COURT: SUPREME COURT OF TASMANIA

CITATION: *Sutcliffe v Brown* [2017] TASSC 51

PARTIES: SUTCLIFFE, Callan Giuseppe
v
BROWN, Jessica

FILE NO: 1754/2017

DELIVERED ON: 5 September 2017

DELIVERED AT: Hobart

HEARING DATES: 4 September 2017

JUDGMENT OF: Blow CJ

CATCHWORDS:

Magistrates – Appeal and review – Tasmania – Motion to review – Other matters – Sentencing – Sentence manifestly excessive or inadequate – Driving with blood alcohol content exceeding .05, injury to property, and other offences – Deliberate collisions with partner's car – Time in custody on related matters overlooked – Sentence of four months' imprisonment with three months suspended manifestly excessive.

Geale v Tasmania [2009] TASSC 28, 18 Tas R 338, referred to.

Aust Dig Magistrates [1349]

REPRESENTATION:

***Counsel*:**
Applicant: F Cangelosi
Respondent: M Figg
Solicitors:
Applicant: Simmons Wolfhagen
Respondent: Director of Public Prosecutions

Judgment Number: [2017] TASSC 51
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Serial No 51/2017
File No 1754/2017

CALLAN GIUSEPPE SUTCLIFFE v JESSICA BROWN

REASONS FOR JUDGMENT **BLOW CJ**
(DELIVERED ORALLY) **5 September 2017**

1 This is a motion to review a sentencing order made by a magistrate, Mr S Mollard. The order in question relates to five charges that arose out of a single incident on the night of 7 December 2016. On that night the applicant deliberately drove a car into the back of his partner's car twice on a public road. In relation to those five charges the learned magistrate convicted him and sentenced him to four months' imprisonment, with three months thereof suspended on condition that he be of good behaviour for two years. The learned magistrate also disqualified the applicant from driving for 18 months as from that day, in addition to a disqualification that had been imposed by a notice served by a police officer. The effect of the partly suspended sentence was that it was a condition of the suspended sentence that the applicant was not to commit any offence punishable by imprisonment for a period of two years after the day of sentencing. It is only the partly suspended sentence that is challenged in these proceedings. None of the other orders are challenged.

2 The principal grounds upon which the applicant relies are that the learned magistrate gave inadequate reasons for not suspending the whole sentence, and that the sentence was manifestly excessive. He does not contend that the head sentence of four months' imprisonment was manifestly excessive. He contends that the sentence is manifestly excessive as a result of it not having been wholly suspended.

3 The five charges that were the subject of the sentence were as follows:

- A charge of exceeding .05. (The applicant's blood alcohol content was measured at 0.127.)
- A charge of driving while his licence was suspended. (It appears to have been a provisional licence that was suspended as a result of an accumulation of demerit points.)
- Driving without due care and attention.
- Failing to stop after involvement in a crash.
- Injury to property.

4 The applicant pleaded guilty to all of those charges before the learned magistrate.

5 The facts as stated were essentially as follows. The applicant had an argument with his partner at a house in Tranmere. She drove off in her car. He took his parents' car and followed her in it. He had been drinking. His licence was suspended. He had only ever held a provisional licence. He drove from Tranmere, caught up with his partner, and followed her to a point on the city side of the Tasman Bridge. On the South Arm Highway near the roundabout at Mornington, he drove into the back of his partner's car on two occasions. She kept driving. He undertook a series of manoeuvres to try to get her to stop. He attempted to flag her down by waving his arms at her. He got in front of her car and slammed on his brakes. He tried to force her off the road. He tried to force her to the side of the Tasman Bridge. A third motorist came to the woman's assistance, and positioned his car beside hers. She called out to him to ring the police. All three drivers stopped near the entrance to HMAS Huon. The complainant locked herself in her vehicle. Ultimately the applicant drove away, and drove all the way back to his home in Tranmere. Police officers found him there in a distressed state. They noticed an injury to his upper left thigh. That injury appeared to have been self-inflicted. They took him to a

police station where a breathalyser analysis was undertaken, and then they took him to the Royal Hobart Hospital.

6 I regard this as a serious case for a number of reasons:

- First, it involved aggressive driving, including two deliberate collisions.
- Second, it involved very irresponsible driving during the period when the applicant was trying to get the complainant to stop.
- Third, he was an inexperienced driver.
- Fourth, his blood alcohol content was 0.127.
- Fifth, he travelled a considerable distance from Tranmere to HMAS Huon and back to Tranmere.
- Sixth, this was a family violence incident. He and his partner were in what the *Family Violence Act* 2004 calls a "significant relationship". That vague term means a marriage-like relationship.
- Seventh, the impact on his partner is significant. Obviously she was terrified.
- Eighth, he was on bail at the time. He was awaiting trial in the Supreme Court as a result of committing an indecent assault.

7 There were related charges that were dealt with by the learned magistrate at the same time. As a result of the incident that I am concerned with, a police family violence order was made. Subsequently the applicant breached that order three times on 9 January 2017. He phoned the complainant during the morning, and then that night he sent her text messages twice. He was arrested that night. It was after midnight that he was arrested. He was held in custody from the early hours of 10 January until being bailed on 25 January. Thus, he spent 16 days in custody.

8 On the three charges of breaching the police family violence order, he pleaded guilty before the learned magistrate. He was sentenced on the same day. The learned magistrate simply recorded convictions, but the reasoning that led him to do that is quite significant, and I will return to that later.

9 There were a number of mitigating factors that the learned magistrate was required to take into account.

- First, the applicant was a youthful offender. He was 19 years old on the night in question and 20 years old when sentenced.
- Second, the applicant had no significant prior convictions. He had been fined on three occasions for committing traffic offences. It appears that they were all dealt with by means of infringement notices.
- Third, the learned magistrate was told that there was no ill-will on the part of the complainant. That is a small factor, but a relevant one.
- Fourth, the learned magistrate was told that the applicant had committed himself to not drinking, and that he had obtained counselling relating to the use and misuse of alcohol. In fact, the learned magistrate was told that the applicant had stopped drinking.
- Fifth, he was in full-time employment at a grocery store. However it was not asserted that the applicant stood to lose that employment if he went to prison.
- Sixth, he was actively involved in AFL football outside working hours.
- Seventh, he had been in a particularly poor emotional state on the night in question. That is apparent from the fact that he wounded himself when he got home. He was going through a very stressful time, amongst other things as a result of protracted Supreme Court proceedings. Between the commission of these offences and the day of the sentencing, he had been tried and acquitted on multiple charges of rape, but the jury found him guilty of one count of indecent

assault. He was awaiting sentencing by the trial judge when the sentence in question was imposed by the learned magistrate.

- Eighth, the applicant made full admissions to the police when interviewed on the night in question.
- Ninth, he pleaded guilty to the offences at a very early stage.
- Tenth, he had stayed out of trouble from the time of his release on 25 January until the sentencing by the learned magistrate, which was on 13 June.
- Eleventh, he had been assessed as suitable for a community service order for the purpose of the Supreme Court proceedings.
- Twelfth, the learned magistrate was told that the applicant had an ambition to pursue a career in food and the retail industry.

10 His counsel submitted to the learned magistrate that a wholly suspended sentence would be within the range that he could see fit to impose. I do not disagree with that, but it was not the only sentencing option that was available.

11 In his sentencing comments, after stating the facts and the relevant considerations relating to the December incident, and then stating the facts in relation to the three breaches of the police family violence order, the learned magistrate said (referring initially to the breaches of that order):

> "These breaches are not minor although they don't comprise either actual physical contact nor any threat of abuse or violence. But they are, in my opinion, also relevant to the matter of whether a wholly suspended sentence is appropriate. The appropriate sentence for these latter breaches is non-custodial, and were it not for my conclusion in relation to the first complaint, I would be imposing a heavy fine, not less than $750. But my conclusion in relation to the outcome of the other matter [that is the December matter], should explain why I think that the appropriate penalty on the breach matters is merely that I record a conviction. I have concluded that a wholly suspended sentence for the other complaint is inappropriate. Neither deterrence or rehabilitation would be likely."

12 In my view, those brief reasons made it clear enough that, firstly, the learned magistrate regarded the December offences as so serious that a period of actual imprisonment was appropriate for the purpose of deterring others from similar offending, and deterring the applicant from re-offending, and, secondly, that the commission of the three *Family Violence Act* offences in January was significant when it came to assessing the applicant's progress in relation to rehabilitation.

13 A magistrate has a duty to give adequate reasons for his or her decisions: *Australian Securities Corporation v Schreuder* (1994) 14 ACSR 614; *Phillips v Arnold* [2009] TASSC 43, 19 Tas R 21. However reasons need only be given to the extent necessary to indicate to the parties why the decision was made and to allow them to consider their appeal rights: *Housing Commission of New South Wales v Tapner Pastoral Company Pty Ltd* [1983] 3 NSWLR 378 at 386; *Robinson v Chatters* [2010] TASSC 66 at [74]. There was no need for the learned magistrate to say any more than he did as to the reasons for not suspending the whole sentence. It was appropriate for him to be very brief. Ground 2 of the notice to review must therefore fail.

14 Ground 1 alleges errors on the part of the learned magistrate in giving too much weight to general deterrence, and giving too little weight to the applicant's youth and good record. That ground cannot succeed independently of ground 3, which asserts that the sentence was manifestly excessive. If the sentence was not manifestly excessive, then it cannot be inferred that the learned magistrate attached too much weight or too little weight to any particular factor or factors. I therefore turn to consider ground 3.

15 The essential question is whether the partly suspended sentence was "unreasonable or plainly unjust": *House v The King* (1936) 55 CLR 499. Imprisonment is a punishment of last resort, to be imposed only when a non-custodial punishment is inappropriate: *Underwood v Schiwy* [1989] Tas R 269; *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282; *James v Turner* [2006] TASSC 54, 15 Tas R 375. One of the sentencing options available to the learned magistrate was to impose a wholly suspended sentence and to require the applicant to perform some community service.

16 I think it is apparent from the learned magistrate's sentencing remarks that he overlooked the fact that the applicant had spent 16 days in custody in January. I say that for three reasons.

- First, the learned magistrate did not mention that time in custody, even though he was otherwise very thorough in listing the relevant mitigating circumstances.
- Secondly, I do not think he would have made the comment that he did, about a fine of not less than $750 as the appropriate penalty for the three *Family Violence Act* offences looked at in isolation, if he had been conscious of the 16 days spent in custody. Section 16(1)(a) of the *Sentencing Act* 1997 required the learned magistrate to take into account those 16 days when sentencing for the three *Family Violence Act* offences. If he had concluded that a fine of at least $750, on top of 16 days spent in custody, was an appropriate penalty, he would have been in error. He would have been imposing a manifestly excessive penalty for the making of a phone call and the sending of the two text messages.
- Thirdly, as the Court of Criminal Appeal made clear in *Geale v Tasmania* [2009] TASSC 28, 18 Tas R 338, it is generally desirable to take into account pre-sentence time in custody on remand in relation to offences other than those that are the subject of the sentence. The learned magistrate did have a discretion not to take that 16-day period into account. If he had made a conscious decision not to take that period into account, I think he would have given reasons for exercising the discretion in that way.

17 But for the 16 days that the applicant spent in custody in January, I would have dismissed this motion to review, despite all the mitigating circumstances, because of the seriousness of the applicant's conduct on the night in question. However I consider that, because the learned magistrate, in effect, ordered a second period of incarceration in respect of offences relating to the same complainant as the January offences, the partly suspended sentence should be regarded as manifestly excessive. I have therefore decided to allow the motion to review and to set aside the partly suspended sentence of imprisonment. The other orders of the learned magistrate will not be disturbed.

[Counsel addressed his Honour as to re-sentencing.]

18 I allow the motion to review. I set aside the partly suspended sentence of four months' imprisonment. [To the applicant.] I sentence you to four months' imprisonment, wholly suspended on conditions that:

(a) You are not to commit any offence punishable by imprisonment within 21 months of today.

(b) You are to perform 120 hours' community service. That is cumulative with the other community service order that was made in the Criminal Court.

19 I order that the respondent pay the applicant's costs of and incidental to the motion to review.