Burgoyne v Burgoyne [2005] NTSC 82

PARTIES:	BURGOYNE, Angelo
	v
	BURGOYNE, Robert Roland
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 39 of 2005 (202422382)
DELIVERED:	22 December 2005
HEARING DATES:	15 December 2005
JUDGMENT OF:	OLSSON AJ

CATCHWORDS:

Justices Appeal - Dismissal by Stipendiary Magistrate of application pursuant to s38 of the Sentencing Act to review community work order - Offender had performed 77 of 240 hours ordered - Application brought without objection by Community Corrections - Offender single male Aboriginal supporting parent with five children - Need to be available for casual shift work to earn money to support children - Discussion of meaning and effect of s38 - Apparent support of application by Community Corrections - Whether discretion appropriately exercised in circumstances - Appeal allowed - Community Work Order discharged - Offender re-sentenced

REPRESENTATION:

Counsel:

Appellant:	T Aickin
Respondent:	C Roberts

Solicitors:

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

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Burgoyne v Burgoyne [2005] NTSC 82
No. JA 39 of 2005 (20422382)

BETWEEN:

BURGOYNE, Angelo
Appellant

AND:

BURGOYNE, Robert Roland
Respondent

CORAM: OLSSON AJ

REASONS FOR JUDGMENT

(Delivered 22 December 2005)

INTRODUCTION

[1] This is an appeal by an offender against the dismissal by a stipendiary magistrate of an application to review a community work order pursuant to s38 of the Sentencing Act.

[2] On 10 January 2005 at the Alice Springs Court of Summary Jurisdiction, the appellant entered a plea of guilty to charges that he had in his possession personal property which, at the time before the making of the charge, was reasonably suspected of having been stolen or otherwise unlawfully obtained.

[3] The prosecution had alleged that, on 30 September 2004, police executed a search warrant at premises occupied by the appellant. During the search the police located and seized numerous items of household goods such as TV receivers, DVD players, telephones, bags, kitchen knives, musical instruments and the like, that they suspected of being stolen.

[4] It was subsequently established that the seized property had, in fact, been stolen from a dwelling in Alice Springs on 1 July 2004. In the event, the police recovered stolen property to the value of slightly in excess of $25,000.

[5] The appellant's explanation was that the items had been in the house, packed up, when he moved in and that he would have been quite happy if no one had claimed them. He and his family had used some of the items and would have simply continued to use them if they had not been claimed.

[6] The learned then Deputy Chief Magistrate recorded a conviction and ordered the appellant to complete 240 hours of community work within eight months. Section 62 of the Summary Offences Act provides that the maximum penalty for an offence of unlawful possession is a fine of $2000 or imprisonment for 12 months.

[7] On 26 August 2005, the appellant made application for the revocation of the community work order and to be re-sentenced. The matter came before the learned magistrate on several occasions. She ultimately refused to accede to that application. This was so, notwithstanding that it was apparently supported by Community Corrections.

RELEVANT BACKGROUND FACTS

[8] It was put to the learned magistrate that the appellant was a single father of five children. The mother had been deemed not an appropriate carer for the children, so he relocated from South Australia, to Alice Springs when his mother died in 1989. This was at about the time of the marriage breakdown.

[9] The appellant was born and brought up in Port Lincoln and it is said that, after leaving school at the age of about 15, he had a very consistent work history, the full details of which are not presently relevant.

[10] It was put to the learned magistrate that, in late 2003, the appellant entered into a relationship with a girlfriend, by whom he had a further two children. Unfortunately, he had a disagreement with her and had to move out of the house that they were occupying.

[11] As a single, aboriginal man with five children he had great difficulty in obtaining other rental accommodation.

[12] It was said that, ultimately, his stepfather, who was moving back to Perth, invited him to move into the house that he had been occupying. He did so. The appellant found that a quantity of goods had been left in one of the rooms. He conceded that his children had taken one or more items from that room and used them.

[13] The appellant admitted that he did suspect that the goods might have been stolen, but was under pressure at the time and did not wish to be evicted from the house.

[14] In essence, it was put to the learned magistrate that the appellant needed to go back to what I take to be substantial employment periods as an orderly at the hospital, or order to pay the rent and support his children. He was finding it impossible to do so and also copy with his community work obligations. It was said that Community Corrections had been very sympathetic and helpful, but that the appellant was simply not keeping up with the required quantum of community work.

[15] The learned magistrate had before her a statutory declaration prepared by Community Corrections that indicated that, as at 26 August 2005, the appellant had only completed 77 hours of community work and had received four warning letters.

[16] It was put to the learned magistrate that the appellant had been in close contact with Community Corrections, which had been supportive of him and endeavouring to help him. Counsel submitted that a continued requirement to do community work was not practical because:

- There was a need for him to devote a reasonable time to the supervision of the children, one of whom had been getting into trouble with the law; and
- He was seeking to obtain and retain work as a casual orderly at the hospital. This required him to be available at short notice, as and when he was wanted. He needed that work to make both ends meet. Counsel stressed that, although the appellant received some money for the children, he needed to have paid work to enable him to cope with the rent and buy food. This was only feasible if he could be available when the hospital required him.

[17] It was pointed out to the learned magistrate that the appellant had commenced casual work as an orderly but that, when he stated that he was not available on certain days per week because of his community service work commitment, the hospital simply stopped calling him.

[18] On that basis it was put to the learned magistrate that the appellant sought to be re-sentenced, so that a more workable disposition could be implemented.

[19] It should be emphasised that the prosecution did not, at any stage, seek to adopt an adversarial role in relation to the application and that an officer of Community Corrections was present for some, if not all of the hearings. The prosecutor did not make any submissions at all, when invited to do so.

[20] Ms Aickin, of counsel for the appellant, asserts from the bar table that Community Corrections actually encouraged to appellant to make the application. A perusal of the transcript is not inconsistent with that contention. I note that, at one point, when it was put to the learned magistrate that the officer of Community Corrections was present and would not be opposing a re-sentencing, the learned magistrate said that, just because someone does not oppose something, did not mean that the proposal would be acceded to. She went on to comment that there *"would have to be extraordinarily good reasons"* to change the sentence from community work to, for example, a fine.

[21] Oddly, the learned magistrate required a prosecutor to supply her with sentencing submissions before she determined whether or not a re-sentencing was in fact appropriate. That procedure was followed. Indeed, the hearing was stood over for a time, to enable that to occur.

[22] The transcript indicates that, on the first appearance, only the Community Corrections officer and counsel for the appellant appeared - a situation consistent with the assertion that the application was in fact being promoted by the former, as suggested by Ms Aickin. The learned magistrate then asked for the interposition of a prosecutor, to provide sentencing information. The matter thereafter proceeded as if it was an *ab initio* sentencing process.

[23] Ms Aickin submitted that, to employ her expression, the process adopted was akin to the putting of the cart before the horse. She argued that, leaving aside the issue of who should have appeared, the correct procedure would have been for a decision to have been made as to the merits of whether or not the sentence ought to be reviewed and the applicant re-sentenced. It was only when a determination to re-sentence was made that sentencing facts and submissions even became relevant. With respect, it is difficult to fault that logic.

[24] In the course of reasons expressed by her, the learned magistrate accepted that she did have a discretionary power to re-sentence the appellant, but commented that *"great care needs to be taken in a decision whether to re-sentence someone. It should not be seen as an opportunity to have another bite at the cherry of de facto appeal process."*

[25] She went on to make the point that, normally, such a matter should go back to the original sentencing magistrate, although she conceded that such a course was not possible in this matter because he had retired. She then summarized what she perceived as being the factors relevant to the application. In her opinion these were:

- The number of hours completed. She noted that 77 out of 240 hours had, in fact, been worked.

- The reasons put forward as justifying the re-sentencing. As to this she noted that reference had been made to childcare responsibilities and the desire of the appellant to recommence work to help support his family.

[26] As to the former aspect she said that that nothing had really changed from the time when the community service order was originally made. She doubted whether that had been a real issue that had led to the working of the limited hours up to that point.

[27] As to the latter she considered that the force of the argument was undermined by the fact that she understood that he had already recommenced some work and was working afternoon shift at the hospital. She felt that, to use her expression, this did not add up. She noted that he had undertaken what was equivalent to an average of only about 2.4 hours per week during the relevant period and had already committed himself to recommence shift work.

[28] I here pause to comment that I am uneasy at the conclusion drawn by the learned magistrate. It seems to me that the strong inference that naturally arose was that, no doubt encouraged by the attitude expressed to her by Community Corrections, the appellant erroneously assumed that a re-sentencing would almost automatically occur; and that he thereafter advised the hospital of his general availability for work.

[29] There is no doubt that the learned magistrate took a fairly jaundiced view of the whole situation. She said that the appellant seemed to have set plans in place to exclude or limit the possibility of him doing the community work irrespective of any order that she made. She did not think that any of the matters referred to in subsection (4) of section 38 were applicable to the circumstances.

[30] The learned magistrate then proceeded to summarise her perception of the situation in these terms:

"Certainly, I do take account of the fact that the application has been initiated by the defendant prior to the time running out and I do give that some weight. I don't give it undue weight though because we have many people before the courts who are simply not literate enough to even contemplate how they'd make such an application and I wouldn't want it to be seen as I will only consider applications like this when they are made in the timely fashion as the defendant has done it. But I do give it some weight that he has initiated the proceedings before the times run out for the work to be done.

One of the difficulties I had with this exercise of this discretion is it was put to me that he was not getting casual work because he indicated that he was having to not be available on certain days and that the Alice Springs Hospital was not contacting him with that. The difficulty I have with that is then well, why didn't he then take that opportunity to get the work done when he wasn't the phone calls [sic] from the hospital. In my view, that part of the submission just simply does not add up.

The time given to do the work and the hours set is also a factor to be considered. If this defendant had got much closer to the hours and seeming [sic] to be making a real effort to try and get them done than I may have been more favourable in considering what to do with his application. He was required to do seven and a half hours a week to complete the order in time.

And whilst that does not appear to be an undue - place an undue burden on him, I do think that I should not lose sight of the fact that he had childcare responsibilities that on top of seven a half hours per week is perhaps a slight - well, it would certainly be more of a burden than

someone who has no childcare responsibilities. But childcare responsibilities of themselves cannot ever be a bar, in my view, to the ability to undertake community work. Everyone is assessed on the merits of their case. Occasionally, childcare responsibilities will mean work cannot be undertaken but it's not a bar on itself. That would have been a factor that was known he court at the time he was being sentenced and he was approved as suitable to do community work.

On the material before me, I cannot find that he's made a real effort to complete the work on time. I disagree with the submission that he's worked constantly or consistently from 20 March to 9 August. In my view, there was only one period of time where you were - where he was working consistently, that is the last two days of March and April and in my view, they are the only time he was working consistently. He did not start work for two a half months after the original order was given. He was given warnings and chances by Corrections. They could have breached him but they did not, they persevered with the situation.

He then signed an agreement on 3 June to start work again on 6 June and to work Monday, Tuesdays and Wednesdays. Even though the agreement did start on the 6th, in fact, he did five hours on 4 June so that is to his credit. Then there was no more work for a month until 6 and 7 July, then there's 18 and 19 July and finally 9 August. That's been the last hours worked. So, in my view, there is no evidence before me that he was working consistently in the period since March 2003……

I do reject the submission that he did work consistently from that period. He did not start his work for two a half months after the order was made. And then when he signed another agreement to start on 6 June, it was another month before he restarted that work, leaving aside the date 4 June 2005."

[31] The learned magistrate thereupon declined to exercise a discretion to revoke the community work order and re-sentence the appellant. She did, however, intimate that she would consider an application for an extension of time.

THE LEGISLATIVE CONTEXT

[32] Section 38 of the Sentencing Act is expressed as follows:

> *"(1) The court, on the application of the Director or an offender, may -*
>
> *(a) discharge a community work order;*
>
> *(b) revoke a community work order and deal with the offender as if the offender had come before the court for sentence for the offence in respect of which the order was made;*
>
> *(c) reduce the number of hours the offender is required to participate in an approved project under the order; or*
>
> *(d) vary the time within which the offender is to complete his or her participation in the approved project.*
>
> *(2) Where the Director makes an application under subsection (1), the court shall summons the offender to appear before it on the hearing of the application and, if the offender does not appear in answer to the summons, may order that a warrant to arrest the offender be issued.*
>
> *(3) Where an offender makes an application under subsection (1), the court shall cause notice of the application and of the time and place fixed for the hearing to be served on the Director.*

(4) Without limiting the matters that the court may take into consideration in reviewing a community work order, the grounds for reviewing such an order include the fact -

(a) that the offender is in custody on a charge for another offence;

(b) that the offender's behaviour is such that the carrying out of the terms of the order is impracticable; or

(c) that the operation of the order offends other persons"

[33] There are several points that need to be made concerning the construction of these provisions.

[34] Whist ss(4) is an inclusive provision that indicates certain bases upon which an order may properly be reviewed, it is, in no sense, a limiting provision. On a fair reading of the section there can be no question that the court is invested with an unlimited judicial discretion to review a community work order whenever, in its opinion, the circumstances warrant such a course.

[35] I agree with the submissions of counsel that the word *"offends"*, as employed in ss(4)(c), is used in the sense of having an adverse effect on other persons. In the context of s38 an important consideration might well be the impact that the community work order may be having on other family members. It follows that, in the instant case, a very proper area of consideration was in relation to any difficulties that might have arisen in relation to the care and supervision of the appellant's five children by reason of the obligations under the community work order.

[36] I must confess that I have some difficulty with the comment that was apparently made by the learned magistrate to the effect that there would

have to be extraordinarily good reasons to warrant a change from a community work order to some other form of sentence.

[37] True it is that a s38 application is manifestly not intended as a vehicle upon which to mount a de facto appeal against the original community work order and that it would be quite inappropriate to accede to an application simply to give effect to a capricious whim of an offender. It is beyond question that some proper reason for the granting of the review must be demonstrated. I do not think that it is possible to fashion some all embracing principle in that regard.

[38] No doubt, a review will often be triggered by some change in circumstances that has occurred subsequently to the making of the original order. Equally, it may be that an offender initially considers that he or she ought to be able to satisfactorily discharge the relevant obligations and then finds that, for some reason other than sheer disinclination or unwillingness to do what is required of him, it is seemingly impossible to fulfil the requirements of the order, given that persons practical circumstances.

[39] It is significant that the section envisages that an application for review may be made either by the offender or the Director. Presumably, if the Director elected to come to the court and indicated that, for some expressed reason, it was impractical or unworkable to persevere with the community work and the offender accepted that assertion, then a proper exercise of judicial discretion would demand the conduct of a review under the section.

THE ISSUES

[40] The first point made by Ms Aickin was that the conclusion of the learned magistrate that the appellant had recommenced work at the hospital prior

to being relieved of his community work obligation, so as to exclude or limit the possibility of performing that work, was not supported by any evidence. All that was before her was some passing comment that was made from the bar table at one stage, during discussion concerning a proposed resumption date for the hearing

[41] She also argued that undue stress was placed on the failure by the appellant to work consistently at his obligation, when there was no detailed evidence before the learned magistrate to suggest that it would have been feasible for him to have performed the community work on a more regular basis. There was, on her argument, simply no concrete basis of evidence that could possibly give rise to the inference that was in fact drawn.

[42] These problems were, she submitted, compounded by what was said to have been a failure to give any real weight to the obvious fact that it was virtual common ground that Community Corrections did not oppose the application, because it had accepted that, given its knowledge of the appellant's domestic circumstances, it had been impractical for him to discharge his community work obligations on a regular basis because of his need to earn money and support and care for his five children.

[43] It was implicit in Ms Aickin's argument that the learned magistrate had allowed herself to be distracted by inferences that were not really justified by an substantial evidence, to the exclusion of giving due cognisance to the circumstance that there was not dispute between Community Corrections and the appellant as to the impracticability of persevering with the community work obligation.

[44] It must be said, against that background, that, the ultimate indication of the prosecutor that he did not wish to make any submissions in relation to the application supported such a thesis. Moreover the whole of the

circumstances also point in favour of a conclusion that Ms Aickin's assertion that Community Corrections had actually encouraged the appellant to bring the application was, indeed, accurate.

CONCLUSIONS

[45] I am acutely conscious, in approaching this matter, of the point stressed by Mr Roberts, of counsel for the respondent. This court ought to be slow to overturn what was essentially an exercise of judicial discretion and it should not do so unless some mistake or error is clearly demonstrated (*House v The King (1936) 55 CLR 499 at 509).*

[46] However, I think that he was unerringly accurate when he commented that the learned magistrate seems to have considered, at the time, that she was being presented with an inappropriate *fait accompli* and that she had been reluctant simply to take the situation at face value.

[47] I would make it abundantly clear that, had the parties involved simply come before the court with little or no explanation and merely sought what was tantamount to a consent order, that would have been quite inappropriate. However, I do not think that the learned magistrate was being presented with a *fait accompli* of that type. Distilled to the essence, the appellant, with the apparent concurrence of Community Corrections, was doing no more than report that, from a practical point of view, the situation had become unworkable.

[48] It seems to me that, absent some compelling reason to question the accuracy of what was being presented as common factual ground, it was inappropriate to seek to draw other contrary inferences. After all, the government agency charged with the responsibility of overseeing the practical implementation of the community work scheme and that had had

significant ongoing contact with the appellant was in a far better position to know and assess his domestic circumstances and the practical situation generally.

[49] It is scarcely for the court to seek to challenge facts put before it as undisputed unless there are truly compelling grounds for so doing. In this case, it is not difficult to envisage the practical problems that the appellant, as single aboriginal parent of five young children was facing, particularly if he could not hold himself out as being available for work at short notice.

[50] Although I have been slow to reach such a conclusion, I am of the opinion that, with respect, the exercise of judicial discretion in this matter miscarried. I consider that the evidence, such as it was, before the learned magistrate did not support the inferences that she sought to draw from it. Such inferences were contrary to what was being presented by the relevant parties as being the undisputed facts. On the face of it, the undisputed material before the court demanded a review of the type sought.

DECISION

[51] I therefore allow the appeal and set aside the order of dismissal of the appellant's application for review. I substitute for it an order discharging the relevant community work order.

[52] It was accepted by the parties to the appeal that, in the event that I came to the above view, the most efficacious course was for me to re-sentence the appellant in light of submissions made by counsel in that regard. I record that, prior to publishing the present reasons, I invited counsel to make submissions to me for that purpose.

[53] At the end of the day, it was really not disputed that the only feasible approach is to impose a modest sentence of imprisonment that reflects a due allowance for the hours of community work already performed by the appellant.

RE-SENTENCE

[54] Having regards to all the circumstances, I consider that the appropriate course of action is to substitute a new sentence of imprisonment for 21 days from today. That sentence will be wholly suspended. I fix 12 months from today as the time within which the appellant must not commit another offence punishable by imprisonment. He is advised that, if he does commit such an offence, he is liable to be brought back before the Court of Summary Jurisdiction and may well have the sentence imposed restored, as well as being dealt with any further offence.

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