

CITATION: Police V Tudor Edward Russell [2017] NTLC 30

PARTIES: Police
V
Tudor Edward Russell

TITLE OF COURT: Local Court

JURISDICTION: Criminal

FILE NO(s): 21753896

DELIVERED ON: 15th December 2017

DELIVERED AT: Darwin

HEARING DATE(s): 12th December 2017

JUDGMENT OF: Judge Fong Lim

CATCHWORDS:

Criminal law – Mandatory disqualification – second and subsequent offence – repealed provisions-intention of legislature – second reading speech and explanatory statement.

Traffic Act [NT] Part V sections 21-23

Transport Legislation (Drug Driving) amendment Act (Act no.7of 2008)

Burnham v Westphal [2012] 31 NTLR 2 - Applied

Keil v Westphal [2012] NTSC11 – Kelly J

REPRESENTATION:

Counsel:

Plaintiff: Mr Riley
Defendant: Mr Razi

Solicitors:

Plaintiff: Director of Public Prosecutions
Defendant: NAAJA

Judgment category classification: C
Judgment ID number: 030
Number of paragraphs: 24

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

No. 21753896

BETWEEN:

Justin Firth

AND:

Tudor Edward Russell

REASONS FOR JUDGMENT

(Delivered 15th December 2017)

JUDGE: Fong Lim

1. On the 12th of December 2017 the defendant pleaded guilty to a charge of driving with low level of alcohol in his breath contrary to section 23 of the Traffic Act. It became apparent that the defendant had priors for like offending under section 19 of the Traffic Act as it then was in 2007 and 2008.
2. A finding of guilty to an offence contrary to section 23 (1) of the Traffic Act attracts a mandatory minimum disqualification of 3 months if that finding of guilty is the defendant's first offence and 6 months if it is a second or subsequent offence.
3. The defendant has previous findings of guilt of driving with blood alcohol content of between 80mg/100ml –under 150mg contrary to section 19 of the Traffic Act as it then was in 2007/2008. His BAC was .131% on both of those occasions which under the present provisions of the Traffic Act is a medium range reading. The question before the court is whether those findings of guilt enliven the mandatory disqualifications under section 23.
4. I handed down my decision on the 15th of December 2017 and indicated to the parties I would publish written reasons at a later date, these are those reasons.
5. Section 23 reads:

Low range breath or blood alcohol content

(1)A person who drives a motor vehicle with a low range breath or blood alcohol content commits an offence.

Maximum penalty:

For a first

Offence - 5 penalty units or imprisonment for 3 months.

For a second or subsequent offence

- a) penalty units or imprisonment for 6 months.

(2) An offence against subsection (1) (a relevant offence) is a second or subsequent offence if the person has previously been found guilty of any of the following offences:

(a) driving with:

- (i) a high range breath or blood alcohol content; or
- (ii) a medium range breath or blood alcohol content; or
- (iii) a low range breath or blood alcohol content (only if the previous offence was committed after 1 July 2007 and
 - (b) only if the previous offence was committed within 3 years before committing the relevant offence);
 - (c) driving under the influence of alcohol or a drug;
 - (d) failing to provide a sufficient sample of breath for a breath analysis;
 - (e) failing to give a sample of blood for analysis.
 - (f) driving with alcohol in the breath or blood (if the person, at the time of the previous offence, was of a class mentioned in section 24(1)).

6. Prior to the introduction of the current Part V¹ the Traffic Act contained section 49(1)(b) which stated that second and subsequent offence included “a similar offence against the Traffic Act as in force immediately before the commencement of this Act”. If this section still existed it would be clear that the previous offences under the repealed Part V would enliven the penalties for “second and subsequent offences”.
7. However section 49 was repealed and specific definitions of what types of offences made a relevant offence a second and or subsequent offence were included in the redrafted Part V. Section 23 is contained within that Part. Nowhere in the new provisions is there any reference to “similar offence against the Traffic Act as in force immediately prior to the present Act”.
8. It is arguable that by not including that section in the new provisions the Legislature must have intended that offences under the old provisions did not invoke the mandatory disqualifications.
9. Southwood J in *Burnham v Westphal* [2012] 31 NTLR 1 considered the issue of whether a finding of guilt of similar offences in another state enlivened the mandatory disqualification periods under section 21 of the Traffic Act. He found it did not given interstate offences were not the specified in the enlivening provisions of section 21. His honour found that should the legislature have intended to broaden the range of aggravating circumstances to include similar interstate offences it would have done so by clear and precise language.
10. He found that as section 21 specified which offences made the relevant offence a second or subsequent offence then if the prior offending relied upon was not included in that description it could not enliven the mandatory disqualifications. His honour was considering whether the “broader” description of the enlivening offences now included interstate offences whereas previously with the repealed section 39 (1)(e) they did not.
11. Section 39 (1) (e), as it then was, described the enlivening priors as
 - (a) “an offence against-
 - (b) Section 19(2)or section 20”
12. The present section 21 describes the enlivening offences with no reference to sections in the Act.

¹ Transport Legislation (Dug Driving) amendment Act (Act no 2008)

13. His Honour referred to the explanatory statement and concluded that the intention was to incorporate the effect of section 39(1)(e) into Part V of the current act. His Honour found therefore the enlivening offences must only relate to those offences under the NT Traffic Act.
14. Kelly J in *Keil v Westphal* [2012] NTSC 11 adopted his honour's reasoning in relation to the operation of section 22 and found that the interstate priors did not enliven mandatory disqualification in relation to the offences before her.
15. The present case is distinguishable from both of those matters where the priors to be considered in this present case are priors under the Traffic Act as it was in 2007/2008.
16. It is significant in my view that the amendment to the Act which introduced the new part V also repealed section 49. The removal of the general definition of "second and subsequent offence" which specifically included references to similar offences in prior versions of the Traffic act and replacing it with a definition that does not specifically include similar offences might suggest that by its specific language the Legislature has intended to narrow the definition.
17. The second reading speech and the explanatory statement makes no reference to the removal of sections 39 or 49 and presented the new Part V as a clearer enunciation of drink driving provisions and was described by the Minister as a recreation of the provisions of the old Part V.
18. The only change illuminated in the second reading speech was that there would be an increase in the penalties to include the two strike rule for drivers on no alcohol licences, passenger car drivers and drivers under the age of 25 and truck drivers.
19. I adopt his honour Southwood J's reasoning that the legislature did not intend to broaden the application of the mandatory disqualification provisions through the repeal of section 39.
20. I further apply that reasoning to the repeal of section 49 that is in my view it was not the intention of Parliament to narrow the definition of "second and subsequent offence" by removing the prior offending under the repealed section 19 as a trigger for the mandatory disqualification provisions.
21. The broadness of the description of the enlivening offences eg "driving with a high range breath or blood alcohol content" could include offending under section 19 of the repealed part because that offending is prohibited levels of alcohol under the old act, that is over 80mg per 100ml of blood to 150mg to 100ml of blood and over 150 ml, are the same as the range articulated as high range and medium range under the new provisions. That is essentially the same levels that are prohibited under the present provisions.
22. It is clear the legislature intended to penalise repeat drink driver offenders and to increase the penalties for some categories of drivers. In light of that I find I am satisfied it was the intention of the legislature to include the prior similar offending under the old provisions of the Traffic Act to invoke the mandatory disqualification of licence.
23. In the present case this means the defendant has been found guilty of a subsequent offence and must be disqualified for a minimum of 6 months.
24. Given the gap in his offending I am not minded to disqualify him for any more than the minimum.

Dated this day of 2017

LOCAL COURT JUDGE