*Alice v Burgoyne* [2003] NTSC 107

| | |
|---|---|
| PARTIES: | ALICE, Rodney |
| | v |
| | BURGOYNE, Robert Roland |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION |
| FILE NO: | JA 37 of 2003 (20313646) |
| DELIVERED: | 12 November 2003 |
| HEARING DATES: | 15 October 2003 |
| JUDGMENT OF: | MILDREN J |

**REPRESENTATION:**

*Counsel:*

| | |
|---|---|
| Appellant: | D Bamber |
| Respondent: | R Noble |

*Solicitors:*

| | |
|---|---|
| Appellant: | CAALAS |
| Respondent: | DPP |

| | |
|---|---|
| Judgment category classification: | C |
| Judgment ID Number: | Mil03316 |
| Number of pages: | 7 |

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

*Alice v Burgoyne* [2003] NTSC 107
No. JA 37 of 2003 (20313646)

BETWEEN:

**RODNEY ALICE**
Appellant

AND:

**ROBERT ROLAND BURGOYNE**
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 12 November 2003)

[1] This is an appeal against sentence from the Court of Summary Jurisdiction.

[2] On 15 August 2003 the appellant pleaded guilty to the following offences:

| Count | Charge | Disposition |
|---|---|---|
| Count 1 | Drive disqualified | Imprisonment for 2 months suspended after 21 days |
| Count 2 | Exceed .08 (.128%) | Imprisonment for 1 month concurrent with count 1 |
| Count 3 | Drive unregistered motor vehicle | Aggregate fine of $510 |
| Count 4 | Drive uninsured motor vehicle | |
| Count 5 | Drive motor vehicle in contravention of defect notice | Fine $80 |

[3] In addition the Court disqualified the appellant from holding or obtaining a driver's licence for a period of 12 months. The operational period of the suspended sentence was for a period of 14 months.

[4] The grounds of appeal are as follows:

1. That the learned Magistrate erred in failing to totally suspend the sentence

2. That the learned Magistrate erred in failing to take account of lack of relevant prior convictions.

3. The sentence is manifestly excessive.

### *Factual Background*

[5] At about 12.48 am on the morning of 18 July 2003 the appellant was driving a red Ford Falcon sedan north along Woods Terrace, Alice Springs. He was pulled over on Woods Terrace for the purposes of a random breath test. At the time of being spoken to by police it was observed that he had bloodshot eyes and slurred speech. A positive reading was obtained from a roadside breath test and he was arrested for the purposes of breath analysis. Subsequent breath analysis returned a reading of 0.128%. When asked why he had been driving a motor vehicle whilst intoxicated, he replied, "Just to get home."

[6] Subsequent checks of police records revealed that the appellant was not the holder of a driver's licence and had in fact been disqualified in the Northern Territory from obtaining a licence from 30 December 2002 for a period of 12 months. When asked why he was driving a motor vehicle whilst disqualified, he replied, "Too far to walk."

[7] Checks also revealed that the registration and insurance had expired on the vehicle on 27 May 2003. When asked why he was driving an unregistered and uninsured motor vehicle he replied, "I thought it was still registered." Checks also revealed that the vehicle had been defected on 19 May 2003 and was still recorded as being a defective motor vehicle.

[8] When asked why he was driving a motor vehicle for which a current defect notice was in place he replied, "It was for the windscreen. It's been fixed, but I didn't know it had to be checked."

[9] The appellant had prior convictions for aggravated assault and intentionally causing grievous bodily harm for which he had received a partially suspended sentence of imprisonment. He also had a prior conviction on 14 February 2003 for driving with a blood alcohol content in excess of .08 namely, .176%, for which he was fined $400 and his licence was disqualified for a period of 12 months back-dated to 30 December 2002. The current offending occurred some five months after that period of disqualification was imposed.

[10] It was put on the appellant's behalf that the appellant ordinarily lived at a family outstation on the north road about 22 kilometres out of town. He had a sister and other family who lived at Charles Creek and he alternated between the two. On the evening in question he was at the Charles Creek camp. He had an argument with his sister. He had had a bit to drink. He had not intended to go away, but because of the argument he decided that he did not want to stay at the Charles Creek camp. The car belonged to his brother. He was aware that there had been a defect notice in relation to the windscreen, but understood that the windscreen had been repaired. He got into the vehicle in order to drive back to the family outstation. It was put that this was a spur of the moment decision and that there was nothing untoward in his actual driving.

***Ground one – Sentence should have been suspended***

[11] Dealing with this ground the appellant's submission is that his counsel had submitted to the learned Magistrate that a sentence of imprisonment ought not to be imposed or that if one was imposed it ought to be immediately suspended, that this was not demurred to by the prosecutor and without giving counsel for the appellant any warning, the learned Magistrate immediately imposed an actual sentence of imprisonment. It was suggested that the learned Magistrate had erred in this approach. It was further submitted that because the prosecutor had indicated that a fully suspended sentence would not be inappropriate, this discouraged counsel for the

accused from putting to the court everything that might have been put in mitigation.

[12] I am unable to accept this submission. The position of the prosecutor was not entirely clear. The prosecutor said that:

> "… the Supreme Court has made it clear, your Worship, in relation to drive disqualified. I don't disagree that any period of imprisonment could be fully suspended, but I would indicate that the Supreme Court has made it clear in relation to the drive disqualified matter."

[13] This comment is somewhat elliptical. It may mean that the prosecutor has accepted that the Magistrate would not be in error in imposing a fully suspended sentence in relation to some or all of the counts, or it may mean only that a fully suspended sentence would be appropriate in relation to some counts but not the drive disqualified count. However that may be, there is no authority for the proposition that a Magistrate must give a warning to counsel that he intends to impose an actual sentence of imprisonment. The matter is quite different where the accused is unrepresented (see for example *Black v Smith* (1984) 30 NTR 29); and it is well established that a sentence ought not to be increased on appeal without warning, see for example, *Parker v DPP* (1992) 65 A Crim R 209 and *Fagioli v Ure* (1996) 84 A Crim R 504. However there is no principle such as that contended for by the appellant in a case where the appellant is represented. It is the duty of his counsel, notwithstanding the attitude of the prosecutor, to put everything that may fairly be put on his client's behalf. It was put by the appellant that matters personal to the appellant were not put

to the court below because of the indication of the prosecutor. I have considered this submission and whether in the circumstances the error of counsel is a sufficient reason for granting the appeal, but the difficulty I have is that I was not told of any matters personal to the appellant on the hearing of the appeal which would have warranted a different course than that adopted by the learned Magistrate. Accordingly ground one of the appeal must fail.

***Ground two – Lack of prior relevant convictions***

[14] In my opinion there is nothing in this submission. There was a relevant prior conviction which the learned Magistrate clearly knew about and took into account. This ground of appeal must fail.

***Ground Three – Manifestly excessive***

[15] It was submitted that an actual term of imprisonment for a second offence for exceed .08% was outside the range of usual sentences for courts to impose and indeed a second offence for drink driving does not ordinarily attract a sentence of imprisonment at all. No statistical information was presented to the court by the appellant to indicate what the range of sentences normally imposed by the lower courts is for exceed .08 but I am prepared to accept that generally speaking it is unusual for a second offence of exceed .08 to attract a prison sentence particularly where the reading is below .15%.

[16] Nevertheless, what I am not prepared to accept is that it is unusual for courts to impose an actual sentence of imprisonment for driving whilst disqualified even if it was a first offence for that offence.

[17] There are a number of occasions when this Court has indicated that the gravity of the offence of driving whilst disqualified is such that gaol for some period is most usually the appropriate sentence, see for example *Flowers v Schute* (unreported, 12 May 1993 per Angel J); *Ebateringa v Boldiston and Billstein* (1988) 8 MVR 413 per Asche CJ; *Pryce v Foster* (1986) 64 ALR 23; *Smith v Torney* (1984) 29 NTR 31; *Oldfield v Chute* (1992) 107 FLR 413; *Arnold v Trenerry* (1998) 118 NTR 1; *Hales v Garbe* [2000] NTSC 49 per Martin CJ; *Gokel v Hammond* (2001) NTSC 9 per Thomas J.

[18] I do not consider that it has been demonstrated that the learned Magistrate erred in imposing an actual sentence of imprisonment for two months for the driving disqualified offence particularly as there was nothing in the circumstances to excuse the appellant's conduct and the offence occurred only a relatively short time after the period of disqualification had been imposed.

[19] Given that the sentence of imprisonment for exceed .08 was made wholly concurrent with the sentence for driving whilst disqualified, I am unable to see that the sentences imposed were manifestly excessive.

[20] In conclusion the appeal must be dismissed.