

Kunoth v Burgoyne [2004] NTSC 42

PARTIES:

DESMOND KUNOTH

v

ROBERT ROLAND BURGOYNE

TITLE OF COURT:

SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION:

SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction

FILE NOS:

JA10/04, JA11/04, JA12/04, JA13/04 & JA14/04 (9926652, 20102184, 20307736, 20406773 and 20407336)

DELIVERED:

12 August 2004

HEARING DATES:

18 June 2004

JUDGMENT OF:

THOMAS J

REPRESENTATION:

Counsel:

Appellant: A Hopkins
Respondent: R Noble

Solicitors:

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

Judgment category classification:

C

Judgment ID Number:

tho200408

Number of pages:

9

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

Kunoth v Burgoyne [2004] NTSC 42
Nos. JA10/04, JA11/04, JA12/04, JA13/04 and JA14/04 (9926652,
20102184, 20307736, 20406773 and 20407336)

BETWEEN:

DESMOND KUNOTH
Appellant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 12 August 2004)

- [1] This is an appeal from a sentence imposed by a stipendiary magistrate in Alice Springs on 2 April 2004.
- [2] On this date the appellant was convicted and sentenced to four months imprisonment for the offences of driving whilst disqualified and exceeding the speed limit, committed on 20 March 2004 (file 20406773).
- [3] The agreed facts as recounted by the prosecutor in the Court of Summary Jurisdiction are (tp 2):

“... about 4 in the afternoon, Saturday, 20 March this year, the defendant was driving a Toyota Camry on the Lasseter Highway from Mutitjulu towards Yulara. On the Lasseter Highway just inbound

from the National Park entrance the defendant's vehicle was detected by police radar travelling at a speed of 103 kilometres per hour.

This particular section of the Lasseter Highway is sign-posted at 80 kilometres per hour. He was apprehended and asked if he had a driver's licence. He said, 'No, I lost it drinking and driving in Alice Springs'. Police inquiries showed that the defendant was disqualified from driving a motor vehicle. He was arrested and taken to the police station.

Those further inquiries showed that he was disqualified from 10 October 2002 for a period of 2 years. He didn't give a reason for driving disqualified or exceeding the speed limit. At the time of the offence the Lasseter Highway was a public road open to the public. There was one adult passenger in the vehicle at the time."

- [4] On 2 April 2004, the appellant was further convicted and sentenced to six months imprisonment for the offences of aggravated assault and five months aggregate for the offences of driving whilst disqualified and drink driving.

These offences occurred on 28 March 2004 (file 20407336).

- [5] On this latter file the sentences are concurrent, and two months of the total six months sentence is to be served concurrent with the sentence on 20406773, making a total of eight months imprisonment.

- [6] The facts in respect of the offences committed on 28 March 2004 as related by the prosecutor in the Court of Summary Jurisdiction and admitted on behalf of the appellant are as follows:

"... on 12 August last year, a Domestic Violence Order was served on the defendant in Alice Springs. It had the following conditions: he wasn't to approach or remain at any place where Kitty Impana was living or staying if he had been drinking; he wasn't to approach Kitty Impana directly or indirectly if he'd been drinking; not contact her if he'd been drinking; not to assault her or threaten to assault; and, not to be provocative or offensive towards her.

The order is in place until 30 July this year. During midmorning of Sunday, 28 March this year, the defendant consumed an unknown amount of liquor near Mutitjulu Community. He then got into a Toyota Camry. The victim in this matter, Ms Impana, also got in the vehicle. He drove the vehicle to several houses within the Mutitjulu Community.

At one particular house the defendant and victim got out and harassed the occupant for money. The occupant was not at home and the defendant became angry with the victim. He's then slapped the victim to her face. He's also scratched the victim to the right side of her face with his fingernail. The defendant then got back into the driver's seat of the vehicle, instructed the victim to also get in the vehicle and she did so.

Both then went to the land council house within the community. At the house, the defendant said to the victim, 'I'm going to hit you in front of your brother'. Soon after, the defendant and the victim drove to the nurse's house within the community. Both got out of the vehicle and began to argue. The defendant said to the victim, 'I'm going to hit you in front of sister'.

He also said, 'I will hit you in the head with a hammer'. The victim then got into the nurse's vehicle. The nurse drove the victim to the clinic. The defendant followed them both. The defendant – at the health clinic the defendant again said to the victim, 'I will hit you in the head with a hammer'. Soon after, the nurse and the victim locked themselves into the health clinic and contacted police.

A short time later police arrive. The defendant was given a roadside breath test, which was positive. He was arrested for breath analysis and taken back to the police station. The defendant's blood alcohol content was 0.164%. Inquiries showed he was disqualified from 10 October 2002 for 2 years. He was offered the opportunity to take part in a record of interview later. He declined to do so.

No permission to assault the victim. She received some treatment to some minor soft tissue injuries to her right cheek. There's no authorisation for the defendant to breach the Domestic Violence Order. At the time of the offences, the streets of Mutitjulu were public streets open to the public."

- [7] The appellant was, at the time of the commission of these offences, subject to three separate suspended terms of imprisonment on files 9926652, 20102184 and 20307736.

- [8] On file 9926652, being offences of drive exceed .08 and drive disqualified on 23 November 1999, the appellant was convicted on 30 January 2003 and sentenced to three months imprisonment which had been suspended. The operative period was two years from 30 January 2003.
 - [9] On file 20102184, being an offence of drive disqualified on 2 February 2001, the appellant was convicted on 30 January 2003 and sentenced to three months imprisonment which had been suspended. The operative period was two years from 30 January 2003.
 - [10] On file 20307736, being offences of aggravated assault committed on 24 December 2001, the appellant was convicted on 31 July 2003 and sentenced to three months imprisonment to be released after one month, the balance of two months imprisonment was suspended. The operative period was two years from 31 July 2003.
- [11] This was a total of eight months sentence which had been suspended.
- [12] The appellant admitted to being in breach of these suspended sentences. He was ordered to serve the full period of eight months imprisonment held in suspense. The sentences for the offending on 20 and 28 March 2004 were made cumulative.
 - [13] Accordingly, the head sentence was 16 months imprisonment. The learned stipendiary magistrate then fixed a non parole period of eight months.

[14] The appellant filed a Notice of Appeal setting out the Grounds of Appeal which are as follows:

- (a) That the learned stipendiary magistrate erred by failing to take into account the totality principle of sentencing.
- (b) That the learned stipendiary magistrate erred in that he gave insufficient weight to the defendant's antecedents.
- (c) That in all of the circumstances the sentence was manifestly excessive.

[15] On the hearing of the appeal the submissions by counsel for the appellant were made in respect of Ground 1. Counsel for the appellant submitted that Ground 2 was subsumed by Ground 1. The appellant did not seek to argue Ground 3.

[16] Accordingly, I deal with Ground 1.

Ground 1: That the learned stipendiary magistrate erred by failing to take into account the totality principle of sentencing.

[17] It was conceded by counsel for the appellant that the sentence of eight months imprisonment for the offences that occurred on 20 and 28 March 2004, do not of themselves contravene the totality principle. The essence of the appeal is that the cumulative imposition of three separate suspended periods of imprisonment totalling eight months offends the proper exercise of the totality principle. Mr Hopkins, counsel appearing for the appellant,

submits that the resultant total head sentence of sixteen months is disproportionate to the gravity of the offending on 20 and 28 March 2004. It was further submitted that the aggregate of sixteen months is not “just and appropriate” in all of the circumstances: *Mill v R* (1988) 166 CLR 59 at 63; *R v Denton* [1999] QCA 343, 20 August 1999.

[18] Counsel for the appellant argued that the most appropriate approach was to telescope the sentences imposed for breach of suspended sentence so that they would be either fully or partially concurrent with the sentences for the new offences, to achieve a sentence commensurate with the total criminality of the offending.

[19] Counsel for the appellant submitted that in determining the totality of the offenders criminality insufficient weight was accorded to the following:

- “That there had been no breach of obedience to the Court orders suspending sentences on files 9926652 and 20102184 for a period of about fourteen months, and for a period of about eight months on file 20307736;
- That the offences were committed within eight days of each other;
- That the Appellant pleaded guilty at an early opportunity; and

In relation to file 20406773:

- That the Appellant’s offending was not aggravated by the consumption of alcohol and resultant danger to the community, though it is conceded he was speeding;

In relation to file 20407336:

- That the Appellant initially sought to comply with the Domestic Violence Order – leaving the victim to camp out bush by himself and drink;
- That the victim sought the Appellant out, threw sand in his face and struck him over the head;

- That he drove at his wife's behest in search of money to travel to a funeral;
- That the assault was constituted by a single slap and resultant scratch, together with ongoing threats in the presence of others;
- That the Appellant had a limited record of assaults, namely in 1994 and 2001, and that there was a three year gap in relevant offending.”

[20] I note that the matters referred to above relating to file 20406773 and 20407336 were all canvassed in some detail by Ms Loy who appeared for the appellant in the Court of Summary Jurisdiction. The learned stipendiary magistrate was fully apprised of the extenuating circumstances and reflected this in the sentences he imposed for the offences committed on 20 and 28 March 2004.

[21] A record of prior convictions was Exhibit P1 before the learned stipendiary magistrate. This record indicates a lengthy history of drink driving offences. The appellant has six prior convictions for drive exceed .08 during the last 10 years. He has two prior convictions for assault the last of these being on 31 July 2003 and three prior convictions for drive disqualified.

[22] With respect to the breach of suspended sentences the learned stipendiary magistrate said in the course of his reasons for sentence (tp 3):

“The other unfortunate circumstances of this trouble is that when you committed the offences this month you were on suspended sentences of files 9926652, that order was made on 30 January 2003, on file 20102184 and that order was made on 30 January 2003 and on file 20307736 that order was made on 31 July. So obviously, because

somebody is under orders of suspending sentences they've got a very strong obligation to make sure they don't get into any trouble. And you were effectively on two orders, albeit on three files and in my opinion that makes your conduct worse because you, of all people, were supposed to make sure that you complied with court orders and didn't get into any trouble at all."

[23] The learned stipendiary magistrate was clearly well aware of the periods of time the appellant had been under a suspended sentence prior to the breaches. His Worship correctly emphasised the importance of complying with the conditions of a suspended sentence.

[24] His Worship stated he was taking into account the principle of totality. He also stated his concern that the failure to comply with the previous suspended sentences indicated "there may not be great prospects for staying out of gaol". His Worship decided against a further suspended sentence with some supervision conditions because, as he noted, such orders had not been effective on previous occasions. He decided to proceed by way of fixing a non parole period.

[25] The appellant is a man 59 years of age. His Worship commented that it was reasonable to assume that a mature man of the appellant's age would realise he could not continue in this way.

[26] The learned stipendiary magistrate took into account in his reasons for sentence that there had been a plea of guilty at the "first available opportunity". His Worship noted that "it is particularly important that Kitty didn't have to come along and tell her story about what happened on that

day". He accepted the plea of guilty as a genuine expression of remorse particularly with respect to the offence of assault.

[27] The sentencing remarks made by the learned stipendiary magistrate do not disclose error. I am not persuaded that an overall head sentence of sixteen months with a non parole period of eight months for the offences committed in March 2004 and the breach of three suspended periods of imprisonment offends the totality principle or is manifestly excessive.

[28] I would dismiss the appeal and confirm the sentences imposed by the learned stipendiary magistrate.
