, the Courts have determined that it is not necessary to prove full *mens rea* to find the offence proven. In those jurisdictions, the legal architecture founding criminal responsibility is completely different to the Northern

Territory. In other jurisdictions, generally speaking, if *mens rea* is not defined within the statute creating the offence, it is most likely the mental element will be defined after determining the category of the offence as set out in *He Kaw Teh v The Queen* (1985) 157 CLR 523. Therefore, it is totally understandable that other jurisdictions resolve this problem within that context.

11. If I have been wrong in defining the elements of drive disqualified by reference to *knowledge* in the context of proving intention or foresight via s 31 *Criminal Code*, then the matter may well be resolved by reference to s 32, *honest and reasonable mistake*. In my view, even if the defendant were to be believed, the mistake he has adverted to is a mistake as to his legal status with respect to driving (he thought he was unlicensed rather than disqualified). First, there is little that would support the reasonableness of his belief and the prosecution could readily negate that excuse beyond reasonable doubt. Secondly, it may in any event be a mistake of law that he is mistaken about the degree of the prohibition on driving. Mistake of law in this respect is no defence: *Ostrowski v Palmer* (2004) 218 CLR 493.

12. I will attempt to forward this decision to the parties today and indicate that I will formally find the offence proved on 1 December 2008 when the matter is next listed.

Dated this 28th day of November 2008.

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Jenny Blokland
CHIEF MAGISTRATE