DISTRICT COURT OF QUEENSLAND

CITATION:	*Faulkner v Morris* [2010] QDC 33
PARTIES:	**PETER LAWRENCE FAULKNER** (Appellant) **AND** **SENIOR CONSTABLE K. MORRIS** (Respondent)
FILE NO/S:	D94/09
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Toowoomba
DELIVERED ON:	3 February 2010 (*ex tempore*)
DELIVERED AT:	Toowoomba
HEARING DATE:	3 February 2010
JUDGE:	Irwin DCJ
ORDER:	**1. Appeal allowed.** **2. Sentence at first instance varied by reducing the period of disqualification to 1 month.**
CATCHWORDS:	CRIMINAL LAW – Appeal Against Sentence – where appellant convicted on his plea of guilty of one count of driving a specified motor vehicle over the no alcohol limit but under the general alcohol limit – where the appellant was fined $500 and disqualified from holding or obtaining a driver licence for a period of 9 months – whether the period of disqualification made the sentence manifestly excessive APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING AN ERROR OF LAW – FAILURE TO GIVE NOTICE OF INTENTION TO RELY ON PRIOR CONVICTIONS – whether sentencing magistrate erred in taking into account previous traffic history where no Notice of Intention to Allege Previous Convictions had been served on the appellant as required by s 47 of the *Justices Act* 1886 (Qld) – whether open to magistrate to act on allegation of previous traffic conviction not otherwise provided to him

Justices Act 1886 (Qld) s 47, s 222(1), s 225

Penalties and Sentences Act 1992 (Qld) s 4

Transport Operations (Road Use Management) Act (Qld) 1995 s 79(2C)(a), s 86(2)(f), s 86(2A), s 86(2E)

House v The King (1936) 55 CLR 504, applied

Hughes v Hopwood (1950) QWN 21, applied

Steinberg v Lundgaard [2001] QCA 332, cited

Washband v Queensland Police Service [2009] QDC 243, applied

COUNSEL: R Davies for the appellant

P.J Alsbury for the respondent

SOLICITORS: MacDonald Law for the appellant

Director of Public Prosecutions (Qld) for the respondent

DISTRICT COURT

APPELLATE JURISDICTION

JUDGE IRWIN

No 94 of 2009

PETER LAWRENCE FAULKNER Appellant

and

QUEENSLAND POLICE SERVICE Respondent

TOOWOOMBA

..DATE 03/02/2010

JUDGMENT

HIS HONOUR: The appellant was sentenced on the 30th of September 2009 by a Magistrate on his plea of guilty to a charge that on 24 July 2009, whilst he was over the no alcohol limit, but not over the general alcohol limit, he did drive a motor vehicle as defined in paragraph (a) of subsection (2C) of section 79 of the Transport Operations (Road Use Management) Act 1995 (Qld) (the TORUM Act) namely, a truck, on a road.

A conviction was recorded and he was fined $500, in default 10 months' imprisonment, while being allowed four months to pay. More significantly, for the purpose of this appeal, it was ordered that he be disqualified from holding or obtaining a driver licence for a period of nine months. The appellant's challenge to the sentence under section 222 (1) of the Justices Act 1886 (Qld) is limited to the length of driving disqualification imposed.

The grounds of appeal that are relevant are: 1, that the sentence is manifestly excessive in respect to that period of disqualification; and 2, the Magistrate erred in taking into account the previous traffic history as no notice to allege previous had been served on the defendant as required by section 47 of the Justices Act, and further, no purported copy of this notice was tendered to the Court. Therefore, the primary challenge to the sentence is the assertion that the Magistrate erred in law when he considered that the minimum disqualification he could impose in the circumstances of the appellant's case was nine months.

It is submitted that because, as deposed to in the affidavit of the appellant's solicitor, which has been filed for the purpose of the appeal, no notice of intention to allege previous convictions was provided to him pursuant to section 47 of the Justices Act, and at no time during the sentence did the prosecution tender such a notice, the period of disqualification applicable was for a period of not less than one month, and not more than nine months from the date of such conviction pursuant to section 86(2)(f) of the TORUM Act.

It is submitted on behalf of the appellant that given his personal circumstances and factors in mitigation, the minimum disqualification of one month is the appropriate order.

Some minor facts alleged by the prosecution were not accepted by the appellant, and a curial determination of the disputed matters was not undertaken. Accordingly, the sentence proceeded on the following basis: police observed the appellant driving his 12 tonne truck from the rear car park of the Royal Hotel at 3.20 p.m. on the day in question. This truck was a medium rigid type. A zero alcohol limit applied to drivers of such a vehicle, although the appellant claimed he was unaware of this. When his breath was analysed, it gave a reading of .036 per cent. There was no allegation that he was unable to control the motor vehicle, or that his manner of driving was unacceptable. He said that he had attended the hotel for the purposes of providing a quote for earthworks to the publican, and whilst there he was given two drinks.

A criminal history and a traffic history was tendered before the Magistrate. I accept the submission on behalf of the appellant that the criminal history was old and irrelevant for the purpose of the charge for which the appellant was being dealt with. His last conviction was in 1993.

His traffic history contained five of what the appellant's counsel conveniently refers to as drink driving related offences from 1991 to 2004. This involved three Court appearances. He received a total of nine months disqualification on 22 September 2004 when he was convicted of two offences of failing to supply a breath specimen and one offence of driving under the influence of liquor. He was fined in relation to one of the offences of failing to supply a breath specimen, and admitted to 12 months probation for the other two offences. The other drink driving related offences involved a low range offence in 2000 for which he received a ticket and a further drive under the influence offence in 1991.

Because he pleaded guilty to the current offence on 15 September 2009, and a conviction is defined under section 4 of the Penalties & Sentences Act 1992 (Qld) as the acceptance of a plea of guilty by the Court, the applicant had been convicted of this offence within five years of his previous conviction on 22 September 2004.

The personal circumstances of the appellant which were submitted by his legal representative, Mr Skuse, were as

follows: the appellant was 37 at the time of the offence and sentence. I note he is now 38. He had been married for 10 years and had three children aged 5, 7 and 13. His spouse did not work and consequently he was the sole bread winner for the family. He was self-employed as an earthmoving equipment operator, and had been for five years. He had significant financial obligations, including a $300,000 mortgage and $200,000 in business debts. Two references were tendered which deposed to his good character. He did not have a drink problem or other health issues.

Reliance was placed on the fact that he had entered a timely plea of guilty, he had cooperated with the authorities and made full admissions to the police. It was also submitted that if he received a lengthy period of disqualification he would not be able to continue with his business. It was submitted that taking into account the low reading, the lack of an allegation of adverse driving and the financial effect of a lengthy disqualification on him, the Magistrate should impose the minimum disqualification of one month under section 86(2)(f) of the Torum Act, or certainly a disqualification towards the lower end of that range.

The Magistrate's sentencing remarks made it clear that he considered his hands were tied by being required to impose the minimum of nine months disqualification under section 86(2E) which is as follows: "If within the period of five years before such a conviction the person has been previously convicted of an offence under section 79(1), or an indictment

of any offence in connection with, or arising out of the driving of a motor vehicle by the person, or summarily of an offence against any provision of the Criminal Code, section 328A, the person is disqualified by such conviction and without any specific order for a period of nine months from the date of such conviction from holding or obtaining a Queensland driver licence."

Against this background it is submitted by Mr Davies, on behalf of the appellant, that the key issue in this appeal is the use that could be made of the appellant's traffic history, and in particular, his history for those offences for which he was convicted on 22/9/2004. It is submitted that this history could not be relied upon or referred to at all because section 47 of the Justices Act had not been complied with.

That section is as follows: "(1) The description of any offence in the words of the Act, order, by-law regulation or other instrument creating the offence, or in similar words, shall be sufficient in law.

(2) Where a person is convicted of an offence by a Magistrate's Court, other than a Children's Court, and it is proved to the satisfaction of the Court on oath, or as prescribed by subsection (3) that there has been served upon the defendant with the summons, or a reasonable time before the time appointed for the appearance of a defendant, a notice specifying any alleged previous conviction of the defendant for an offence proposed to be brought to the notice of the

Court in the event of the defendant's conviction for the offence charged, and the defendant is not present in person before the Court, the Court may take account of any such previous convictions so specified as if the defendant had appeared and admitted it.

(3) Any person who serves such a notice specifying any alleged previous conviction may serve such notice in the same manner as is provided for the service of a summons by this Act, and may attend before any Justice having jurisdiction in the State, or part of the State, or part of the Commonwealth in which such a notice was served, and to depose on oath and in writing endorsed on the notice to the service thereof.

(3A) Such deposition shall upon production to the Court by whom the case is heard and determined be sufficient proof of the service of the notice on the defendant.

(4) Unless otherwise expressly provided, if for the purposes of the assessment of penalty in respect of a simple offence, it is intended to rely upon a circumstance which renders the appellant liable upon conviction to a greater penalty than that to which the defendant would otherwise have been liable, that circumstance shall be expressly stated in the complaint made in respect of that offence.

(5) However, if the circumstance is that the defendant has been previously convicted of an offence, the alleged previous conviction must be stated in a notice served with the

complaint.

(6) Despite subsections (4) and (5), if the proceedings for the offence were started by a notice to appear, the alleged previous conviction must be stated in a notice served - (a) with the notice to appear; or (b) a reasonable time before the time appointed for the defendant's appearance."

In Washband v Queensland Police Service [2009] QDC 243, Durward SC DCJ at paragraphs (43) - (45) decided:
"Whether a prior conviction is admitted by a defendant or not, if the allegation of a prior conviction has not been made in a notice, then the prior conviction cannot be relied upon by the prosecution, and cannot be used by the Magistrate in determining the penalty or period of disqualification to be imposed. In my view, this is so regardless of whether the allegation of the prior conviction may otherwise be before the Magistrate by reason of its inclusion in a traffic history, or by other means, such as an oral submission by the Prosecutor.

…

The Court of Appeal in Steinberg v Lundgaard [2001] QCA 332 regarded the non-compliance with the mandatory statutory requirements of section 47(5) and (6) as sufficient to vitiate the proceeding insofar as reliance on prior convictions was concerned."

In that case, as in the present case, the relevant notice was not given. In the case with which Durward DCJ was concerned, the notice was given pursuant to section 47(6) but the wrong offence was referred to in the notice. In those circumstances, he held that there being a significant error made in the notice it was vitiated entirely. In those circumstances, it could not have been relied on by the prosecution in the Magistrates Court, there being no relevant notice given in this case in compliance with the requirements of section 47(5) and (6). The proceeding before the Magistrate was vitiated insofar as reliance on the prior convictions was concerned.

It is clear from his Honour's judgment that he believed that he was obliged to impose a minimum licence disqualification of nine months and that this was the critical part of his decision to do so. As his Honour said: "I will take into consideration that it was within five years, and I deal with you on that basis that it was. In those circumstances my hands are tied. Mr Skuse can take it elsewhere if he wishes to do so, but I propose imposing the minimum of a nine month disqualification."

The principles governing appeals against the exercise of a discretion on sentence are well established. In Hughes v Hopwood [1950] QWN 21 (at p31) Macrossan CJ stated that an appeal Court is not entitled to interfere unless it "can find that the sentence is manifestly excessive, or that there are some circumstances which showed that the Magistrate acted

under a misapprehension of fact, or on some wrong principle in awarding sentence. Similarly, in House v The King [1936] 55CLR 504, Dixon, Evatt and McTiernan JJ stated at 505 that "it is not enough that Judges comprising the appellate Court consider that if they had been in the position of a primary Judge they would have taken a different course. It must appear that some error has been made in exercising the discretion."

There having been a significant error made in the present case by relying on the previous conviction of the appellant when the requirements of section 47(5) and (6) had not been complied with I agree with the appellant that the sentencing process miscarried because the incorrect period of disqualification was applied. In these circumstances, it is open for me to re-sentence the appellant in respect of the period of disqualification. The appellant is present and I propose to do so, having had the advantage of receiving written and oral sentencing submissions on his behalf.

Submissions have also been made on behalf of the respondent who accepts that the minimum disqualification period applicable in this case was one month, rather than nine months, and the appellant should now be re-sentenced, having regard to section 86(2)(f) of the Torum Act.

Mr Davies, on behalf of the appellant, submits that the disqualification should be no more than one month, and although Mr Alsbury, for the respondent, submits that the

appropriate range insofar as this disqualification period is concerned is one month to three months, he does not argue strongly that the disqualification period should be at the top of that range.

Having regard to the fact that the offence was towards the bottom of the range involving a low reading and no loss of control of the motor vehicle, and there having been no intentional flouting of the law, the considerations in section 86(2A) of the Torum Act apply in the following terms: "A period of disqualification must be decided by the Court which in making its decision must have regard to the concentration of alcohol in the blood or breath of the defendant, or the presence of a relevant drug in the defendant's blood or saliva, and the danger, real or potential to the public in the circumstances of the case."

In those circumstances I consider that this case is a suitable one for the application of a minimum period of disqualification. In coming to this conclusion, in addition to the factors that I have mentioned, I also have regard to the appellant's timely plea of guilty, cooperation with the authorities, including making admissions, remorse, excellent work history, his good character as attested to by the two references tendered, the fact that as the sole financial supporter of a family of five, a lengthy disqualification would cause him to close his business and be unable to support his family, and the fact that almost five years has elapsed since his previous drink driving offence.

I also take into account that in instituting this appeal to overcome an error of law, albeit a perfectly understandable error in the difficult circumstances confronting a Magistrate conducting a busy list, during which he is required to interpret the complex provisions of the Torum Act, the fact is that he has incurred significant costs through no fault of his own in rectifying the situation. This is in a situation in which costs are no longer sought on his behalf in respect of this appeal.

Accordingly, the orders of the Court are as follows: 1, Appeal allowed; 2, Sentence at first instance varied by reducing the period of disqualification to one month.
