Tolson v Burgoyne [2003] NTSC 46

PARTIES:	TOLSON, Terry
	v
	BURGOYNE, Robert Roland
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 43 of 2002
DELIVERED:	9 May 2003
HEARING DATES:	29 April 2003
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL

Justices appeal – drive unlicensed – drive unlicensed whilst having a concentration of alcohol – appeal against sentence – manifestly excessive – failed in not wholly suspending sentence – failed to consider option of home detention order.

Traffic Act 1949 (NT), s 19(2) and s 32(1)(a)(i); *Traffic Regulations* 1999 (NT), s 17(b); *Sentencing Act* 1995 (NT), s 44, *Justices Act* 1928 (NT), s 177(2)(f)

Daniels v Nichol, unreported, 13 August 1976 NTJ, referred to.
Hales v Garbe (2000) 2 NTJ 1102, applied.
Eustace v Hales and Rigby, unreported, 21 March 2003 NTJ, referred to.
Dinsdale v The Queen (2000) 202 CLR 321, referred to.
Oldfield v Chute (1992) 107 FLR 413, referred to.

REPRESENTATION:

Counsel:

Applicant:	M O'Reilly
Respondent:	C Roberts

Solicitors:

Applicant:	CAALAS
Respondent:	DPP

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

Tolson v Burgoyne [2003] NTSC 46
No. JA 43 of 2002

BETWEEN:

TERRY TOLSON
Applicant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 9 May 2003)

[1] Appeal against sentence imposed by the Court of Summary Jurisdiction sitting at Alice Springs on 16 August 2002. On that date the appellant pleaded guilty to a number of offences which had occurred on different days, summarised as follows:

1. On 4 June 2002 drove a motor vehicle whilst having a concentration of 137 milligrams of alcohol per 100 millilitres of blood; drove a motor vehicle on a public street whilst not being the holder of a licence to do so.

2. On 22 July 2002 drove a motor vehicle on a public street while having a concentration of 178 milligrams of alcohol per 100

millilitres of blood; drove the motor vehicle at that time whilst not being the holder of a licence to do so.

3. On 15 August 2002 drove a motor vehicle on a public street whilst having a concentration of 136 milligrams of alcohol per 100 millilitres of blood; drove a motor vehicle whilst disqualified; drove a motor vehicle which was in such condition as to be unsafe to drive; being the driver of the motor vehicle, gave false information to police.

[2] One of the issues raised upon this appeal is the manner in which his Worship approached the rather complex sentencing task presented by so many charges in that he commenced by dealing with the last of the offences, that is, those committed on 15 August 2002. In relation to each of the first two of these charges, he was sentenced to three months imprisonment to be served concurrently and disqualified from holding a driver's licence for a period of 18 months on the drink driving charge. A fine of $250 was imposed in relation to the third matter. Proceeding backwards in time, his Worship dealt with the offences which occurred on 22 July and sentenced the appellant to imprisonment for one month to be served cumulatively upon the effective sentence of three months imprisonment previously imposed, being a total effective sentence of four months. His Worship proceeded to disqualify the appellant from holding a driver's licence for two years and six months, backdated to 22 July 2002, being the date which his Worship

expressed as being that upon which the licence was suspended by police. For driving whilst unlicensed on that date he was fined $300.

[3] Turning to the earliest offences, 4 June 2002, the appellant was sentenced to imprisonment for one month to be served concurrently with the one month imposed for the drink driving offence on 22 July so that the total sentence to imprisonment stood at four months.

[4] His Worship then looked at the offender's record of prior convictions, and noting one in December 1994 for failure to supply a sufficient sample of breath, took into consideration the gap between then and the current offending and indicated it was not sufficient to warrant a wholly suspended sentence but sufficient to warrant a partly suspended sentence and proceeded to order that the four month head sentence be suspended after one month. An operational period of 18 months was fixed for the date of release of the offender from prison. It was also ordered that consequent upon his release from prison he be subject to supervision and comply with reasonable directions as to residence, employment, associates, reporting and alcohol counselling and/or treatment. A further financial penalty of a $300 fine was imposed for the driving whilst unlicensed charge.

[5] The earliest of the offending should have been dealt with first in the light of all the circumstances that then existed including the lapse of time between the appellant's only prior conviction at that time, and thence to progress through each of the later stages of offending in proper turn so that the

sentences imposed in respect of the earlier offending could be taken into account. Once that process had been followed the result would then be looked at in the light of the totality principle.

[6] A brief summary of the facts. On each occasion the appellant was stopped whilst driving a motor vehicle in Alice Springs and subjected to a roadside breath test, as a consequence of which the offending blood alcohol content was detected. On 14 June it was also revealed that he did not have a licence, having lost it for a year after being convicted of failing to supply a sufficient sample of breath on 8 December 1994. No new licence had been obtained. It was also admitted that the vehicle he was driving was moving from the curb edge of the lane to the median edge of the lane for a distance of about 700 metres prior to his being stopped. He was arrested and bailed. On 22 July there was nothing remarkable about his driving but he still did not have a driver's licence and there were four passengers in the vehicle including a three year old child. Again he was arrested and bailed. On 15 August he was again detected whilst driving with an infringing blood alcohol level. He provided a false name, "Andrew Tolson", the vehicle was faulty, the passenger's side headlight was not operating, the driver's side indicator was not working and the brakes were faulty. Both rear tyres were bald. He still did not have a licence to drive. As a consequence of the detection of this offending on 22 July a member of the police force had given him a notice informing him that he was disqualified from driving a

motor vehicle until the charge was determined (s 20A(2)) and while thus disqualified he was not able to apply for a licence.

[7] On no occasion did the appellant have any valid excuse for any of the offending. His counsel informed the court that he was at the time 32 years of age, an Aboriginal man who normally lived at Papunya, had been initiated, attended the local school though not receiving a very formal education, but could read and write a little bit. He was married and had three children and that was said to have provided the major stability in his life as evidenced by his minimal prior offending which, his counsel suggested, was quite remarkable given the environment in which he had grown up. Papunya is a dry community and it was put that when people come to Alice Springs those who drink take advantage of the availability of alcohol. His Worship was informed that on each occasion the appellant had come to Alice Springs for a legitimate purpose.

[8] Counsel indicated that the appellant would be prepared and able to undertake community work. It was submitted that given his previous good character and that he had never previously been placed under supervision, that would be appropriate. A sentence to a term of actual imprisonment was not called for. A sentence to imprisonment fully suspended was in contemplation although counsel recognised the seriousness of driving whilst disqualified. In that context his Worship was referred to a decision of the reasons of Mildren J in *Oldfield v Chute* (1992) 107 FLR 413 and that of Riley J in *Eustace v Hales and Rigby*, unreported, 21 March 2002. In

Oldfield v Chute his Honour reviewed the authorities having to do with sentencing a person who has been convicted of driving whilst disqualified from holding a driver's licence and the way in which the court has from time to time come to consider what fell from Forster J in the unreported decision of *Daniels v Nichol* of 13 August 1976 in which his Honour said:

> "For the offence of driving whilst disqualified from holding a driving licence imprisonment is the appropriate penalty say in exceptional circumstances … ."

[9] Attention has been directed to the phrase "exceptional circumstances", and the trend of authority indicates that the word "exceptional" in that context does not mean "extraordinary" or "outstanding" or the like, but rather, circumstances which are sufficient to except the particular case from the usual rule (as I endeavoured to explain in the unreported decision of *Hales v Garbe* (2000) 2 NTJ 1102).

[10] In *Eustace v Hales and Rigby*, with reference to the South Australian authority, Riley J upheld the views of a Magistrate in proceeding on the basis that an offence of driving disqualified where the disqualification results from the issue of a notice under s 20A of the Traffic Act was just as serious as a breach of a disqualification order made by a court. His Honour went on to note other circumstances relating to that method of disqualification which might be pleaded in mitigation.

[11] Counsel for the appellant urged before his Worship that a sentencing option was to suspend any term of imprisonment that might be imposed upon the

making of a home detention order. Section 44 of the Sentencing Act 1995 (NT) provides that a court which sentences an offender to a term of imprisonment may make an order suspending the sentence on the offender entering into a home detention order, where it is satisfied that it is desirable to do so in the circumstances. I consider that "desirable" in this context means being helpful or advantageous in promoting the general principles of sentencing as set out in s 5 of the Act. It is thus a two stage process. The first, in determining that a sentence of imprisonment is the only proper sentence to be imposed in the circumstances, and then consideration of the desirability or otherwise of suspending the sentence in order to fulfil those principles. (As to suspended sentences generally, see the reasons of the Justices of the High Court in *Dinsdale v The Queen* (2000) 202 CLR 321).

[12] The making of a home detention order is dependent upon the court having before it a report from the Director of Correctional Services covering the matters referred to in s 45(1)(a) of the Act and for those purposes the court must order the Director to prepare and provide to the court such a report (s 45(1A)). Quite properly, the preparation of the report takes time and the length of time depends on the circumstances, including identification of and investigations about the home in which it is proposed the offender be detained. His Worship usually performed his judicial functions in Darwin and nearby areas. This case was being conducted in Alice Springs and it appears from the transcript that he was due to return to Darwin that afternoon. The report which was required by statute to be available to his

Worship could not possibly be ready in that time, and there is an indication from a reading of the whole of the transcript that that was a consideration in his Worship's decision not to order such a report. There was a problem in how the case might be dealt with if a report was then ordered which would not be available for some weeks when his Worship would no longer be in Alice Springs. That could necessitate his having to return to finally dispose of the case. (In the course of submissions I raised the question of the use of an audio-visual link between Alice Springs and Darwin as a possible means of overcoming the problems, but on looking at Part VA of the Evidence Act 1939 (NT) doubt is raised as to whether a sentence may be passed by a Magistrate sitting, say, in Darwin where the offender is linked by a videoconferencing system at Alice Springs.)

[13] During the course of discussion his Worship also touched upon the question of bail for the offender in the meantime and indicated it would not be granted. He had not had submissions from either the prosecutor or counsel for the appellant on the subject. His Worship had already come to the view as to the period that he considered the appellant must spend in custody and since that period was less than the period it would take to get the home detention report, it would be in the appellant's interests, in his view, that the matter be disposed of there and then without waiting for such a report. If the appellant remained in custody, as his Worship indicated, he would whilst awaiting the home detention report be there longer than the period during which he would be in a gaol as a sentenced prisoner.

[14] Having heard submissions and ventured upon that discussion his Worship adjourned to consider what he would do. In sentencing the appellant his Worship referred to the number of offences and took into account the fact that the appellant had pleaded guilty to all of them such that he was entitled to a substantial discount for that. He rightly expressed his concern that there were three charges of exceed .08 which occurred close together and that they were matters of grave concern to him. Turning to the question of sentence for the offence of driving whilst disqualified, his Worship said:

> "Usually people who are found guilty of driving whilst disqualified can expect to go to gaol unless there are exceptional circumstances. One has to look, of course, at the reason for driving and I have taken that into account in each instance."

His Worship specifically referred to the decision of Mildren J in *Oldfield v Chute* with particular reference to his Honour's indication that it may be relevant to the exception if the accused is an Aboriginal person from a deprived section of the community. Taking the whole of his Worship's comments on that matter into account I am not satisfied that he erred by treating "exceptional" in this context as meaning extraordinary or outstanding or the like.

[15] In his conclusion his Worship expressed the view that the series of offences warranted a sentence to a term of imprisonment and then turned to consider whether or not the court should suspend it in whole or in part and added:

> "I have not called for a home detention assessment report because I believe that on the facts of this case, it would not be appropriate to do that."

As earlier indicated, however, his Worship then immediately mentioned that if he had done so, then it would take about six weeks for it to be obtained and since he would not be disposed to grant bail in the meantime the appellant would serve a longer period in actual custody than he was proposing to order him to serve. He then proceeded to sentence in the manner earlier indicated imposing an effective sentence of four months imprisonment suspended after one month.

[16] The grounds of appeal are that overall the sentence was manifestly excessive, that his Worship had failed in not wholly suspending it and that he erred in failing to properly consider the sentencing option of a home detention order.

[17] Upon the hearing of the appeal counsel for the appellant did not submit that the total period of four months imprisonment was excessive in itself, but based the appeal upon the fact that it was only partly suspended. In particular, it was also put that his Worship had failed to take sufficient regard to the fact that there had been a gap of some eight years or thereabouts between the time the appellant had been convicted of an offence and the time of his next offending, that is, June 2002 and referred to *R v Groom* (1998) 104 A Crim 375. It was also submitted that his Worship erred in not acceding to the request that a home detention report be obtained

so that he could properly consider whether to suspend the sentence and impose a home detention order.

[18] Counsel for the respondent has acknowledged that his Worship arguably fell into error, but submitted that even if any error was found, then it would not be such as to call for the appeal to be allowed and that it should be dismissed upon the grounds that no substantial miscarriage of justice has actually occurred (s 177(2)(f) Justices Act 1928 (NT)).

[19] I am satisfied that error on the part of the learned sentencing Magistrate has been shown. The order in which he dealt with the offending on the various days was inappropriate and led to what may be regarded as a convenient result, but not one which would have been arrived at if it had been approached in a proper manner. With respect to his Worship I also think that the expressed way in which he declined to deal with the suggestion that a home detention report be ordered was not justified, particularly as he was influenced by his decision not to grant bail where no submissions had been received. Admittedly the appellant was then in custody, but that was but many of the factors which were required to be taken into account in considering an application for bail as prescribed in the Bail Act 1982 (NT). Bail may be granted after an accused person has entered his plea and been found guilty but before he is sentenced (s 6(c)(ii) Bail Act).

[20] Notwithstanding all that I am not satisfied that a sentence of four months imprisonment suspended after one month is in all the circumstances of this

offending and of the offender a sentence falling outside the range of sentences which could be imposed in the proper exercise of sentencing powers. The seriousness of the successive aggregation of offences is evident. On three occasions within a short space of each other the appellant drove on public roads with alcohol in his blood exceeding the prescribed limit. I accept that on two such occasions the amounts involved were not as great as many to be seen but, having been pulled up, arrested and bailed he offended again and having been pulled up, arrested and bailed for that, he offended again. He was not licensed to drive on the first occasion, he was not licensed to drive on the second occasion at which time he was disqualified from obtaining a licence, but nevertheless notwithstanding the absence of a licence and the express disqualification from obtaining one, he offended again. His contempt for the law is abundantly clear. Other road users expect to be protected from those who consume alcohol beyond the prescribed limit and then drive. The appellant must be personally deterred from engaging in such conduct again. He poses a significant menace to other road users and he must learn to obey the law. Importantly, others who are minded to act in such a way must understand that significant punishment is likely to be the result.

[21] Given the submissions made to his Worship, and to this Court upon appeal, I have considered the question of suspension of sentence upon the making of a home detention order but do not consider it desirable to do so since such a

disposition would not achieve the principles of sentencing for such repeated serious offending and flagrant breaches of the law.

[22] I am of the opinion that some of the points raised in the appeal might be decided in favour of the appellant, but I dismiss the appeal because I am satisfied that no substantial miscarriage of justice has actually occurred.
