Forrest v Burgoyne [2002] NTSC 41

PARTIES:	JUSTIN FORREST
	v
	ROBERT ROLAND BURGOYNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AS JA 29 OF 2002 (20203503)
DELIVERED:	11 July 2002
HEARING DATES:	9 July 2002
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	Mr K Banbury
Respondent:	Mr C Roberts

Solicitors:

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

Judgment category classification:	B
Judgment ID Number:	Ril0220
Number of pages:	7

Ril0220

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Forrest v Burgoyne [2002] NTSC 41
No. AS JA 29 OF 2002 (20203503)

IN THE MATTER OF the *Justices Act*

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

BETWEEN:

JUSTIN FORREST
Appellant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 11 July 2002)

[1] This is an appeal against sentence. On 9 May 2002 the appellant appeared before the Court of Summary Jurisdiction at Alice Springs and pleaded guilty to offences which had been committed on 13 November 2001, 6 March 2002 and 25 April 2002. The appeal relates only to the offence which occurred on 6 March 2002.

[2] On 6 March 2002, whilst he was at large having failed to honour his bail obligations in relation to the offending of 13 November 2001, the appellant

brought liquor into a restricted area contrary to s 75(1)(a) of the *Liquor Act*. On 9 May 2002 he pleaded guilty to that offence and was sentenced to imprisonment for a period of two months. It is that sentence against which he appeals. The grounds of appeal are:

1. That the learned Magistrate erred in that he gave insufficient weight to the appellant's youth and lack of prior convictions.

2. That in all of the circumstances the sentence was manifestly excessive.

[3] The circumstances of the offending were described in the sentencing remarks of the learned sentencing Magistrate. Those remarks were as follows:

> "On 6 March 2002 at 5:40 in the afternoon he was driving a motor vehicle north along the Willowra Access road. Police found him inside the boundary of the restricted area. He had eight casks of Moselle wine with him in the car, each of 5 litres. He said they belonged to Eric Williams. He, however, was the driver of the motor vehicle and he has pleaded guilty to bringing the liquor into the restricted area.
>
> This is a serious offence. The people of Willowra have chosen that their area be a dry area. This was a significant quantity of alcohol being smuggled into the community and quite deliberately. And it had the potential to cause severe disruption and disharmony in the lives of the (residents) of the community. He was no doubt pressured by Eric Williams into bringing the grog into the area.
>
> He says it was his intention to insist that the grog be consumed outside the settlement itself, but within the restricted area. But it seems to me that doesn't really count because then all the drunks would have gone home, drunk, and the results been the same.

> The defendant is young and does not have a bad record, but he will have to serve a sentence of imprisonment for this. I will reduce it to 2 months because of his youth, his plea of guilty and the prior good record, otherwise it would have been 4 months. People, including the defendant, must be deterred from wholesale grog running into a restricted area. I do not propose suspending the whole or any part of that sentence."

[4] The sentence was back dated to take into account time in custody. In sentencing the appellant his Worship noted that there was only one prior conviction and that was for driving without a licence. The appellant was aged 25 years at the time of sentencing.

[5] The principal ground of appeal is that the sentence was manifestly excessive. The first ground of appeal was argued as an element of the second. The sentencing remarks reveal that his Worship did take into account the youth of the appellant and his relatively clean record. In written submissions the appellant acknowledged that his Worship considered all of the factors relevant to the sentencing process but submitted that he had accorded insufficient weight to matters of mitigation.

[6] The general principles applicable to an appeal based upon the ground that a sentence is manifestly excessive are well known. In the absence of identified error an appellant seeking to establish that a sentence was manifestly excessive must show that the sentence was not just arguably excessive but that it was so "very obviously" excessive that it was "unreasonable or plainly unjust": *Raggett, Douglas and Miller* (1990) 50 A Crim R 41 at 47; *Salmon v Chute* (1994) 94 NTR 1. The presumption is

that there is no error in the sentence. It is not enough that this Court would have imposed a less or different sentence. There must be some reason for regarding the sentencing discretion as having been improperly exercised: *Cranssen v The King* (1936) 55 CLR 509 at 519-520.

[7] The maximum penalty for a first offence under this provision of the *Liquor Act* is a fine of $1,000.00 or imprisonment for six months. The maximum penalty for a second or subsequent offence is a fine of $2,000.00 or imprisonment for twelve months.

[8] In the Court of Summary Jurisdiction counsel for the appellant submitted that the appellant was placed under pressure by members of his family to commit the offence. It was submitted that the appellant was a reluctant participant. Counsel went on to submit that, although the courts regarded this type of offending as serious and "a term of imprisonment is probably appropriate", it was "open to the court to suspend a term of imprisonment to give him one more opportunity". The bases upon which that submission was made included the circumstances of the offending, the age of the appellant and his relatively clean criminal record.

[9] The submission that the sentence of imprisonment for two months was itself manifestly excessive was only faintly pressed by counsel for the appellant. Whilst no tariff for such offending was introduced or established in this appeal, the challenged sentence was not inconsistent with other penalties for similar offending imposed by the Court of Summary Jurisdiction to which I

was referred. Bearing in mind the undisputed prevalence of the offence, the devastating impact such offending may have upon members of the relevant community, the substantial quantity of alcohol involved on this occasion and the concession that a term of imprisonment was appropriate in light of the attitude to such offending previously demonstrated by the courts, the head sentence cannot be said to be manifestly excessive. The sentence of imprisonment for two months imposed by the learned sentencing Magistrate was not disproportionate to the offence having regard to the need for both specific and general deterrence and it accorded appropriate weight to the appellant's personal circumstances.

[10] The true focus of the appellant's submissions was whether, in all the circumstances, part or all of the head sentence should have been suspended. It was not submitted that the sentencing Magistrate erred by not turning his mind to whether or not to suspend the whole or any part of the sentence. The fact that he did so is clear from a reading of the submissions made to his Worship and from the sentencing remarks. During the course of submissions counsel suggested to his Worship that the appellant may "avoid an immediate term of imprisonment" and went on to set out the basis upon which that submission was made. At the conclusion of the submissions his Worship indicated that he would need to think about the appropriate sentence in the matter and adjourned the hearing for two days. At the time of sentencing the appellant, his Worship had clearly considered and

expressly rejected the submission. He concluded that he did not propose to suspend the whole or any part of the sentence.

[11] A court when sentencing an offender to a term of imprisonment of not more than five years has a discretion to make an order suspending the sentence "where it is satisfied that it is desirable to do so in the circumstances" (s 40(1) *Sentencing Act*). The court will determine the minimum term of imprisonment which must be served to satisfy the requirements of s 5 of the *Sentencing Act*. It must be remembered that the head sentence is, in any event, one that is of a length that would constitute an appropriate disposition in all the circumstances: *Simmons* (1997) 93 A Crim R 589.

[12] In this case it is clear that his Worship was not satisfied that it was desirable to suspend any part of the sentence. This was an experienced Magistrate dealing with an offence and a community with which he was familiar. His Worship was clearly of the view that the period of actual imprisonment imposed was necessary to meet the circumstances of this offence in the relevant community and to provide appropriate deterrence for those who may be inclined to offend in a similar way. As I noted in *Meneri v Smith* [2001] NTSC 106 appellate courts accord respect and weight to the views expressed by those who are regularly called upon to deal with offences of this kind. See also *Griffiths v The Queen* (1976-1977) 137 CLR 293 at 310; *Jambajimba v Seears* [1984] 2 NTJ 439.

[13] In my opinion it cannot be said that the sentence imposed upon the appellant was unreasonable or plainly unjust. Whilst it may have been stern, I am not satisfied that the sentence fell outside the range appropriate to the circumstances of the offence or of the offender. There is no reason for regarding the sentencing discretion as having been improperly exercised and, notwithstanding that other sentencers may have imposed a different sentence, the sentence must stand. No error has been demonstrated and the sentence is not manifestly excessive.

[14] The appeal is dismissed.

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