Alympic v Burgoyne [2003] NTSC 43

PARTIES:	ALYMPIC, Timothy Alexander 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 46 of 2000
DELIVERED:	29 April 2003
HEARING DATES:	28 April 2003
JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Counsel:	
Applicant:	J Kelly
Respondent:	S Geary
Solicitors:	
Applicant:	NTLAC
Respondent:	DPP
Judgment category classification:	C
Judgment ID Number:	mar0316
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Mar0316

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

Alympic v Burgoyne [2003] NTSC 43
No. JA 46 of 2000

BETWEEN:

TIMOTHY ALEXANDER ALYMPIC
Applicant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 29 April 2003)

[1] Application to extend time to appeal against conviction pursuant to s 165 of the Justices Act.

[2] The Justices Act grants a right of appeal to this Court from a conviction in proceedings in the Court of Summary Jurisdiction on grounds involving error or mistake on a question of fact or law or of both fact and law.

[3] The appellant claims to have identified errors of fact or law in the reasons of a learned Magistrate in the Court of Summary Jurisdiction sitting in Alice Springs leading to his conviction for an assault. That conviction was recorded after trial on 12 August 2002.

[4] It is provided in s 171 that an appeal shall be instituted by notice, by entering into a recognisance and on payment of a fee, all as prescribed by the statute. Subsection (2) of s 171 provides a special ground allowing an extension of time to institute an appeal based upon historical circumstances now of little or no relevance in the Territory. However, s 165 empowers the Court to dispense with compliance with any condition precedent to the right of appeal if in the opinion of the Court the appellant has done what is reasonably practicable to comply with them. It cannot be doubted that the provisions referred to are conditions precedent to the right.

[5] The appellant seeks to bring himself within s 165 as the conditions precedent were not complied with until 16 days after the period fixed for the giving of notice expired.

[6] The uncontested evidence of the applicant discloses that on the day of his conviction he instructed his solicitor that he wished to investigate the merits of prosecuting an appeal. Three days later he received a letter from his solicitor confirming his instructions and also confirming that he was to obtain an application for legal aid from the solicitors office, complete it and return it so that consideration could be given to extending aid for the purposes of pursuing the appeal. He was thereby advised that he had 28 days from the date of the conviction in which to appeal and was requested to return the completed form with the application for legal aid as soon as possible.

[7] The applicant then says that he thought about the possibility of appeal and concluded not to do so. He explained why he came to that view including reasons related to perceived stress, inconvenience and monetary loss in attendance at court in association with the appeal and his mistaken belief that the only consequences upon the conviction was the fine of $1,000 imposed.

[8] The applicant became aware on 18 September 2002 that he was named as respondent to a claim by the victim of the assault under the Crimes (Victims Assistance) Act. His solicitor gave him advice about that and he then realised that he would incur a financial liability in addition to the fine. That spurred him to give instructions to institute the appeal. He gave instructions to the solicitor, but the date upon which he gave those instructions is not disclosed.

[9] In my opinion the applicant had not made out a case to bring himself within the provisions of s 165. He failed to do that which it was reasonably practicable for him to do to comply with the Act, that is, complete the application for legal aid in time to enable it to be considered and, if successful, lead to the conditions precedent being fulfilled. Nor did he take any other steps to comply with those conditions precedent. He failed to act as advised for his own reasons. That those reasons may not have been justified is not to the point. His lack of knowledge or mistake on that issue and consequent failure to act cannot be a ground for showing that he did what was reasonably practicable for him to do. It explains why he did

nothing, it does not show that he did something to enable him to rely on s 165.

[10] During the course of argument the applicant raised s 44 of the Limitations Act. I do not consider that that provision applies. It is a general provision relating to extension of time, hedged about with significant limitations, and must yield to the special provisions in that regard in the Justices Act.

[11] I have considered the prospects of whether success on the appeal, if the application was granted, is a relevant factor, and rule that it is not. This is not a general enabling provision for extension of time on grounds which raise for consideration the wider concepts of justice or injustice should the applicant not have the opportunity to pursue the appeal. The enabling power is limited by its express words.

[12] In coming to these views I have been assisted by numerous Territory cases dealing with the subject, *Seven v Seears*, a decision by Forster CJ, reported, [1984] 4 NTJ at 1113 in which his Honour reviewed earlier decisions and confirmed that the requirements of the Act in relation to the institution of appeal were conditions precedent to the right to appeal; *Fry v Williams* [1985] NTJ 397 a decision of Muirhead ACJ reported in 1995 2 NTJ 397 (in which in the last paragraph his Honour said he should express no view as the likelihood of success of the appeal) *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8 a decision of Asche J (as he then was) in which the authorities are extensively reviewed; *Nottle v*

Trenerry (1993) 89 NTR 7, Mildren J in which again there is reference to some of the earlier cases.

[13] The application is dismissed.
