

*Mick v Burgoyne* [2006] NTSC 5

PARTIES: MICK, Richard  
v  
BURGOYNE, Robert Roland

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION

FILE NO: JA 33 of 2005 (20411037)

DELIVERED: 23 February 2006

HEARING DATES: 5 October 2005, 3 and 20 February 2006

JUDGMENT OF: SOUTHWOOD J

**CATCHWORDS:**

MAGISTRATES – Appeals from Magistrates  
TRAFFIC LAW

Appeal against sentence – whether sentence of imprisonment was manifestly excessive – whether there was a failure to have regard to the undue hardship a term of imprisonment would cause the appellant – driving whilst disqualified – failing to submit to a breath test – appeal dismissed

*Arnold v Trennerry* (1997) 118 NTR 1; *Oldfield v Chute* (1992) 107 FLR 413, cited

**REPRESENTATION:***Counsel:*

Appellant:	T Aicken
Respondent:	C Roberts

*Solicitors:*

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

Judgment category classification: B

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

*Mick v Burgoyne* [2006] NTSC 5  
No. JA 33 of 2005 (20411037)

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal  
against the sentence of the Court of  
Summary Jurisdiction at Alice Springs

BETWEEN:

**MICK, Richard**  
Appellant

AND:

**BURGOYNE, Robert Roland**  
Respondent

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 23 February 2006)

**Introduction**

- [1] This is an appeal pursuant to s 163 of the Justices Act. The appellant appeals against a sentence of three months imprisonment, to be suspended after 14 days, that was imposed on him by the Court of Summary Jurisdiction on 26 August 2005 for two offences under the Traffic Act of drive disqualified and fail to submit to a breath test.
- [2] On 26 August 2005 the appellant was convicted of five offences under the Traffic Act being charges 1, 2, 4, 5 and 6 in a complaint dated 12 May 2004.

Charge 1 was that contrary to s 31(1) of the Traffic Act the appellant, being a person who was disqualified from holding a driver's licence, drove a Mitsubishi Sigma on the Stuart Highway. Charge 2 was that contrary to s 20(1) of the Traffic Act the appellant, being required under the Traffic Act to submit to a breath analysis, failed to provide a sample of breath sufficient for the completion of the breath analysis. Charge 4 was that contrary to s 33(1)(a) of the Traffic Act the appellant drove a Mitsubishi Sigma on a public street, namely the Stuart Highway. Charge 5 was that contrary to s 34(1) of the Traffic Act the appellant drove a Mitsubishi Sigma that did not have a current compensation contribution on a public street, namely the Stuart Highway. Charge 6 was that contrary to reg 17(b) of the Traffic Regulations the appellant, being the driver of a Mitsubishi Sigma on the Stuart Highway, drove that vehicle which was in such a condition as to be unsafe to drive.

- [3] The Court of Summary Jurisdiction imposed the following penalties and term of imprisonment on the appellant. For the counts of drive disqualified and fail to submit to a breath test the appellant was sentenced to three months imprisonment to commence from 23 August 2005. The sentence of imprisonment was to be suspended after 14 days from 23 August 2005 on condition that the appellant was to be supervised by Correctional Services in relation to substance abuse, residence and reporting. An operational period of 15 months was fixed by the Court of Summary Jurisdiction.

- [4] On the charge of failing to provide a sample of breath sufficient for the completion of the breath analysis, the appellant was disqualified from driving for a period of five years, such period to start from 13 May 2004.
- [5] For the counts of driving an unregistered motor vehicle, driving a vehicle that did not have a current compensation contribution and driving a vehicle which was in such a condition as to be unsafe, the appellant was fined in aggregate \$1200 and also ordered to pay three victim levies of \$40 each. He was given 28 days to pay the fine but is able to obtain an extension if necessary.

## **Grounds**

- [6] The principle ground of appeal is that the sentence of imprisonment that was imposed by the Court of Summary Jurisdiction on 26 August 2005 was manifestly excessive as the Court of Summary Jurisdiction failed to have regard to the undue hardship that a term of imprisonment would cause the appellant.
- [7] In my opinion, although the sentence of imprisonment is towards the top of the sentencing range for a first offence of drive disqualified, it cannot be said that the sentence of imprisonment was manifestly excessive. Nor can it be said that the Court of Summary Jurisdiction erred because it failed to have regard to the appellant's age and health. The appeal should be dismissed.

## **The Facts**

- [8] The appellant is a 60 year old Aboriginal man. He has two prior convictions for driving offences. On 11 December 1985 the appellant was convicted for driving unlicensed and driving an unregistered/uninsured motor vehicle. On 10 December 2003 the appellant was convicted for driving a motor vehicle while he had a blood alcohol level of 150 mg/L or more and for driving unlicensed. After being convicted of the drink driving offence on 10 December 2003 the appellant was disqualified from driving a motor vehicle for a period of 12 months. The suspension was backdated to 14 October 2003.
- [9] On 12 May 2004 the appellant drank alcohol during the day and he got drunk. At 5.30 pm while still drunk he drove a Mitsubishi Sigma on the Stuart Highway. When he did so he drove onto the wrong side of the road for a short time. On two occasions he drove over the verge on the opposite side of the road and he was weaving within his lane. He was stopped by police and asked to get out of his car. When he got out of his car the appellant was unable to stand up properly because he was drunk. Police noticed that the appellant was affected by alcohol. They did a breath test on him and it was positive. They arrested the appellant and took him back to the police station where the appellant failed to undergo a further test.
- [10] At the time he drove the motor vehicle, the appellant did not have a driver's licence. The motor vehicle was uninsured and unregistered. The appropriate compensation payment had not been made and the motor vehicle

was unsafe to drive. There were lots of things wrong with the motor vehicle. A window was broken, a tyre was in bad condition, the mirrors of the motor vehicle were missing, the car could start without a key and the battery was not tied up properly.

- [11] The appellant was not in a fit state to drive and the car he drove was not in a safe condition to be driven. What he did on 12 May 2004 was extremely dangerous and if he had injured himself he would not have been able to obtain compensation. This meant that if he was injured, the cost of any treatment would be thrown back on the rest of the community. It is extremely fortunate that nobody was injured as a result of the appellant's driving.
- [12] At the time of the offending the appellant had completed two thirds of the period of his licence disqualification for the offence of drink driving that he committed on 10 December 2003.
- [13] Following his arrest on 12 May 2004 the appellant was charged with each of the offences referred to above. However, he failed to attend court and he was picked up on a warrant. He pleaded guilty to the driving offences one year and three months after he committed them.

## **Conclusions**

- [14] The exercise of a sentencing discretion by a lower court is not to be disturbed on appeal unless error is shown in the exercise of that discretion. It must be emphasised that this is an appeal from a discretionary judgment

and that this court will not interfere merely because it believes that the sentence is more than what the individual judge constituting this court would have imposed had this been the court of first instance. If specific error cannot be demonstrated the sentence must not only be excessive, it must be manifestly so. The error is said to be that the Court of Summary Jurisdiction failed to take into account the offender's age, health and disabilities.

- [15] The sentencing magistrate had regard to both the appellant's age and health. As to his age the sentencing magistrate expressly noted, "I am told you are around 60 years of age. The papers I have tell me you are either 51 or 57 years of age." As to the appellant's health and personal circumstances the sentencing magistrate said, "Given your personal circumstances which I have been told about by your lawyer, I am prepared to partly suspend (the) sentence (of imprisonment)."
- [16] The Court of Summary Jurisdiction was informed that the appellant had certain health problems, he has difficulty walking long distances and he has to undergo dialysis treatment on a regular basis. The Court of Summary Jurisdiction was not given any details about the appellant's dialysis treatment nor were any medical reports tendered. The Court of Summary Jurisdiction was also told that the appellant was driving so he could go to the caravan park to buy a cool drink and to get some tucker. He could not find anyone else to drive him. There is nothing in these assertions to

establish that the appellant's age and health are such that a two week period of actual imprisonment is likely to cause undue hardship to him.

- [17] The appeal was adjourned from time to time to enable the appellant to obtain further evidence as to his health. Despite the adjournments, no further evidence has been tendered. No further adjournment is allowed.
- [18] Both general and specific deterrence are proper factors to be considered in any sentence to be imposed on the appellant. The appellant did not have a good character. He had previously been disqualified from driving. The offences were serious. The driving was dangerous. The appellant drove on a major highway late in the day. The appellant drove on the wrong side of the road and on two occasions went over the verge on the opposite side of the road and he was weaving within his lane. The appellant was unable to stand properly when he was apprehended by police because he was drunk. His car was also in a dangerous condition. A tyre was in particularly bad condition, mirrors were missing and the battery was not tied up properly.
- [19] Driving while disqualified is a serious matter: *Oldfield v Chute* (1992) 107 FLR 413 per Mildren J; *Arnold v Trennerry* (1997) 118 NTR 1 at 7. The appellant has shown a flagrant disregard for the previous order of the court. He drove for his convenience, not in an emergency or for any other exceptional reason. What is more, he drove in a dangerous manner. The objective aspects of the offending place it into a serious category of this type of offending. It is not uncommon for a term of imprisonment to be

imposed in cases such as this. While the sentence is towards the top of the range of sentences for such matters it cannot be said to be manifestly excessive.

[20] The appeal is dismissed. I will hear the parties as to costs.