James v Burgoyne [2003] NTSC 52

PARTIES:	JAMES, Jeffrey
	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 67 of 2002
DELIVERED:	9 May 2003
HEARING DATES:	29 April and 8 May 2003
JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

APPEAL
Justices appeal – appeal against sentence – driving offences – grounds for appeal – failure to warn in consideration of custodial sentence – failure to give weight to gap between present and prior offences.

Traffic Act 1949 (NT), s 19(6)(a), s 32(1)(a)(i), s 33(1)(a) and s 34(1)

Annetts v McCann (1990) 170 CLR 596, referred to.
Hunter (RE) v The Queen (1988) 62 ALJR 432, referred to.
Wilson v Hill (1995) NTJ 52, considered.
Brand and Hein v Parson and His Honour Judge Lewis (1993) 68 A Crim R 147, referred to.
Bugmy v The Queen (1990) 169 CLR 525, referred to.

REPRESENTATION:

Counsel:

Applicant:	V Gillick
Respondent:	C Roberts

Solicitors:

Applicant:	CAALAS
Respondent:	DPP

Judgment category classification:	B
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Mar0322

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

James v Burgoyne [2003] NTSC 52
No. JA67 of 2002

BETWEEN:

JEFFREY JAMES
Applicant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 9 May 2003)

[1] Appeal against sentence. On 9 December 2002 the appellant was convicted upon his pleas of guilty before the Court of Summary Jurisdiction sitting at Alice Springs, for that on 8 December 2002 at Alice Springs he:

1. did drive a motor vehicle upon a public street whilst there was present in his blood a concentration of 74 milligrams of alcohol to 100 millilitres of blood;

2. drove a motor vehicle on a public street whilst not being the holder of a licence to do so;

3. drove an unregistered motor vehicle on a public street; and

4. drove a motor vehicle that did not have a current compensation contribution on a public street.

[2] The submitted facts were that on the afternoon of the day in question he drove the motor vehicle on Telegraph Terrace and was apprehended for the purposes of a random breath test. He had blood shot eyes and smelt of liquor. The roadside breath test was positive and he was arrested and conveyed to the watchhouse for breath analysis which revealed the concentration of alcohol in his blood. When asked why he had been driving and drinking, he replied: "That bloke he been forced me". Further investigations revealed he was not the holder of a driver's licence. His excuse for driving without a licence was, "That bloke with the yellow cap, he forced me to drive that car". When it was found that the vehicle was unregistered and did not have a current compensation contribution, he replied, "That bloke with the yellow cap he forced me to drive".

[3] Counsel for the appellant informed his Worship that he was instructed that the appellant had been with his family near Alice Springs. He had consumed some port and was then asked by his brother-in-law to drive the brother-in-law and other persons to another place. In the all too familiar scenario he was asked to drive because he was the least affected by alcohol of those present. It was pointed out that the concentration of alcohol in his blood was relatively low, "especially in this part of the world". There was nothing bad about his driving.

[4] The appellant was 27 years of age, had come from Papunya, was residing in a camp near Alice Springs and had a wife and three young children who were then residing at Ernabella. His counsel informed the learned Magistrate that his client planned to go and join his family for Christmas, if granted his liberty. He was then unemployed but receiving $180 a fortnight. It was pointed out that he pleaded guilty at the first opportunity, the offences only having occurred the day before. It was submitted that the appellant be dealt with by way of a monetary penalty and a period of disqualification.

[5] He had 24 prior convictions, amongst them for driving with a blood alcohol concentration of .066 in 1994 for which he was fined, another in 1996, the concentration being .109 for which he was fined, another in 2000, the concentration being .143 for which he was fined and disqualified from driving for 12 months. He breached the disqualification on 15 March 2001 at which time he was found to have a concentration of alcohol in his blood of .189. In July 2000 he drove a motor vehicle while disqualified and was apprehended on the same day for failure to supply a sufficient sample of his breath. The last four matters came before the court at the one time, 16 March 2001. For those offences the effective sentence was five months imprisonment, including three months for the drink driving offence, all suspended after 28 days with an operational period of 18 months being fixed.

[6] In sentencing, his Worship took account of the relatively low level of his blood alcohol level, but noted his numerous convictions, although still a relatively young man:

> "He has a few drinks and he drives when he shouldn't. He's driven unlicensed and he's driven an unregistered and uninsured car in the suburban or built up areas of Alice Springs."

[7] His Worship regarded the offence as prevalent and being the Coroner he said that he was aware of the dangers which are often presented by motor vehicles driven by people affected by alcohol, although he did not over emphasise that, but added: "There needs to be a message go out to people who are minded to drink and drive in this town that it will be treated seriously." His Worship then said that he had looked at the various sentencing options, considered all the dispositions, and having regard to what was put to him by counsel for the appellant and the principles and guidelines of the Sentencing Act 1995 (NT), he imposed a period of imprisonment of two weeks. It was ordered that the appellant be disqualified from obtaining a driver's licence for 12 months.

[8] There are a number of grounds of appeal, one of which was quite rightly conceded. A penalty to imprisonment is not open under s 34 of the Traffic Act 1949 (NT) for driving a motor vehicle in respect of which a current compensation contribution has not been paid. For a first offence the maximum penalty is $500.

[9] The first ground of appeal is that his Worship failed to indicate to counsel for the appellant, before he imposed the penalty, that he was considering a custodial sentence and to allow an opportunity for submissions.

[10] It was submitted that a general principle of procedural fairness or natural justice must apply where a person's rights or interests can be destroyed or defeated, reliance being placed on *Annetts v McCann* (1990) 170 CLR 596, a case in which it was held that the parents of a boy in respect of whom an inquest was being conducted had a common law right to be heard in opposition to any potential adverse findings in relation to themselves or their son. The principle cannot be doubted, but here the appellant was heard through his counsel before the learned Magistrate. Reference was also made to *Hunter (RE) v The Queen* (1988) 62 ALJR 432. There the interested party had not been heard at all.

[11] *Wilson v Hill* (1995) NTJ 52 involved an appeal in a case where counsel for the offender had put to the Court of Summary Jurisdiction that the court not proceed to record a conviction. The learned Magistrate on that occasion gave no indication that he considered that an assault, which was one of the charges being considered, was such as to warrant a sentence of imprisonment. For the assault he was sentenced to four months imprisonment, but it was directed that he be released forthwith upon entering into a recognisance to be of good behaviour for two years (the matter is being dealt with under the Criminal Law (Conditional Release of Offenders) Act then in force. At p 72 I said that the appellant in that case

had an expectation that "he might avoid conviction, but nevertheless have to pay pecuniary penalties or perform community service" and that once it was plain to the learned Magistrate that that expectation could not be met and that he was considering imposing a substantial penalty he should have said so and invited further submissions. At p 73:

> "The position is quite clear in a case where the court is contemplating sentencing a person to a discretionary term of imprisonment, whether it has it in mind that the person should serve the whole of the term or not, it should say so unless it is manifest that the offender understands that such a sentence is at least likely."

I referred to the remarks of Coldrey J in *Brand and Hein v Parson and His Honour Judge Lewis* (1993) 68 A Crim R 147. I adhere to those views.

[12] However, this case is distinguishable since the remarks of counsel for the appellant before his Worship plainly disclose that there was a possibility that his client would suffer punishment by way of sentence to a term of imprisonment. The appellant wanted to go and see his wife and children for Christmas, "if granted his liberty" and that was followed by a submission as to what was considered to be the appropriate penalty, that is, a fine and disqualification.

[13] The next ground of appeal is that his Worship failed to give sufficient weight to the gap between the present and last relevant prior offence which was on 15 March 2001, the subject of the sentences imposed the following day. It is true that his Worship did not pay particular attention to that, but concentrated instead upon all of the prior convictions for this offence.

Nevertheless, the submission before this Court was that the appellant had not breached the order in relation to the suspension of the sentence imposed on that occasion and thus a suspension of any sentence to imprisonment on this occasion was warranted. An associated ground of appeal is that the sentence imposed was out of step with prevailing standards and reference was made to uniformity in sentencing as being an important factor (*Bugmy v The Queen* (1990) 169 CLR 525). The difficulty with that submission is that this Court has not been provided with sufficient information to enable it to determine the "prevailing standard". A representative sample of recent convictions for this type of offence was provided to the court by counsel for the appellant, but out of all of their number only four of the offenders had prior convictions. One had five such convictions since 1999 all readings being over .150 percent and he was sentenced to imprisonment for one month, in another, the offender had four prior drink driving convictions which were in relation to low blood alcohol readings but extensive other driving offences, and he was sentenced to three months imprisonment. In the third, the offender had six drink driving prior convictions, had been previously disqualified from holding a licence six times and had a total of 22 driving offences since 1992. He was convicted and sentenced to six months imprisonment and disqualified from holding a driver's licence for four years. This ground of appeal is not made out. The sample is too small and in any event indicates that consistent offenders such as this man can well expect a sentence to imprisonment, as was in fact anticipated.

[14] The appellant has displayed a continuing attitude of disobedience to the law. He has suffered financial penalties and has been imprisoned already. Although the blood alcohol level may be regarded as "relatively low" it is plain that he has not learnt the lesson that he must not drive after he has been drinking alcohol. In my view a sentence of two weeks imprisonment for that offence alone was light on. It is indicative that his Worship paid regard to the "gap" and to the reduction in sentence for the guilty plea.

[15] However, for reasons already mentioned, the sentence has to be set aside since it is infected by error in relation to inclusion of a sentence of imprisonment for driving the uninsured motor vehicle. As to the appellant's financial circumstances, the court was informed that since he was before the Court of Summary Jurisdiction he has separated from his wife and family. They are provided for by way of social service benefit. He is now living in Alice Springs, is employed in CDEP and earns about $200 per week. Since a financial penalty must be imposed, that would amount to punishment beyond the period of two weeks imprisonment and I must reduce that sentence for the other offences so as to take into account the proposed fine. I do so reluctantly, but think that to retain the sentence of two weeks plus imposing a fine would be to effectively increase the penalty from that the subject of the appeal.

[16] The appeal will be allowed on the grounds that the imposition of the aggregate sentence of two weeks imprisonment for all offences was not permissible. I quash the sentence imposed and in lieu thereof the appellant

is sentenced to an aggregate period of imprisonment of 12 days for the first three offences and a fine of $100 is imposed in respect of the uninsured motor vehicle matter. The victim's assistance levy is imposed by operation of the statute.
