

Burrarrwanga v Rigby [2009] NTSC 57

PARTIES: BURRARRWANGA, Andrew

v

RIGBY, Kerry Leanne

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING APPELLATE
JURISDICTION

FILE NO: JA 36 of 2009 (20807847)

DELIVERED: 6 November 2009

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JUDGMENT OF: SOUTHWOOD J

APPEAL FROM: Dr J Lowndes SM

CATCHWORDS:

APPEAL AGAINST SENTENCE – Regulatory offence – failure to comply with the storage and safekeeping requirements under the Firearms Act – sole ground of appeal: recording of a conviction was manifestly excessive – general deterrence a paramount consideration – appeal dismissed

Hales v Adams [2005] NTSC 86; *Lanham v Brake* (1983) 34 SASR 578, applied

REPRESENTATION:

Counsel:

Appellant: G Lewer
Respondent: J Tierney

Solicitors:

Appellant: North Australian Aboriginal Justice
Agency
Respondent: Office of the Director of Public
Prosecutions

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

Burrarrwanga v Rigby [2009] NTSC 57
No. JA 36 of 2009 (20807847)

BETWEEN:

ANDREW BURRARRWANGA
Appellant:

AND:

KERRY LEANNE RIGBY
Respondent:

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 6 November 2009)

Introduction

- [1] On 8 July 2009, in the Court of Summary Jurisdiction, the appellant pleaded guilty to an offence that contrary to s 46 of the *Firearms Act* (NT), on 12 August 2007 at Darwin, he, being a person in possession of a Stirling 12 gauge shotgun, failed to comply with the storage and safekeeping requirements which apply to the firearm. The sentencing Magistrate convicted the appellant and placed him on a good behaviour bond for 12 months with security of \$750 in his own recognisance.
- [2] The appellant appeals against the sentence imposed on him by the Court of Summary Jurisdiction. The only ground of appeal is: the sentence imposed

by the sentencing Magistrate was manifestly excessive. The appellant maintains a conviction should not have been recorded against him.

Section 46 of the *Firearms Act*

- [3] Section 46 of the *Firearms Act* states a person in possession of a firearm must take all reasonable precautions to ensure: it is kept safely; it is not stolen or lost; it does not come into the possession of a person who is not authorised to possess it; and must comply with the storage and safe keeping requirements under this Act that apply to the firearm. Subsection 46(3) of the *Firearms Act* states the regulations may specify the minimum standards for storage and safe keeping of firearms or classes of firearms.
- [4] Regulation 21 of the *Firearms Regulations* states a category ‘A’ firearm must be stored in accordance with the following requirements: when the firearm is not being used or carried, it must be stored in a locked receptacle which complies with the requirements specified in Sch 2; if the receptacle weighs less than 150 kg when empty, it must be fixed to a wall or floor in a manner that prevents its easy removal; ammunition for the firearm must be stored in a locked container that is kept separate from the receptacle containing the firearm.
- [5] According to Sch 2 of the *Firearms Regulations*, the sides and door of the storage receptacle are to be constructed of solid steel – that has a minimum thickness of 3 mm; or that has a minimum thickness of 2 mm if the method of construction used ensures rigidity or additional reinforcing to prevent

distortion has been included. All edges are to be rolled or folded. The door is to be recessed or flush fitted and is to be sized to prevent leverage points. All hinges are to be secured so that the door cannot be detached by removing the pins, internal or trap-type hinges being preferred. There are at least 2 bolt-down points. There is to be one locking point. There is to be sufficient reinforcing to prevent distortion of the door if a forced entry were to be attempted. If a padlock is used, it is to be covered so as to prevent the lock being cut or broken off.

- [6] In summary, a category 'A' firearm is to be stored in a lockable solid steel box. The box is to be reinforced and is to have no points that can be levered open. If a padlock is used to lock the box, it must be covered to prevent it being cut or broken.

Penalty

- [7] At the time the offender committed the offence, the maximum penalty for failing to comply with the storage and safe keeping requirements of the *Firearms Act* was a fine of \$5,500 or imprisonment for 12 months¹. In addition, under s 40(1) of the *Firearms Act* a firearms licence is automatically revoked on a person being found guilty of an offence against the Act.

¹ s 46 (1) of the *Firearms Act* (NT)

[8] Subsection 40(1) of the *Firearms Act* had no application in this case as on 27 November 2007 the appellant's licence was revoked under the provisions of s 96A(5) of the *Firearms Act*. However, the provisions of s 10(2A) have application.

[9] Subsection 10(2A) states:

The Commissioner is not to grant a licence to a person who has been found guilty of an offence against this Act or the *Weapons Control Act* or in which a firearm was involved unless:

(a) in a case where, on the trial or hearing in relation to the offence:

(i) an order under section 10 or 11 of the *Sentencing Act* or referred to in section 130(2) of that Act (or a provision of a law in force in the jurisdiction in which the offence was committed that, in the opinion of the Commissioner, is of similar effect) has been made directing that the person be discharged on giving security in accordance with the section; or

(ii) a pecuniary penalty only has been imposed,

and not less than 2 years have elapsed since the person was found guilty of the offence; and

(b) in the case where a custodial sentence was imposed – 5 years have elapsed since the applicant was found guilty of the offence or released from custody, whichever is the later.

[10] The meaning of s 10(2A) of the *Firearms Act* is a little unclear. The intention of the legislature would have been clearer if the word 'and' appearing at the beginning of the second last line of s 10(2A)(a) had immediately followed the comma at the end of the first line of

s 10(2A)(a)(ii); and if all possible sentencing dispositions had been covered. Nonetheless, given that s 10(2A)(a) is divided into two subparagraphs, the semi colon interposed after the word ‘section’ at the end of s 10(2A)(a)(i), the word ‘or’ appearing at the end of s 10(2a) (a) (i), which is disjunctive, and the semi colon interposed after the word ‘offence’ at the end of s 10 (2A)(a), the structure of s 10(2A) is such that it has three parts. The parts are based on the three kinds of sentencing disposition that are referred to in the subsection namely, non-conviction discharge or bond, fine and custodial sentence. The length of the time for which a licence cannot be granted by the Commissioner following the revocation of a licence by the operation of s 40(1) of the Act varies in accordance with the severity of the three kinds of sentencing disposition referred to in the subsection.

[11] In my opinion, s 10(2A) of the *Firearms Act* provides for mandatory suspension of a firearms licence in two circumstances. First, if a person is found guilty of an offence against the *Firearms Act* and a pecuniary penalty is imposed, a person is prevented from obtaining a firearms licence for a period of two years from the date when the person was found guilty of the offence. Secondly, if a person is found guilty of an offence against the *Firearms Act* and a custodial sentence is imposed, a person is prevented from obtaining a firearms licence for a period of five years from the date

when the offender was found guilty of the offence or the date when the person is released from custody, whichever is the latter².

[12] If a person who is found guilty of committing an offence against the *Firearms Act* receives neither a pecuniary penalty nor a custodial sentence, the person maybe re-granted a firearms licence forthwith by the Commissioner. The provisions of s 10(2A) of the *Firearms Act* do not prevent the Commissioner granting the appellant a licence forthwith. An order made under s 13 of the *Sentencing Act* is of similar effect to an order made under s 10 or s 11 of the *Sentencing Act* and in any event s 10(2A) of the *Firearms Act* only provides for a suspension of licence when a person is either convicted and a fine imposed or convicted and a custodial sentence imposed.

The Facts

[13] The facts are as follows.

[14] The appellant is a traditional Aboriginal man. He was born on 2 April 1941. He is 68 years of age. The appellant is a senior man for his clan. He grew up on Elko Island. The appellant's first language is Gumatj. He speaks a

² This interpretation of the subsection is consistent with what the Minister for Police, Fire and Emergency Services stated during the First Reading Speech of the Firearms Amendment Bill Serial 158. At p 4086 of Hansard for 28 May 2003 he stated: "Further amendments to the *Firearms Act* contained in the bill will facilitate the administration of the Act by amending a number of anomalies or strengthening current provisions. The current provisions relating to the period of disqualification for a person applying to register a firearm for an offence under the Act are confusing and ambiguous. The Bill will provide a new procedure, simplifying the regime into a three tier system as follows: where a person has been found guilty of an offence, and a court has imposed a pecuniary penalty, the person cannot apply to register a firearm for a period of two years. Where, however, the Court has imposed a period of imprisonment, the period will be five years."

number of Yolgnu Matha languages. He has limited English. He cannot read English.

- [15] The appellant teaches the Gumatj language at Sanderson High School on a part time basis. He has run workshops on spear making. The appellant is a recreational shooter who shoots for hunting purposes. He goes hunting almost every weekend. He hunts for turtle at Buffalo Creek.
- [16] Before being sentenced by the Court of Summary Jurisdiction on 8 July 2009, the appellant only had one prior conviction. On 29 July 2004, the appellant was convicted by the Court of Summary Jurisdiction of failing to carry safety equipment on his boat. The offence was committed on 29 February 2004. The appellant was convicted and fined \$300.
- [17] On 3 March 2006 the appellant was issued a firearm licence. On 12 August 2007, the appellant underwent a firearms audit at his home. During the audit a single barrel 12 gauge shotgun was located in a rectangular steel tube near a wall in the main bedroom of his home. The tube was approximately 1.5 metres in length. The appellant did not have the required storage facility for the shotgun which was registered in his name.
- [18] It was also common ground between the parties that the appellant's firearm licence was revoked under the provisions of s 96A(5) of the *Firearms Act* on 27 November 2007.

[19] During 2008, with the assistance of an interpreter, the appellant studied a book entitled, National Firearms Safety Code Book, and in December 2008 he passed a verbal firearms safety test about the safety, storage and safe keeping of firearms. The test was conducted by the Northern Territory Police. The offender also purchased an approved Firearms Safe and a Crown Lands Permit.

The remarks of the sentencing Magistrate

[20] When passing sentence on the appellant, the sentencing Magistrate made the following remarks:

Today I am going to record a conviction in relation to this matter. I take into account the appellant's guilty plea. I have taken into account the steps he has taken after the offence to make things right. I also take into account his good character. Although, I see on his record, he has been to court once before.

He was previously convicted for failing to carry safety equipment on his boat. This firearm offence is a bit like that because he has failed to store his firearm. So I am really worried that it is not once but twice he has failed to do things that are safe.

I record a conviction. I am going to place him on a good behaviour bond, which means he promises to the court he will stay out of trouble for the next 12 months. If he gets into trouble, he is going to have to come back to court and explain the trouble. If he gets into trouble, then I can punish him again for this offence and he will also have to pay \$750 because that is the order I make today.

The reason I am recording a conviction is I need to let other people know, if they get into the same trouble, they are going to be punished with a conviction. The other thing I am worried about is firearm offences are very common. They happen quite a bit. So I have to make sure other people do not do the same thing.

There will be a victim levy of \$40 and 28 days to pay the victim levy.

The arguments of the appellant

- [21] The appellant submits that, in all the circumstances of the case, the recording of a conviction was manifestly excessive. No appeal point was taken about the imposition of the bond or its terms.
- [22] As to the relevant circumstances, counsel for the appellant stated the following. The offence concerned only a single firearm. The firearm was not loaded nor was any ammunition found with it. The firearm has since been destroyed. There is a lesser risk of harm associated with the misuse of Category A firearms than other kinds of firearms.
- [23] The appellant was 68 years of age at the time of the sentence. He was a senior man of his clan who was learned in the ceremony of his people. He engaged meaningfully in hunting activities and cultural activities within his community. The appellant only had one prior conviction which was for another regulatory offence.
- [24] The reason for the offending was not any blatant disregard of the law but ignorance about the extent of the obligations imposed on a licensed holder of a firearm by the *Firearms Act* and associated regulations. The appellant is an elderly traditional Yolnu man who is illiterate. He received very little Western education and he requires an interpreter in court.

[25] The appellant was genuinely remorseful. He regretted breaching the provisions of the *Firearms Act* and he has taken considerable steps to ensure he does not breach the Act or its regulations in the future, including undertaking a safety test relating to his competency with firearms and acquiring an appropriate safe for the keeping of firearms.

Consideration

[26] In my opinion the sentence imposed by the Court of Summary Jurisdiction on the appellant was not manifestly excessive. The offence is a regulatory offence³. The deterrent aspect of punishment is paramount when an offender is being sentenced for a breach of regulatory legislation aimed at maintaining public safety and there must be good reason for not recording a conviction⁴. The weight to be given to prior good character is less in the case of regulatory offences than in the case of simple offences or crimes that contain overtones of considerable moral turpitude⁵.

[27] The purpose of the firearm storage regulations is to preserve public safety. The failure to store a firearm in accordance with the regulations is not a trivial offence and can have very serious consequences. The sentencing magistrate found that such offending is prevalent. The breach was a serious breach of the regulations. The appellant's attempt at storage fell well short of the standards required by the regulations. The appellant's position is no different to many other users of firearms in the Northern Territory who use

³ s 109 *Firearms Act* (NT)

⁴ *Hales v Adams* [2005] NTSC 86 at [18]

⁵ *Lanham v Brake* (1983) 34 SASR 578

their firearm for recreational hunting. The onus was on the appellant, as the user of a firearm, to ensure he was aware of and understood the storage requirements in relation to firearms. The sentence was proportionate to the seriousness of the offence and the sentencing Magistrate made due allowance for all of the relevant subjective factors to be taken into account in the sentencing process.

[28] In the circumstances the appeal is dismissed. I make no order as to costs.
