Baker v Arnison; Burrett v Arnison [2009] NTSC 11

PARTIES:	GEOFFREY DAVID BAKER v SHANE HUNTER ARNISON AND: TRACEY LOUISE BURRETT v SHANE HUNTER ARNISON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 8 of 2009 (20833555) and JA 9 of 2009 (20833531)
DELIVERED:	2 April 2009
HEARING DATES:	26 March 2009
JUDGMENT OF:	RILEY J
APPEAL FROM:	OLIVER SM

CATCHWORDS:

CRIMINAL LAW – JUSTICES APPEAL – drinking in a prescribed area – fine and conviction imposed – whether sentence was manifestly excessive – ex tempore reasons – failure by Magistrate to make reference to matters

does not mean she did not turn her mind to them – failure to mention particular sentencing options does not mean she did not consider them – sentence was not manifestly excessive – Appeals dismissed

Northern Territory Emergency Response Act (Cth); Liquor Act (NT): Sentencing Act (NT) s 28

R v Davey (1980) 50 FLR 57; *Wannambi v Thompson* (1994) 120 FLR 243, followed/approved
Kuiper v Brennan [2006] NTSC 54; *The Queen v Woods* [2009] NTCCA 2, referred to

REPRESENTATION:

Counsel:

Appellant Baker:	M O'Donnell
Appellant Burrett:	Self represented
Respondent:	M Thomas

Solicitors:

Appellant Baker:	Woodcock Solicitors
Appellant Burrett:	Self represented
Respondent:	Office of the Director of Public Prosecutions

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

Baker v Arnison; Burrett v Arnison [2009] NTSC 11
No. JA 8 of 2009 (20833555); JA 9 of 2009 (20833555)

BETWEEN:

GEOFFREY DAVID BAKER
Appellant

AND:

SHANE HUNTER ARNISON
Respondent

AND:

TRACEY LOUISE BURRETT
Appellant

AND:

SHANE HUNTER ARNISON
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 2 April 2009)

[1] These are appeals against sentence. The appeals were heard together at the request of the parties. The appellants appeared before the Court of Summary Jurisdiction at Alyangula on 20 January 2009 in answer to a complaint dated 8 January 2009. Each appellant pleaded guilty to having consumed liquor in a prescribed area, namely the Groote Eylandt restricted area, contrary to the provisions of the *Liquor Act*

(NT) where it relates to the *Northern Territory Emergency Response Act* (Cth). The appellants were unrepresented. They were each convicted and fined.

[2] There is no challenge to the imposition of the fines. The appeals relate only to the recording of a conviction in each case. The grounds of appeal as argued were:

(a) the sentence imposed, which included the recording of a conviction, was manifestly excessive in all the circumstances;

(b) the learned Magistrate erred by giving insufficient weight to the criteria in s 8 of the *Sentencing Act* (NT).

[3] The appellant, Ms Burrett, was unrepresented on the hearing of the appeal and she adopted the submissions made on behalf of Mr Baker.

The facts before the court

[4] The learned Magistrate was provided with a brief statement of agreed facts relating to each of the appellants. They had been on a camping expedition with a group of people. Prior to embarking on the camping trip they and their friends loaded alcohol into the vehicles. The appellants each said they believed that the area to which they were travelling was an area where the consumption of alcohol was permitted. On the journey to the proposed camping site they drove past two separate signs indicating that they were "entering a

prescribed area". During the course of the journey at least one vehicle became bogged. At that time members of the party, including Ms Burrett, were confronted by an Aboriginal male who removed a bottle of vodka from the esky in one of the vehicles and who later consumed the alcohol. The group then travelled on to the camping area where they consumed alcohol. When Ms Burrett was asked why she took alcohol into the prescribed area she responded, "I didn't think. I just chucked them in the car".

[5] During the hearing of the appeal, and with the consent of all of the parties, further material was placed before me in the form of an affidavit of the appellant Mr Baker. This material was not before her Honour. In the affidavit Mr Baker confirmed the information provided to her Honour that he believed it was permissible to consume alcohol in the area and he referred to a handbook and a community notice providing advice to that effect. However, in his affidavit he gave evidence of two confrontations with Aboriginal men on the day. The first occurred as the group travelled to the camping site. They were confronted by a man who said: "This area is closed, you have come through my outstation, you are not allowed here, it is closed". That was the man who took the vodka.

[6] The second confrontation occurred when the group reached the camping area. They had commenced consuming alcohol when they were confronted by another man who was described as a Traditional

Owner. He was annoyed by the consumption of alcohol and he required them to tip out the beer they were drinking, which they did. There was some further discussion and then the man left. At least by that point in time the members of the group should have been acutely aware that there was a real issue about their right to be where they were and, more importantly, to consume alcohol. Nevertheless, further alcohol was consumed.

Section 8 Sentencing Act

[7] Both appellants complain that the learned Magistrate failed to give sufficient weight to the criteria in s 8 of the *Sentencing Act*. The section provides that a court shall have regard to identified circumstances in determining whether or not to record a conviction. Those circumstances include:

> (a) the character, antecedents, age, health or mental condition of the offender;
>
> (b) the extent, if any, to which the offence is of a trivial nature; or
>
> (c) the extent, if any, to which the offence was committed under extenuating circumstances.

[8] It is not in dispute that in imposing sentence the learned Magistrate did not make direct reference to the matters referred to in the section. In the circumstances it was not necessary for her to have done so. The sentence was imposed by an experienced magistrate who had dealt

with many such matters including a number dealt with on that day. The learned Magistrate was on circuit at Groote Eylandt and was familiar with the circumstances that prevailed in that location and, in particular, the importance and the impact of breaches of a law of this particular kind on the local communities. At the time of dealing with the appellants her Honour also dealt with at least four co-offenders who each pleaded guilty to the same or similar offences. Each of those persons was convicted and fined.

[9] Her Honour, through discussion with the appellant Mr Baker, ensured that he accepted the facts as placed before the court and she then invited him to make submissions. The appellant indicated that he was not aware that the status of the particular area had changed to a restricted area and he acknowledged, in relation to his conduct, that "it was my fault". He went on to express his regret for what had occurred. The learned Magistrate then asked questions regarding the time the appellant had spent on Groote Eylandt, the nature of his work and his income. In sentencing the appellant her Honour said:

> Mr Baker, I am pleased to hear that you at least acknowledge that some harm to people occurred as a result of this and perhaps it has made you and your friends appreciate just how serious and significant these problems are.

[10] A similar approach was adopted by the learned Magistrate in relation to the appellant Ms Burrett. Ms Burrett provided information as to her occupation, her income and the fact that she had been on Groote

Eylandt for over four years. She acknowledged that she was aware of the "liquor rules" and she expressed her sorrow for what had happened.

[11] The learned Magistrate delivered ex tempore reasons. Whilst it may have been preferable for her Honour to make reference to a range of matters I do not consider her failure to do so meant that she did not turn her mind to relevant matters in arriving at her sentence. In *R v Davey*[1] Muirhead J said:

> A judge's remarks on sentence will seldom reveal all the matters he takes into consideration. Foremost should be his anxiety to protect the public, but judicial assessment of the prisoner, the prisoner's family and background, his opportunities, his demeanour, his remorse and the precipitating factors causing the offence, all play their part. Remarks on sentence should not be reviewed on appeal as though they are a reserved judgement. They are frequently made ex tempore and in conversational manner, but generally only after anxious thought.

[12] Similarly, it should not be inferred that, merely because her Honour failed to specifically mention a particular sentencing option other than the imposition of a conviction and a fine, she did not consider all of the available sentencing options: *Kuiper v Brennan*[2]. In *Wannambi v Thompson*[3] Kearney J observed:

> It is not the duty of a sentencing court to set out in detail, or in general terms, each and every disposition available in a given case, and then to explain why and on what basis that

[1] (1980) 50 FLR 57 at (66)
[2] [2006] NTSC 54 at [33].
[3] (1994) 120 FLR 243 at (264)

> disposition is or is not made. It is presumed that a court in exercising its sentencing discretion will keep the alternative dispositions in mind in assessing what is the appropriate disposition for the case and offender under consideration.

[13] It was not submitted that the learned Magistrate did not give consideration to the criteria referred to in s 8 of the Act or to the prospect that a conviction should not be recorded. Rather, it was submitted that her Honour failed to give sufficient weight to the matters set out in the section. The learned sentencing Magistrate was familiar with this type of offending and the impact it may have in the geographical area in which her Honour was sitting. It is plain that the learned Magistrate regarded the recording of a conviction as being an appropriate response to the offending in all the circumstances, including the personal circumstances of each of the appellants. She had dealt with a number of matters in that way on that day. She had all the necessary information before her. This argument was primarily presented in support of the contention that the sentences were manifestly excessive. I see no error in the approach adopted by the learned sentencing Magistrate.

Manifest excess

[14] The major complaint made on behalf of the appellants was that the imposition of a conviction in all the circumstances served to make each sentence manifestly excessive. The principles applicable to such an appeal are well known. It is fundamental that the exercise of the

sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is excessive. It interferes only if it be shown that the sentencing judge was in error in acting on a wrong principle or in misunderstanding or wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing judge said in the proceedings or the sentence itself may be so excessive as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. The appellant must show that the sentence was clearly and obviously, and not just arguably, excessive: *R v Woods*[4].

[15] In support of the contention that the recording of a conviction was manifestly excessive the following submissions were made on behalf of the appellant Mr Baker and adopted by Ms Burrett:

1. the appellant was not aware that it was unlawful to consume alcohol at the identified location, it was not a deliberate breach;

2. he pleaded guilty at the first opportunity;

3. he expressed genuine contrition;

[4] [2009] NTCCA 2

4. the ramifications of a conviction extended to his employment and obtaining permission to travel overseas;

5. the offence could have been dealt with by way of an infringement notice.

[16] It was submitted that the learned Magistrate was in error in not eliciting relevant information from the appellants (who were, at that time, unrepresented) to enable the court to fully consider all of the circumstances of the case as required in s 8 of the *Sentencing Act*.

[17] In sentencing the appellants the learned Magistrate knew that they claimed to have been unaware that the area concerned was a restricted zone. Her Honour was aware of the employment of each and, as is common knowledge for those associated with requirements for living and working on Groote Eylandt, she must be taken to have been aware that a conviction for an offence of this kind may lead to termination of the employment of the individual appellant and his or her exclusion from Groote Eylandt. Indeed her Honour said as much when she said to Ms Burrett that if she wanted to live on Groote Eylandt she had to obey the applicable rules.

[18] The ground of appeal relating to the impact of a conviction upon the employment of the appellants and also upon their individual capacities to travel overseas was not further addressed in the course of written or oral submissions before this Court. The remaining matters raised in

the course of submissions were matters which were plainly before her Honour at the time of sentencing.

[19] The offences to which the appellants pleaded guilty were not trivial matters. The appellants each acknowledge that to be so. The problems associated with the consumption of alcohol by Aboriginal persons in many communities within the Northern Territory are well known and the provisions breached by the appellants were part of the legislative response to those problems. It was not in dispute that within many Aboriginal communities excessive consumption of alcohol has led to widespread social dislocation along with significant and sustained levels of violence and the breakdown of traditional authority. The effective control of alcohol in communities such as those found on Groote Eylandt is vital to the lives and well-being of the residents. Her Honour made shorthand reference to those problems when she observed to the appellant Mr Baker that she was pleased to hear "that you at least acknowledge that some harm to people occurred as a result of this and perhaps it has made you and your friends appreciate just how serious and significant these problems are."

[20] In sentencing Ms Burrett the learned Magistrate made reference to the observations she had made to other offenders in the presence of Ms Burrett during the course of the sittings (transcript of which is not available) and went on to say:

> In your case, someone who obviously didn't have a permit and -- and was not a person who was meant to have alcohol (a reference to the man who took the vodka), obtained a considerable amount of alcohol as a result of your foolishness in taking the alcohol. ... it is for everyone's protection and the tragedy often is that women become the object of violence when men have been drinking, it is the sad truth in many communities right throughout the Northern Territory ... and we all have to do our bit to make sure that these sorts of things don't happen. And if that means in a small community that people have to observe the rules and if you want to live here that is the rules you have to observe.

[21] Considered in the context of the geographical area in which it occurred the offending was plainly serious.

[22] In my view the imposition of a conviction for each of the appellants was within the range of sentences available to her Honour. Whilst another judicial officer may have adopted a different approach the sentence was open to her Honour and, in my opinion, it cannot be said that either sentence was manifestly excessive. I see no error on the part of the learned Sentencing Magistrate.

[23] The appeals are dismissed.
