JasonPepperill v Robert Roland Burgoyne [2005] NTSC 50

PARTIES:	JASON PEPPERILL v ROBERT ROLAND BURGOYNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 31 of 2005, 20508912, 20500408, 20409378, 20218725
DELIVERED:	13 September 2005
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DECISION OF:	OLSSON AJ

CATCHWORDS:

APPEAL

Justices – Appeal against sentence– Driving with prescribed Concentration of alcohol in the blood - Driving whilst disqualified – Driving an Unregistered and uninsured vehicle – Driving a vehicle in a condition Unsafe to drive – Whether sentences manifestly excessive – Whether Sentences failed to recognise the totality principle – Whether head sentence crushing in the circumstances – Whether concurrency provisions of the Sentencing act should have been applied.

REPRESENTATION:

Counsel:

Appellant:	T. Aickin
Respondent:	C. Roberts

Solicitors:

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

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

Jason Pepperill v Robert Roland Burgoyne [2005] NTSC 50
JA 31 of 2005, (20508912, 20500408, 20409378, 20218725)

BETWEEN:

Jason PEPPERILL
Appellant

AND:

Robert Roland BURGOYNE
Respondent

CORAM: OLSSON AJ

REASONS FOR DECISION

(Delivered 13 September 2005)

Introduction

[1] This is an appeal against sentences imposed by a Stipendiary Magistrate on the appellant on 27 April 2005. The appellant contends that the overall sentencing approach adopted produced a result that was manifestly excessive in all of the circumstances and failed to give adequate recognition to the totality principle.

[2] On 26 April 2005, the appellant appeared before the Alice Springs Court of Summary Jurisdiction in relation to offences charged on two separate files.

[3] File No 20500408 concerned four offences said to have been committed on 6 January 2005. These were:

3.1 Driving a motor vehicle with a concentration of alcohol in the blood in excess of 80 mg of alcohol per 100 mg of blood (namely 148 mg);

3.2 Driving a motor vehicle whilst disqualified;

3.3 Driving an unregistered motor vehicle on a public street; and

3.4 Driving a motor vehicle that did not have a current compensation contribution on a public street.

[4] File No 20508912 concerned five offences said to have been committed on 15 April 2005. Four such offences were the same generic type as those on the first File, save that the alleged concentration of alcohol was 98 mg per hundred milligrams of blood. The fifth charge was that of being the driver of a motor vehicle which was in a condition unsafe to drive.

[5] The appellant pleaded guilty to all charges.

[6] The learned Magistrate was told that, on the first occasion at about 5 p.m., the appellant was observed driving a Datsun sedan with no number plates

in a southerly direction on the Stuart Highway near the Six Mile Community at Ti Tree. Checks made at the time indicated that he had been disqualified from driving for a period of 18 months from 12 May 2004.

[7] When asked why he was driving, his response was to the effect that he was "*Going to pick the kids up*". At the time, traffic was light and the weather fine.

[8] In making submissions on behalf of the appellant, counsel informed the Court that the appellant had been driven to the Ti Tree Roadhouse by an uncle, who was to have driven him back to the Six Mile area. However, his uncle had decided to stay at Ti Tree and gave the appellant his keys to the vehicle. The appellant had been unable to get anyone else to drive the vehicle. He therefore drove back himself, because he needed to get back to his children.

[9] The subsequent group of offences related to an incident that occurred at about 7:15 p.m. on 15 April 2005. The appellant was seen driving a Subaru station wagon in a northerly direction along the North Stuart Highway, whilst towing a Ford Falcon station wagon.

[10] It was noted that he weaved across the middle broken white line on several occasions, crossing into the path of oncoming traffic. His vehicle had no

tail lights and only one working headlight. He was pulled up about 10 kilometres north of Alice Springs.

[11] The Court was told that both vehicles involved in the second incident belonged to the appellant's auntie and that he had agreed to drive the towing vehicle under some pressure from her, because, although she had a licence, she had never towed another vehicle. The towed vehicle was inoperable, but the auntie proposed to have it done up at her place near the Tanami Road junction.

[12] The learned Magistrate was informed that the commission of the offences breached the conditions of suspension of two earlier sentences that had been imposed on the appellant in relation to Files Nos 20218725 and 20409378. Both of these concerned offences that had been dealt with on 12 May 2004 at the Yuendumu Court of Summary Jurisdiction.

[13] On the first file the appellant had pleaded guilty to four offences similar to those the subject of File No 20500408, committed on 12 January 2002. He had been sentenced to an aggregate of two months imprisonment, suspended forthwith -- the specified period being 18 months from 12 May 2004.

[14] On the second file the appellant had pleaded guilty to an offence of having driven a motor vehicle on 23 April 2004, whilst disqualified. An identical, but concurrent, sentence had been imposed in respect of that offence.

[15] Accordingly, the learned Magistrate was asked to deal with breaching applications in respect of the last mentioned two files, together with the matters then currently before him.

[16] It was common ground before the learned Magistrate that the appellant had little in the way of an antecedent record, apart from the offences to which reference has already been made.

[17] Counsel made the point to the learned Magistrate that the appellant was a 31-year-old Amudgarra man, who had not been in very much prior trouble. He had never before been required to serve any custodial sentence. It was said that he lives at an outstation near the Mount Allan Community with his wife and young family and works there as a stockman.

[18] It was put to the learned Magistrate that going to prison for any length of time would have a tremendous impact on the appellant and that it would cause serious hardship because of his inability to work and look after his family.

[19] In the course of his sentencing remarks the learned Magistrate noted the appellant's good record up until 1999, but commented that there had been several incidents of disregard for the orders of the Court since 2002. He agreed with the submission that proper credit should be given to the appellant for his pleas of guilty.

[20] However, he drew attention to the prevalence of the types of offence then before him and the need to bear in mind issues of both specific and general deterrence. He also reflected on the aggravating factor that the most recent offences had been committed during the period of suspension of the earlier sentences

[21] Having expressed the view that the earlier suspended sentences ought to be restored because of the repeat nature of the offences, he relevantly concluded his sentencing remarks in these terms:

> "So far as the other two matters are concerned, it is my view that they are separate and distinct offences and that the criminality displayed by you is serious. And to reflect the seriousness of it and to bring home to you that you must not drink and drive or drive in contravention of the Court's orders, I am of the view that those sentences should be served cumulatively. In ordering that I do take into account the totality principle, that is not imposing a sentence upon you that is crushing and I intend to reflect that by way of suspending the total sentence that I'm going to impose upon you today.
>
> ……..
>
> Because you have pleaded guilty to the offending that happened in January and April, although it took you a bit of time to get along to Court for the

January matter, nevertheless, I accept your plea as a genuine expression of you being sorry for what you did and you've also saved the community the cost of having a hearing and calling witnesses to prove the charges against you, because of those reasons I have decided to allow you the full discount of one third on each of those matters and that's what I intend to. Because of the matters that have been put to me by Mr Kenny and for the reasons that I've already set out so far as the totality principle is concerned, I'm going to suspend part of the sentence as opposed to fixing a non-parole period but take into account those things that have been put to me and not to impose a crushing sentence on you."

The impugned sentences

[22] The learned Magistrate thereupon restored the two suspended sentences and directed them to be served concurrently from 15 April 2005.

[23] In relation to the offences on File No 20500408 he imposed an aggregate sentence of four months imprisonment in relation to Counts 1 and 2 and an aggregate fine of $1010 as to Counts 3 and 4. The sentence of imprisonment was to be served cumulatively upon the restored sentences.

[24] In relation to the offences on File No 20508912 he imposed an aggregate sentence of six months imprisonment in relation to Counts 2 and 5, to be served cumulatively upon the sentence imposed on File No 20500408. Additionally, he imposed substantial fines in respect of the other counts.

[25] A period of three years disqualification was imposed in relation to the first of those files and a period of five years disqualification was imposed in respect of the second.

[26] The total effective custodial sentence was therefore one of 12 months imprisonment, commencing on 15 April 2005. The learned Magistrate ordered that this sentence be suspended after service of seven months of the term and fixed a period of two years from the date of sentence during which the appellant was not to commit another offence punishable by imprisonment.

Relevant principles

[27] In approaching the issues arising on this appeal it is trite to say that an appellate court must proceed on the basis articulated by the High Court in *House v The King (1936) 55 CLR 499 at 505*.

[28] It is not enough that the appellate court may consider that, if it had been in the position of the sentencing judicial officer, it would have adopted a different course. It must appear that some error has been made in exercising the sentencing discretion. If a sentencer acts upon the wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then

his determination may be reviewed and the appellate court may exercise its own discretion in substitution for his, if it has the materials for doing so.

[29] If no such error can be demonstrated then it is inappropriate for the appellate court to intervene.

[30] In *House v The King* the High Court went on to make the point that it may not appear how the primary judicial officer has reached the result embodied in the orders made, but, if upon the facts they are unreasonable or plainly unjust, the appellate court may infer that, in some way, there has been a failure to properly exercise the discretion that the law reposes in the Court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

The bases of the appeal

[31] In the instant case, Ms Aickin, of counsel for the appellant, seeks to impugn the approach adopted by the learned Magistrate on several bases.

[32] First, she contends that, on any view, if the aggregate sentences of imprisonment actually imposed on File Nos 20500408 and 20508912 in fact

represent net sentences after allowing for a reduction of one third, then, manifestly, they are, on the face of them, clearly excessive.

[33] She points out that, on writing back that percentage into the sentences actually imposed, the learned Magistrate must, necessarily, have taken as his starting point head sentences of six and nine months respectively. She contended that, bearing in mind that the appellant had never before actually been called upon to serve a custodial sentence, those starting points were patently too high, especially if they were accumulated. They were, she submitted, disproportionate, as a quantum leap, from the earlier suspended sentences -- particularly when regard was had to his quite modest antecedent record. A requirement to actually serve any modest custodial sentence would constitute a very considerable future deterrent to the appellant.

[34] Second, whilst recognising the need to apply the conceptual approach adverted to by the majority in *Pearce v The Queen (1998) 194 CLR 610 at 624*, the ultimate effective sentence imposed plainly offended the totality principle.

[35] Ms Aickin accepted that, conformably with the last mentioned authority, the correct approach was to initially arrive at appropriate aggregate sentences in relation to each new file, considered separately, and whether to restore the earlier suspended sentences; and then to consider questions of accumulation

or concurrence in light of the totality principle, as was discussed by the High Court in *Mill v The Queen (1988 166 CLR 59 at 62-63.*

[36] She argued that, on posing Lord Parker's rhetorical question in *Reg. v Faulkner (1972) 56 Cr. App. R. 594 at 596*, at the end of the day, the inevitable response must be that the effective sentence imposed was simply "*too much*".

[37] Third, she in effect contended that it was not a proper application of the totality principle to purport to recognise it, as the learned Magistrate did, by suspending what would otherwise be a crushing head sentence, after service of some portion of that sentence. To do so would be to fail to recognise the fact that the head sentence may, in the event, ultimately have to be served by the offender in the event of a breach of conditions of suspension. The head sentence had to be tested against the totality principle in its own right.

[38] Finally, she argued that the learned Magistrate had not identified any persuasive reason for not applying the concurrency provisions of s43(6) of the Sentencing Act in respect of the most recent offences. The learned Magistrate had simply expressed the view that the two files related to what were separate and distinct offences; and that the sentences imposed in relation to them should be accumulated and added to the restored sentences to reflect the seriousness of the criminality and to bring home to the

appellant that he must not drink and drive in contravention of the orders of the Court. Her points were that the mere fact that the sentences arose from separate and distinct offences did not, of itself, operate to negate the provisions of the section and that the particular circumstances of this case, as already outlined, simply did not warrant a departure from the statutory norm.

Conclusions

[39] Whilst I hesitate to join issue with the very experienced learned Magistrate, particularly in an environment in which it is beyond denial that offences of the type here under consideration are rife and that factors of personal and general deterrence are necessarily of great importance, it seems to me that Ms Aickin is correct in the points made by her.

[40] I would merely qualify that conclusion by making point, that, at times, a convenient practical strategy for achieving a mathematical observance of the totality principle may properly involve a non-observance of s43(6) of the Sentencing Act simply for the purpose of achieving a desirable end mathematical result.

[41] It seems to me that the following aspects are of particular importance in the instant case:

41.1 In strong contradistinction from many offenders coming before the Territory courts, the appellant, at 31 years of age, had little history of offending until 2002.

41.2 He normally resided with his wife and family at the Mount Allen Community Outstation and appears to have been in reasonably regular employment.

41.3 He had never before been called upon to serve an actual sentence of imprisonment and it is abundantly apparent that service of *any* significant custodial sentence is almost certain to have a major salutary impact on him.

41.4 There can be no reasonable criticism of the decision to restore the previously suspended sentences which, of themselves, were manifestly appropriate to the nature of the offending. However, leaving to one side questions of accumulation or concurrency for the moment, it was a vast quantum leap to move direct, in one fell swoop, to starting points of six months and nine months imprisonment respectively in respect of a person who was scarcely shown to be a long-term, chronic offender.

41.5 Moreover, whilst due regard must be had for the fact that the appellant came before the Court as a serial offender, in the sense that the offences of 6 January 2005 and 15 April 2005 were of the same generic nature as the offences in 2002 and 2004, it must never be

forgotten that the appellant was being dealt with, at the one-time, for the overall criminality related to the two occasions in question and, *prima facie*, s43(6) of the Sentencing Act was also applicable. Had he already been separately punished for the January offence and then proceeded to commit the April offences, a substantial ratcheting up of penalty would clearly have been called for. But this was not the case. In conceptual terms, the situation was akin to that when he was earlier sentenced on 12 May 2004 for the two occasions then under consideration.

[42] No doubt the April offences constituted an ongoing disregard of the orders of the Court, but this was of a different order to what otherwise might have been a flagrant failure to heed the lesson of some prior actual salutary custodial punishment for similar conduct.

[43] That situation was compounded by the decision to accumulate *all* sentences, so as to produce a total head sentence of 12 months imprisonment -- one that was, in this case, plainly disproportionate to what was called for in recognition of the personal background of the appellant and the overall criminality under consideration at the one time, even given the obvious need to recognise the factors of personal and general deterrence (cf *Regina v The Queen [2004] NTCAA 9 at pars 27 et seq]*. In

relation to this appellant it was, truly, a crushing sentence by any objective standard.

[44] In making those points I by no means ignore the fact that the learned sentencing Magistrate elected to suspend the sentence imposed after service of seven months, rather than fix a non-parole period pursuant to s53 of the Sentencing Act. But this cannot, as a matter of correct conceptual approach, operate so as to negate the inappropriateness of a head sentence that, in certain circumstances, the appellant might be called upon to serve in any event.

Conclusion

[45] I am driven to the conclusion that the appellant has made good the primary grounds of appeal in this case.

[46] The appeal must be allowed, the impugned custodial sentences related to Files Nos 20500408 and 20508912 respectively must be set aside and the sentencing discretion with regard to those matters exercised afresh.

[47] As I earlier pointed out, it seems to me that, in the circumstances, a restoration of the suspended sentences was well-nigh inevitable. The decision to do so must be confirmed.

[48] I substitute the following sentences in lieu of the custodial sentences that I have set aside:

48.1 In respect of Counts 1 and 2 on File No 20500408, an aggregate sentence of three months imprisonment, to be served cumulatively upon the restored sentences;

48.2 In respect of Counts 2 and 5 on File No20508912, an aggregate sentence of four months imprisonment, to be served concurrently with the last mentioned sentence.

[49] This will result in a total effective sentence of six months imprisonment, to run from 15 April 2005. In this case an accumulation of the restored sentences with that in respect of Counts 1 and 2 is a convenient method of juggling the various sentences so as to produce a final end result in recognition of the totality principle.

There will be formal orders in conformity with the foregoing reasons