Waters v James [2014] NTSC 37

PARTIES:	WATERS, Andrew v JAMES, Neil Anthony
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 15 of 2014 (21339542)
DELIVERED:	15 August 2014
HEARING DATES:	4 July 2014
JUDGMENT OF:	HILEY J
APPEAL FROM:	NEILL SM

CATCHWORDS:

CRIMINAL LAW – Appeal against sentence – Whether sentence manifestly excessive – Whether magistrate failed to apply principle of totality in relation to the effect of the sentence upon the remaining non-parole period under a previous sentence – Appeal allowed

CRIMINAL LAW – Appeal against sentence – Non-parole periods – Fixing new non-parole period under s 57 of the *Sentencing Act 1995* (NT) where sentence is not one in respect of which a non-parole period can be fixed

The Queen v Bortoli [2006] VSCA 62 – applied.

Hankin v The Queen [2009] NTCCA 11; *Horrigan v Rowbottam & Ors* [2005] NTSC 60; *Mill v The Queen* (1988) 166 CLR 59; *Mulhall v Nicholas* [2012] NTSC 50; *Postiglione v The Queen* (1997) 189 CLR 295; *R v Haji-Noor* (2007) 21 NTLR 12; *R v Shrestha* (1991) CLR 48; *R v Todd* [1982] 2 NSWLR 517; *The Queen v Gerald James Ryan* 20 September 2012, SCC 21207543, Southwood J, unreported; *The Queen v Mardinga* 18 September 2012, SCC 21220840, Barr J, unreported; – referred to.

Sentencing Act 1995 (NT) ss 43, 53, 54, 57, 59 & 78B.

Stephen J Odgers, *Sentence* (Longueville Books, 2nd ed, 2013).
Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011).

REPRESENTATION:

Counsel:

Appellant:	T Moses
Respondent:	I Taylor

Solicitors:

Appellant:	Northern Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Hil1411
Number of pages:	16

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

Waters v James [2014] NTSC 37
No. JA15 of 2014 (21339542)

BETWEEN:

ANDREW WATERS
Appellant

AND:

NEIL ANTHONY JAMES
Respondent

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 15 August 2014)

Introduction

[1] On 21 January 2014 the appellant pleaded guilty to and was convicted and sentenced in relation to four offences which he committed between 20 and 21 February 2012.[1] Counts 1 and 4 concerned the unlawful use of motor vehicles with circumstances of aggravation, count 2 concerned criminal damage to a motor vehicle, and count 3 concerned the stealing of fuel.

[2] He was sentenced to terms of imprisonment of 6 months, 8 months, 1 month and 6 months for counts 1 to 4 respectively. Following

---

1 These offences were the subject of file 21339542.

application of the totality principle various parts of those sentences were ordered to be served concurrently with others, leaving the appellant with an effective sentence of 11 months imprisonment (the **present sentence**).

[3] After committing those offences the appellant committed a number of other offences and thereby breached the conditions of an earlier sentence that had been suspended.[2] On 5 March 2013 the sentence previously suspended was restored and he was sentenced in relation to those other offences. This resulted in a sentence of imprisonment of 33 months and a non-parole period of 18 months, both backdated to 25 November 2012 on account of the fact that the appellant had been in custody since then (the **previous sentence**).

[4] But for the present sentence the appellant would have been eligible to apply for parole on 25 May 2014. By force of s 59 of the *Sentencing Act* the appellant must now serve the present sentence of 11 months to commence on 21 January 2014, and then the remaining 4 months and 4 days of his non-parole period, before being eligible to apply for parole. In other words, he will not be eligible to apply for parole until 25 April 2015.

Grounds of appeal

---

[2] These offences were the subject of files 21244859 and 21116934.

[5] The appellant relied upon two grounds of appeal, and was given leave during the hearing to add a third ground of appeal. The grounds of appeal are as follows:

1. That the learned Magistrate failed to take proper account of the principle of totality in ordering that the sentence of 11 months passed on file 21339542 be served wholly cumulatively on the sentence already passed on files 21244859 and 21116934.

2. That the learned Magistrate failed to take proper account of the impact of the delay in prosecuting file 21339542.

3. That the learned Magistrate failed to properly consider and apply s 57 of the *Sentencing Act*.

[6] Underlying all grounds was the fact that because no further non-parole period was fixed the present sentence effectively extended the period before which the appellant would be eligible for parole by the full 11 months.

[7] The appellant's contention was that this was excessive because his Honour did not properly apply the totality principle and have proper regard to the previous sentence and the delay in bringing these four matters before the court.

[8] Through no fault of the appellant, charges were not laid in respect of the four offences until November 2013; some 18 months after the

offences were committed. He had been interviewed by police on 4 September 2013 and made full admissions. His first court appearance was on 21 January 2014, when he pleaded guilty and was sentenced. Counsel contended that had those matters been prosecuted earlier they could have been dealt with on 5 March 2013 when he was sentenced for the other offences, with the consequence that his overall sentence and non-parole period would have been significantly less than that which he must now serve as a result of the present sentence. His expectations of being eligible to apply for parole on 25 May 2014, having already served 14 of the 18 months of his non-parole period, were unreasonably and crushingly dashed by now having to wait another 11 months to 25 April 2015 before being eligible to apply for parole.

[9] The respondent conceded the first 2 grounds of appeal, and effectively the third ground. The respondent contended that the appellant should be resentenced so that the sentence is partially concurrent with the previous sentence, and that a new non-parole period should be fixed which relates to the total effective sentence across all matters, as contemplated by s 57(2) of the *Sentencing Act*.

[10] The main thrust of the appellant's submissions and the respondent's concessions concerned the effective extension of the non-parole period by the 11 months.

Consideration

[11] Contrary to the main submissions advanced in relation to ground 1, his Honour did consider the previous sentence and apply totality principles in the process of deriving each of the sentences for counts 1, 2 and 4. He noted that each of those counts were subject of the mandatory sentencing provisions in s 78B of the *Sentencing Act*, selected starting points for each offence, applied discounts for the early pleas, and further reduced the sentences on account of the previous sentence.

[12] His starting point for count 1 was 12 months imprisonment, for count 2 - 16 months, for count 3 - 1 month, and for count 4 - 12 months, a total of 41 months. He applied discounts on account of the early pleas and derived notional sentences of 8 months for count 1, 12 months for count 2, 1 month for count 3 and 8 months for count 4. These discounts add up to 12 months (approximately 29.3%), and resulted in a total of 29 months before any consideration of totality.

[13] He then reduced those notional sentences for counts 1, 2 and 4 by a further 2 months, 4 months and 2 months respectively "taking into account the principle of totality in relation to the previous offending." He thus derived the four sentences noted in paragraph 2 above (which add up to 21 months) before considering totality again, this time as between these four offences, and thereby derived the effective sentence of 11 additional months.

[14] Put simply, his Honour did reduce the notional sentence of 29 months, which he had derived after allowing the discounts for the guilty pleas, to the effective sentence of 11 months, by applying the totality principle with regard to both the previous sentence and the current four offences. I agree that his Honour could have considered totality in a different order than he did, by leaving it to the end before he had "one last look" at the overall sentence of 62 months, namely the previous sentence of 33 months and the notional sentence of 29 months for the current offences. Also, he could have ordered that some parts of one or more of the new sentences be served concurrently with the previous sentence. But the result of such processes would have been no different in the end, namely an additional 11 months to serve, an overall sentence of 44 months.

[15] Indeed, instead of reducing the sentences from those which he derived after allowing the discounts for the early pleas, his Honour could have imposed those sentences (8, 12, 1 and 8 months respectively) and then applied (and satisfied) totality principles by ordering that parts of them be served concurrently with the previous sentence (and parts with each other). For example he could have ordered that the sentences for counts 1, 3 and 4 be served concurrently with the 12 month sentence for count 2, and that one month of that 12 month sentence be served concurrently with the previous sentence. This would have achieved the same result of the appellant having to serve an additional 11 months

imprisonment on account of these four current offences. It would also have clearly brought the matter within the scope of s 57(1)(b) of the *Sentencing Act* because one of the sentences would have been 12 months imprisonment, thus clearly attracting the operation of ss 54 and 57.[3]

[16] Putting aside for the moment the non-parole period aspect, I do not consider that his Honour erred by not fairly applying the totality principle. He did reduce the effective sentence of additional imprisonment by a significant amount from his starting point of 29 months.

[17] Nor do I consider that the sentence of 11 months additional imprisonment was manifestly excessive, even if greater weight was attached to the delay in prosecuting the case. Counsel submitted that by effectively extending the appellant's non-parole period by 11 months his Honour failed to take proper account of the appellant's prospects of rehabilitation and crushed his expectations of being eligible for parole as soon as 25 May 2014.

[18] Even if these four offences had been dealt with at the same time as the other offences and resulted in a total sentence of imprisonment of 44 months instead of 33 months, I do not consider that an additional 11

---

[3] Cf *Mulhall v Nicholas* [2012] NTSC 50 at [27] – [33].

months imprisonment for these four offences would have been inappropriate, after taking totality and delay into account.[4]

[19] The real concern arises because of the effective extension of the non-parole period by 11 months following the operation of s 59 of the *Sentencing Act*.

[20] If his Honour had done what I have suggested in [15] above or followed what I consider to be the intent of s 57 of the *Sentencing Act*, his Honour would have fixed a fresh non-parole period that would not have had such a result. If that were permissible his Honour could have fixed a fresh non-parole period of 22 months commencing 25 November 2012, namely 50% of the total period of imprisonment of 44 months derived when the 11 months is added to the previous sentence of 33 months.[5] This would have meant that the appellant would be eligible for parole on 25 September 2014, rather than 25 April 2015, 7 months later. I consider that such a sentence would have been appropriate.

Does s 57 apply?

[21] Section 57 of the *Sentencing Act* provides as follows:

---

4 Cf *Mill v The Queen* (1988) 166 CLR 59 at 66; *R v Todd* [1982] 2 NSWLR 517 at 519; *Horrigan v Rowbottam & Ors* [2005] NTSC 60.

5 Section 54(1) requires a minimum non parole period of 50% of the period of imprisonment that the offender is to serve. See too s 57(2)(c).

57 Fixing of new non-parole period in respect of multiple sentences

(1) Where:

(a) a court has sentenced an offender to be imprisoned for an offence and has fixed a non-parole period in respect of the sentence; and

(b) before the end of the non-parole period the offender is sentenced by a court to a further term of imprisonment *in respect of which it proposes to fix a non-parole period*;

it must fix a new single non-parole period in respect of all the sentences the offender is to serve or complete.

(2) The new single non-parole period fixed at the time of the imposition of the further sentence:

(a) supersedes any previous non-parole period that the offender is to serve or complete; and

(b) must not be such as to render the offender eligible to be released on parole earlier than would have been the case if the further sentence had not been imposed; and

(c) must not be less than the non-parole period required to be fixed in accordance with section 53A, 54, 55 or 55A, as the case may be, in respect of the further sentence.

(emphasis in italics added by me)

[22] Because his Honour did not fix a non-parole period in relation to the present sentence, it might seem at first glance that s 57(1)(b) did not apply. Consequently there was no obligation, or power, to comply with s 57(1) and fix a new single non-parole period in respect of all of the appellant's sentences.

[23] However, such a construction of s 57(1)(b) could lead to unintended and potentially unjust results, including the result in the present case.

[24] In order to achieve the desired objective of effectively extending an offender's non-parole period by an appropriate and just term, say four months, a court may feel obliged to alter the term of imprisonment which it considered appropriate, in this case an additional 11 months imprisonment. It might do this by reducing the term of actual imprisonment to 4 months (presumably by adding the other 7 months to the periods of concurrency already decided upon) or by increasing the term of additional imprisonment to 12 months in order to have jurisdiction to fix a non-parole period under s 54. But neither of these approaches would be permissible as they would result in terms of (actual additional) imprisonment that were different to that which would be appropriate, in the present case 11 months.[6]

[25] The difficulty arises because of the words "in respect of which it proposes to fix a non-parole period" at the end of s 57(1)(b). Whilst s 57(1) might be construed as only applying in circumstances where the court has an express power to fix a non-parole period, such as that contained in s 54, it could be argued that those words could also apply to circumstances where the court considers it appropriate that an

---

6 Per Stephen J Odgers in *Sentence* (Longueville Books, 2nd ed, 2013) at 415 [5.81], referring to *Stokes* [2001] NSWCCA 82: "… it would be wrong to modify the term of the sentence in order to achieve a particular outcome in relation to the non-parole period or ensure release on parole."

existing non-parole period should be adjusted in light of the further term of imprisonment to be imposed. The argument would be that a court could "propose" to fix a non-parole period, irrespective of its power to do so if it was only to have regard to the new sentence about to be imposed. Such a construction would avoid the unjust consequences referred to above.

[26] It is trite that a statutory provision, particularly a penal provision, should be construed in a way that reflects its purpose and intent, and that an ambiguity in the language of a provision that affects the liberty of a subject should be resolved in favour of the subject.[7] This would include provisions which confer upon a prisoner the possible benefit of a parole order.[8]

[27] The purpose and intent of s 57 is to require and enable a court to fix a new single non-parole period that is appropriate in light of the total effective imprisonment that the prisoner will now have to serve, having regard to the sentence or sentences still being served and the additional sentence about to be imposed.[9]

[28] To construe s 57(1)(b) so that s 57 can only operate where the further term of imprisonment is 12 months or more would deprive an offender

---

7 See for example Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) at [9.1], [9.9] & [9.10].

8 See for example *R v Haji-Noor* (2007) 21 NTLR 12 (*R v Haji-Noor*) at [89], [92] and [142].

9 Cf *Hankin v The Queen* [2009] NTCCA 11 at [9].

in the position of the appellant of the opportunity to have a fresh non-parole period fixed. Such a result, in the context of s 59, seems inconsistent with the fundamental purposes of the parole system as explained in many cases including *R v Shrestha*[10] and applied in other cases such as *R v Haji-Noor*. In *R v Haji-Noor* the Court of Criminal Appeal held that a non-parole period could be imposed under s 53 of the *Sentencing Act* when a court is wholly restoring a suspended sentence under s 43 of the *Sentencing Act*. The majority took into account the main purposes of the parole system and construed s 53 of the *Sentencing Act* in such a way as to give effect to those purposes.[11]

[29] Further, for a case such as this (but not for cases where the total sentence is less than 12 months imprisonment) it might be argued that the sentence of imprisonment imposed was in fact more than the 12 months referred to in s 53(1) because substantial parts of the main three sentences actually imposed were ordered to be served concurrently with each other. Consequently, s 53 would have required the court to fix a non-parole period.

[30] Section 57 has previously been applied in this Court in circumstances analogous to the present ones in *The Queen v Gerald James Ryan*[12] where the Court imposed a sentence of 9 months imprisonment, 2

---

10 *R v Shrestha* (1991) CLR 48 at 63 & 67-68.
11 See for example paragraphs [88] – [91], [138] – [142] & [197].
12 *The Queen v Gerald James Ryan* 20 September 2012, SCC 21207543, Southwood J, unreported.

months of which were to be served cumulatively on a sentence of four years imprisonment that the offender was already serving for other offences. The judge added the 2 months to the 4 years, then fixed a new non-parole period of 2 years and one month, namely 50% of the total term of imprisonment. This had the effect of extending the effective non-parole period by one month only, not by the two months additional term of imprisonment imposed.

[31] However another judge of this Court has assumed that s 57 cannot apply where the new sentence is for a period of less than 12 months.[13] Moreover, in *The Queen v Bortoli*[14] the Victoria Court of Appeal held that the Victorian equivalent of s 57 cannot be used in circumstances such as those here, where the new sentence is lower than that in respect of which a non-parole period can be fixed.[15]

[32] Whilst this Court is not bound by decisions of courts in other States or Territories, I feel it necessary for me to apply that decision here. I do that most reluctantly for the reasons expressed above, and I recommend that consideration be given to amending s 57(1)(b) by removing the last 11 words, or amending s 59 to allow for a situation such as the present.

[33] Accordingly, I must reject ground 3.

---

13 *The Queen v Mardinga* 18 September 2012, SCC 21220840, Barr J, unreported.
14 [2006] VSCA 62.
15 Paragraphs [49], [51], [55] and [56].

[34] This would leave the appellant with a sentence that is manifestly unfair because his eligibility for parole would be extended by the whole 11 months as a consequence of the operation of s 59 of the *Sentencing Act*. As I have said his Honour did not err in considering and applying totality principles in relation to reaching the final sentence of 11 months additional imprisonment. However, the way in which he structured the sentence resulted in s 59 having this unfair consequence for his eligibility for parole. The sentence could have been structured differently to avoid this consequence by applying concurrency in such a way as to attract the operation of s 57.

[35] Accordingly, I uphold ground 1 for the reason that to effectively extend the non-parole period by the whole 11 months was not "just and appropriate" and offends the totality principle,[16] and so amounted to a sentence that is manifestly excessive.

Resentence

[36] Having found that his Honour erred, I set aside the sentences which he imposed and proceed to resentence the appellant. In doing so I have taken into account the submissions made to his Honour by the appellant's counsel[17] and his Honour's sentencing remarks.[18] In addition to the trespassing and stealing the offending involved

---

16 Cf *Mill v The Queen* (1988) 166 CLR 59 at 66; *Postiglione v The Queen* (1997) 189 CLR 295 per Kirby J at 341.

17 Transcript 21 January 2014 pp 5-7 and 10-12.

18 Transcript 21 January 2014 pp 13-14.

significant damage to three motor vehicles and a front entrance gate, resulting in repair costs exceeding $23,000. Although he was only 22 years of age when he committed these offences and 24 when he was sentenced for them, he had an extensive criminal history that included similar kinds of offending and also offences involving violence, extending back to October 2004. Punishment and deterrence both specific and general were and are important factors to be taken into account.

[37] I consider that the nominal sentences which his Honour used and his discounts and other allowances for totality set out in paragraphs [12] to [14] above are appropriate. I share his Honour's uncertainty in relation to the appellant's prospects of rehabilitation and I consider that they are better assessed by the parole board when he becomes eligible for parole.

[38] However, in order to achieve a fair and just result that will clearly attract the operation of s 57, I propose to adjust the sentence for count 2 to 12 months, being the sentence that I would have imposed before taking account of concurrency with the previous sentence, and achieve the same outcome of 11 months additional imprisonment for all of the current offences.

[39] I sentence the appellant as follows:

(a) count 2 – 12 months imprisonment, one month of which is to be served concurrently with his sentences on files 21244859 and 21116934, the other 11 months to commence on 21 January 2014;

(b) count 1 – 6 months imprisonment to be served concurrently with his sentence on count 2;

(c) count 3 - 1 month imprisonment to be served concurrently with his sentence on count 2;

(d) count 4 – 6 months imprisonment to be served concurrently with his sentence on count 2.

[40] Pursuant to s 57 of the *Sentencing Act* I fix a new non-parole period of 22 months commencing 25 November 2012.

.....