

R v Mulkatana [2009] NTSC 53

PARTIES: THE QUEEN

v

MULKATANA, Grant

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO: 20815593

PARTIES: THE QUEEN

v

MULKATANA, Ernest

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION

FILE NO: 20813202

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JUDGMENT OF: REEVES J

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Criminal Law – sentence – concurrent and cumulative sentences – offence committed whilst on parole – power to accumulate sentence being served

upon sentence to be served – order of sentences when serving parole under existing sentence

Criminal Law – sentence – concurrent and cumulative sentences – non-parole periods for murder – order of sentences and non-parole periods for several offences when one of which is murder

Criminal Code – ss 156, 157, 188, 188(2), 213, 213(6)

Parole of Prisoners Act (NT) – s 11

Sentencing Act (NT) – ss 3, 40, 52, 52(3), 53, 53A, 53A(1)(a), 53A(1)(b), 53A(3), 53A(3)(f), 53A(4), 53A(12), 54, 55, 55A, 56, 57, 59, 59(1), 59(2), 62(1), s 63(5), 64, Schedule 2

Hankin v The Queen [2009] NTCCA 11

REPRESENTATION:

Counsel:

Plaintiff:	N Rogers
Defendants:	T Sinoch (for Grant Mulkatana) B Braithwaite (for Ernest Mulkatana)

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendants:	Central Australian Aboriginal Legal Aid Service

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

R v Mulkatana [2009] NTSC 53
No. 20815593

BETWEEN:

THE QUEEN
Plaintiff

AND:

GRANT MULKATANA
Defendant

No. 20813202

BETWEEN:

THE QUEEN
Plaintiff

AND:

ERNEST MULKATANA
Defendant

CORAM: REEVES J

SENTENCING REASONS

(Delivered 15 October 2009)

Introduction

- [1] On 29 July 2009, Ernest Mulkatana and his brother Grant Mulkatana were both found guilty by a jury in the Supreme Court at Alice Springs on four counts, as follows:

1. That each unlawfully entered a dwelling house at night with an intention to commit an offence contrary to s 213 of the *Criminal Code*;
2. That each assaulted Donella Hayes in circumstances of aggravation contrary to s 188 of the *Criminal Code*;
3. That each assaulted Jennifer Gorey in circumstances of aggravation contrary to s 188 of the *Criminal Code*; and
4. That each murdered Tarzan Loo contrary to s 156 of the *Criminal Code*.

[2] On 6 August 2009, I entered convictions against Grant Mulkatana on all four counts and on 17 September 2009 I did likewise in relation to Ernest Mulkatana. On the same dates I heard submissions on sentencing from the counsel for the various parties.

[3] During the course of those submissions I was informed that on 8 September 2004, Ernest Mulkatana had been convicted in the Supreme Court at Alice Springs on a charge of manslaughter. He was ordered to serve nine years imprisonment to commence on 15 August 2003. The Court fixed a non-parole period of four and a half years.

[4] At the time of the current offences, Ernest Mulkatana was released on parole. He was arrested on the current offences on 11 May 2008 and, on 12

May 2008, the Court of Summary Jurisdiction at Alice Springs revoked his parole under the provisions of the *Parole of Prisoners Act* (NT).

[5] These facts have a couple of consequences under the *Sentencing Act* (NT). First, by virtue of their convictions for murder, both prisoners are liable to imprisonment for life: see s 157 of the *Criminal Code*. Secondly, s 53A of the *Sentencing Act* requires me to fix a minimum non-parole period in respect of those periods of life imprisonment. However, the period to be fixed is affected by whether any of the circumstances described in s 53A(3) apply. Ms Rogers, for the Crown, has informed me that none of those circumstances applies to Grant Mulkatana. In that event, s 53A(1)(a) requires me to fix a non-parole period of twenty years for him.

[6] Turning to Ernest Mulkatana, one of the circumstances described in s 53A(3) is that: ‘at the time of his conviction for murder, a person had one or more previous convictions for unlawful homicide’: see s 53A(3)(f). The expression ‘unlawful homicide’ is defined in s 53A(12) of the *Sentencing Act* to mean ‘the crime of murder or manslaughter’.

[7] This circumstance obviously applies to Ernest Mulkatana by virtue of his previous conviction for manslaughter on 8 September 2004. That being so, s 53A(1)(b) requires me to fix a non-parole period of twenty-five years for him.

[8] It should be noted that s 53A(4) allows a sentencing court to fix a longer non-parole period than those referred to above, if it is satisfied that:

‘because of any objective or subjective factors affecting the relative seriousness of the offence, a longer non-parole period is warranted’. Ms Rogers did not request me to fix a longer non-parole period in either of these matters and I do not therefore propose to do so.

[9] Having identified the sentences I must apply for the murder convictions, I now turn to consider what sentences, if any, I should apply to the convictions for the other three counts. Given that the prisoners will be serving terms of life imprisonment with very long minimum non-parole periods, it might be thought otiose to fix penalties for these other convictions, particularly where they are likely to involve periods of imprisonment which will be much shorter than the non-parole periods fixed by s 53A of the *Sentencing Act* as outlined above. However, Ms Rogers, for the Crown, has asked that I do so, specifically because there may be a successful appeal by either or both of the prisoners against their convictions for murder and, in that event, they would still be required to serve any terms of imprisonment imposed in relation to the other three counts. I will therefore proceed to sentence the prisoners on those three counts.

[10] The process of fixing a penalty for the other three counts raises a number of other aspects of the *Sentencing Act*, particularly in relation to Ernest Mulkatana, who is presently required to serve the balance of his term of imprisonment for his conviction for manslaughter in 2004. For ease of reference, I will refer that sentence henceforth in these reasons as the

existing sentence and the sentences I impose for the current convictions as the current sentences.

- [11] The first thing to note is that, because Ernest Mulkatana's parole for his existing sentence was revoked by the Court of Summary Jurisdiction almost eighteen months ago, the deemed revocation and other provisions of s 64 of the *Sentencing Act* do not apply.
- [12] The next thing to note is that s 50 provides that, where a person has been sentenced to serve a term of imprisonment for an offence and that person is sentenced to serve another term of imprisonment, unless the Sentencing Court orders otherwise, the term or terms of imprisonment for the other offence is to be served concurrently with the first offence. This provision will, therefore, apply to both prisoners in relation to any terms of imprisonment I impose for their convictions on Counts 1 to 3 on top of that already imposed for their murder convictions. It will apply additionally to Ernest Mulkatana for the term or terms of imprisonment I impose for his current convictions, on top of that already imposed for the existing sentence.
- [13] I should make it clear that I do not propose to order otherwise than concurrent sentences in relation to any of the terms of imprisonment I impose on the prisoners for their current convictions. Indeed, it would be absurd to order cumulative sentences where both prisoners are to serve mandatory terms of life imprisonment in any event.

- [14] Section 52 of the *Sentencing Act*, which allows a court to fix aggregate sentences of imprisonment where a person is found guilty of two or more offences, does not apply in these cases because of the exceptions relating to violent offences contained in s 52(3) and the fact that the offences in Counts 2 and 3 under s 188 of the *Criminal Code* are defined as ‘violent offences’ under s 3, and Schedule 2, of the *Sentencing Act*.
- [15] Under s 53 of the *Sentencing Act*, subject to ss 53A (which I have already dealt with above) 54, 55 and 55A (which I will deal with below), I am required to fix a non-parole period in relation to any sentence of imprisonment for twelve months or longer that I impose that is not suspended in whole or in part. This is so: ‘unless [I] consider that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate’.
- [16] Given that the non-parole period for Counts 1 to 3 will be completely subsumed by the non-parole periods both prisoners will be serving on their murder convictions, the only sensible course, in the circumstances of these cases, is to conclude that fixing a non-parole period is inappropriate. Of course, if it later becomes appropriate to fix a non-parole period for any of the sentences I impose, s 56 of the *Sentencing Act* allows that to occur.
- [17] As s 53 suggests, there is a provision of the *Sentencing Act* (s 40) that allows me to suspend in part, or in full, any term of imprisonment I fix, provided that that term of imprisonment does not exceed five years. I am

able to do that if I am satisfied it is desirable. However, as I have observed above, both prisoners will be serving non-parole periods on their murder convictions of at least twenty years (and for Ernest Mulkatana, twenty-five years), so it would be quite meaningless to suspend any part of any of the terms of imprisonment I impose for their convictions on Counts 1 to 3.

[18] In passing, I note that ss 55 and 55A, which fix minimum non-parole periods for certain sexual offences and for offences against persons under the age of sixteen years, are not relevant in this case.

[19] Furthermore, I do not consider s 57 of the *Sentencing Act* applies in relation to Ernest Mulkatana's existing sentence because the non-parole period on that sentence expired before he committed these current offences.

[20] Before turning to s 59 of the *Sentencing Act*, there are two other important provisions of that Act I should mention. First, s 62(1) provides that, where the offender is in custody, a sentence of imprisonment commences on the day it is imposed. However, that is subject to the provisions of s 63(5), which allow a court to backdate the commencement period of a term of imprisonment where the offender has been in custody on account of his arrest for an offence in relation to which he is subsequently convicted and sentenced. On this aspect, I note that I was informed by Ms Rogers that Grant Mulkatana was taken into custody on the current offences on 5 June 2008.

[21] Finally, I come to s 59 of the *Sentencing Act*. It provides:

- (1) Where an offender has been sentenced to several terms of imprisonment in respect of any of which a non-parole period was fixed, the offender shall serve:
 - (a) the term or terms in respect of which a non-parole period was not fixed;
 - (b) the non-parole period; and
 - (c) unless and until released on parole, the balance of the term or terms after the end of the non-parole period,in that order.
- (2) Where, during the service of a sentence of imprisonment, a further sentence of imprisonment is imposed, service of the first-mentioned sentence shall, if necessary, be suspended in order that the sentences may be served in the order referred to in subsection (1).

[22] This section has been the subject of a recent decision by the Northern Territory Court of Criminal Appeal: see *Hankin v The Queen* [2009] NTCCA 11. Among other things, that decision holds that:

- (a) s 59 is a machinery provision that dictates the order in which several terms of imprisonment are to be served.
- (b) ss 59(1)(c) and (2) do not, by themselves, provide for the balances of any terms of imprisonment to be served cumulatively.

[23] Taking into account that decision, and putting aside for the moment Ernest Mulkatana's existing sentence, I consider s 59 will have no impact in these cases for the following reasons:

- (a) first, all of the terms of imprisonment will commence on the same date, ie, either on the day they are imposed, or on the date to which their commencement is backdated: see [20] above;
- (b) in the absence of an order otherwise, all of the terms of imprisonment will be served concurrently: see [12 – 13] above; and
- (c) since no sentence of imprisonment on Counts 1 to 3 is likely to be longer than the non-parole periods fixed on the sentences for the murder convictions, these non-parole periods will yet again subsume any other sentences of imprisonment such that there will be no need to determine an order under s 59 in which the various sentences of imprisonment are to be served.

[24] Turning, then, to Ernest Mulkatana's existing sentence. As noted above, after he was arrested on the current offences, Ernest Mulkatana's parole in relation to his existing sentence was revoked by the Court of Summary Jurisdiction at Alice Springs. Once that occurred, he began to serve the balance of the term of imprisonment he was liable to serve under the existing sentence by virtue of the provisions of s 11 of the *Parole of Prisoners Act*. Ms Rogers informed me that, if he continues to serve that period of imprisonment uninterrupted, it will be completed on 8 November 2012.

[25] Taking into account these facts, I also consider s 59 will have no impact in relation to Ernest Mulkatana's existing sentence, for the following reasons:

- (a) If I do not make an order otherwise, all of Ernest Mulkatana's current sentences of imprisonment will be served concurrently with his existing sentence;
- (b) Since the non-parole period fixed on the sentence for his murder conviction will far exceed the date of completion of his existing sentence, there will be no necessity to suspend that sentence under s 59(2) to achieve the order set out in s 59(1) of the *Sentencing Act*.

[26] Taking into account all these matters, I will now proceed to fix the sentences for each of the prisoners on each of the four counts for which they have been convicted. In doing so, without setting out the details thereof, I take into account, among other things, the following:

- (a) all of the matters put in mitigation of penalty by Mr Braithwaite on behalf of Ernest Mulkatana and Mr Sinoch on behalf of Grant Mulkatana;
- (b) the criminal histories of both Ernest Mulkatana and Grant Mulkatana including the previous convictions both have for crimes of violence;
- (c) the victim impact statements of Max Hayes and Jennifer Gorey. I note that there is no victim impact statement for Donella Hayes, but I am aware from the evidence given at the trial that she suffered a serious injury to her head;
- (d) the seriousness of the various offences committed by both prisoners;

(e) that Grant Mulkatana was the secondary offender in relation to all of the offences and did not participate directly in either of the assaults. However, the jury must have concluded he gave sufficient support to his brother to warrant him being made criminally responsible on all four counts; and

(f) the maximum penalties for the offences on Counts 1 to 3, taking into account the circumstances of aggravation found to exist by the jury, are:

Count 1 – s 213(6) of the *Criminal Code* – imprisonment for life

Counts 2 and 3 – s 188(2) of the *Criminal Code* – five years imprisonment.

[27] Accordingly, I impose the following sentences:

Ernest Mulkatana

(a) Count 4

I sentence him to life imprisonment. I order that period of imprisonment is to commence from 11 May 2008. I fix a non-parole period of twenty-five years.

(b) Count 1

I sentence him to eight years imprisonment.

(c) Count 2

I sentence him to two years imprisonment.

(d) Count 3

I sentence him to two years imprisonment.

(e) I order that each of the terms of imprisonment I have imposed for Counts 1 to 3 are to commence from 11 May 2008. In the circumstances of this case, I do not consider it is appropriate to fix a non-parole period for any of the sentences I have imposed for Counts 1 to 3.

Grant Mulkatana

(a) Count 4

I sentence him to life imprisonment. I order that period of imprisonment commence from 5 June 2008. I fix a non-parole period of twenty years.

(b) Count 1

I sentence him to four years imprisonment.

(c) Count 2

I sentence him to six months imprisonment.

(d) Count 3

I sentence him to six months imprisonment.

- (e) I order that each of the terms of imprisonment I have imposed for Counts 1 to 3 are to commence from 5 June 2008. In the circumstances of this case, I do not consider it is appropriate to fix a non-parole period for any of the sentences I have imposed for Counts 1 to 3.