Riley v Heath [2016] NTSC 63

PARTIES:	RILEY, Galvin v HEATH, Andrew
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LCA 24 of 2016 (21631377), LCA 25 of 2016 (21630891), LCA 26 of 2016 (21630892), and LCA 27 of 2016 (21635912)
DELIVERED:	1 December 2016
HEARING DATES:	1 December 2016
JUDGMENT OF:	RILEY J
APPEAL FROM:	Local Court

REPRESENTATION:

Counsel:

Appellant:	R Anderson
Respondent:	J O'Brien

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
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

Riley v Heath [2016] NTSC 63
No. LCA 24 of 2016 (21631377), LCA 25 of 2016 (21630891),
LCA 26 of 2016 (21630892), and LCA 27 of 2016 (21635912)

BETWEEN:

GALVIN RILEY
Appellant

AND:

ANDREW HEATH
Respondent

CORAM: RILEY J

Ex Tempore
REASONS FOR JUDGMENT

(Delivered 1 December 2016)

[1] On 12 September 2016 the appellant was sentenced in the Local Court to imprisonment for a period of 38 months with a non-parole period of 28 months. The sentence related to a series of offences. He now appeals against the sentence principally upon the grounds that the total sentence was manifestly excessive and also that one individual sentence was manifestly excessive.

The offending and the sentences

[2] At the time of the present offending the appellant had a criminal history which included offences of violence. On 14 July 2011 he was convicted of aggravated assault upon a female and fined $500. On 18 July 2011 he was

convicted of aggravated assault and released on a good behaviour bond. On 20 March 2013 he was convicted of aggravated assault upon his partner, Myrtle Palmer, and sentenced to imprisonment for six months. In February 2014 he was convicted of resisting police and assaulting police and received sentences of imprisonment for two months and three months to be served concurrently. On 8 September 2014 he was convicted of the aggravated assault of Ms Palmer and sentenced to imprisonment for six months. On 8 September 2014 he was convicted of resisting police and disorderly behaviour and sentenced to imprisonment for 14 days and seven days respectively. On 13 October 2015 he was convicted of breaching an order suspending sentence. In addition he has convictions for unlawful damage and breaching bail.

[3] The first offence, the subject of this appeal, was an aggravated assault upon Ms Palmer who was then aged 20 years. This was his third violent offence where Ms Palmer was the victim.

[4] On 22 June 2016 the appellant and Ms Palmer had been drinking and were both intoxicated. Ms Palmer had been seated on the ground when the appellant kicked her to the mouth causing her to fall backwards. He then took a pair of scissors from his back pocket and stabbed her to the outside of her left knee and thigh. Ms Palmer was in significant pain and was screaming for the appellant to leave her alone. She walked from the scene toward the Charles Creek Camp in Alice Springs. The appellant followed her still holding the scissors. He continued to punch her to the head and he stabbed her in the right hand. Another person sought to intervene but was unable to stop the appellant. Police and ambulance were called and Ms Palmer was conveyed to the Alice Springs Hospital where she received treatment for the stab wounds and for the bruising to her head and face.

[5] The Local Court Judge sentenced the appellant to imprisonment for 18 months in relation to the offending.

[6] The next matter was an offence of aggravated assault by the appellant upon his 46-year-old mother. On the same night, 22 June 2016, Ms Palmer complained to her mother-in-law that the appellant had stabbed her. The appellant then entered the room holding a four-point wheel spanner and informed his mother that he wished to hit Ms Palmer. Ms Palmer was extremely frightened and hid behind the mother. The appellant threw the wheel spanner in the direction of both his mother and Ms Palmer and it struck his mother to the area of her left ribs below her armpit. She fell to the floor in pain. The appellant continued to fight with Ms Palmer until police were called and he then fled. The appellant's mother received medical treatment for her injuries.

[7] In relation to that offending the appellant was convicted and sentenced to imprisonment for six months to be served cumulatively upon the earlier sentence.

[8] The next offending occurred on the night of 1 July 2016 and again involved Ms Palmer. The appellant was intoxicated and walking with Ms Palmer when he became angry, accusing her of seeing other men. He picked up a stick approximately 20 cm in length and hit her in the face causing a laceration to her nose. He then grabbed her by the hair and pulled her to the ground. She called out for help and people intervened. Later that night they met up again and early on the morning of 2 July 2016 the appellant again accused her of seeing other men. He grabbed her by the hair and dragged her to the ground. Whilst she was on the ground he kicked her a number of times including to the face. He then walked away. Ms Palmer was taken to Alice Springs Hospital for medical treatment. She sustained bruising and swelling to her forehead and a scratch on her nose.

[9] The appellant pleaded guilty to two counts of assault occasioning harm in relation to the separate offences. He was sentenced to an aggregate term of

imprisonment of 10 months, with that sentence to be served cumulatively upon the earlier sentences.

[10] The appellant also pleaded guilty to having escaped lawful custody. While he was in custody in relation to the July 2016 offending he was transported to Alice Springs Hospital for treatment in relation to a medical condition. Prison officers were located outside his room. He entered the roof cavity of his room. When prison officers checked on him and found him to be missing a search of the hospital premises was conducted taking the officers from their posts. The appellant then re-entered the room from the ceiling and ran from the hospital. He was located on 6 July 2016 at the Amoonguna community. In relation to this offending he was convicted and sentenced to imprisonment for four months. The sentence was directed to be served cumulatively on the earlier sentences.

[11] Each of the sentences was directed to be served cumulatively upon the others providing a combined sentence of imprisonment for 38 months. His Honour further considered the sentence in light of the totality principle and confirmed the sentence.

[12] In sentencing, the Judge commented upon the fact that the appellant had "shown a repeated willingness and ability to be extremely violent to his partner" and, despite the intervention of the courts and being dealt with by way of suspended sentences and partly suspended sentences, had continued to be violent towards her. It was noted that the appellant had failed to comply with court orders including conditions of bail and the terms of orders suspending sentence. His Honour concluded that the appellant was unlikely to comply with court orders. Concern was expressed that he would continue to be violent. A supervision assessment report advised that the appellant was not a suitable candidate for supervision. In all the circumstances a non-parole period of 28 months was set.

Section 52 of the *Sentencing Act*

[13] The appellant claimed that the Local Court Judge erred by imposing an aggregate penalty of imprisonment for 10 months in respect of the offending which occurred on the night of 1 and 2 July 2016, contrary to the terms of s 52(3) of the *Sentencing Act*. His Honour stated that it was his reading of the relevant provision that "if both offences are offences of violence, you can aggregate it". In my opinion that is not so. The subsection provides that the capacity of a court to impose an aggregate sentence is not present "if one of the offences in the information, complaint or indictment is a violent offence or a sexual offence". Each of these offences was a violent offence for the purposes of the legislation and, therefore, at least "one of the offences" was a violent offence. Both parties agreed that error occurred.

[14] Notwithstanding that error was present it does not follow that a different total sentence is required. I accept the submission of the respondent that the sentence of 10 months imposed by his Honour is an appropriate sentence given the objective seriousness of the offending and the appellant's history of violent offending against the same victim. Although the appeal must be allowed the re-sentencing process will achieve the same result.

[15] I allow the appeal in this regard and resentence the appellant to imprisonment for four months on the first matter (1 July 2016) and seven months on the second (2 July 2016). The sentence on the first matter is to be served cumulatively upon the second to the extent of three months giving a total period of imprisonment of 10 months. That sentence is to be served cumulatively upon the remaining sentences.

Manifest excess

[16] The principal ground of appeal was that the total sentence was manifestly excessive and that the individual sentence imposed in relation to the assault of 22 June 2016 was, in itself, manifestly excessive. In addition it was

argued that the non-parole period imposed in relation to the total sentence was also manifestly excessive.

[17] The principles applicable to such a ground of appeal are well known and well understood. It is fundamental that the exercise of the sentencing discretion will not be disturbed unless error has been shown. The presumption is that there is no error. Interference will only occur if it be shown that the sentencing Judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The sentence itself may be so excessive as to manifest error. It is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so.

(a) The assault of 22 June 2016

[18] In relation to the offending of 22 June 2016 the sentencing Judge noted that the victim suffered a "very significant wound" which would have been extremely painful. The use of a dangerous weapon, the scissors, was an aggravating circumstance. The victim was stabbed to the left knee and thigh. The assault continued over a period of time and involved the appellant following her as she sought refuge. He further assaulted her by punching her to the head and again stabbing her with the scissors, this time to the right hand. He continued with his violent conduct notwithstanding the attempted intervention of another. The victim had to be treated for stab wounds to her leg and hand as well as bruising to her head.

[19] His Honour referred to the violent history of the appellant and to the fact that Ms Palmer had been the victim of previous assaults by him. Emphasis was given to both general deterrence and specific deterrence in determining an appropriate penalty. His Honour noted the maximum penalty was imprisonment for five years and categorised the offending as being at the medium level of offending of its kind. I see no error in those observations.

[20] The appellant submitted that the sentence imposed in relation to this offending was "three times that for any other prior assault in the appellant's history" and was greater than the penalty imposed for the other assault upon Ms Palmer (that which occurred on 1 and 2 July 2016) and which was dealt with at the same time. The simple answer to this submission is that this offending was much more serious than the other offences referred to and involved a dangerous weapon, being the scissors, which were wielded against the victim on a number of occasions.

[21] In my opinion the sentence of imprisonment for 18 months could not be said to be manifestly excessive.

(b) The total sentence

[22] There was no complaint about the remaining individual sentences imposed upon the appellant. However, the appellant argues that the accumulation of the sentences across the different offending led to a total sentence which was manifestly excessive.

[23] In the course of the sentencing remarks his Honour observed that he must avoid "a mathematical adding up exercise" and said he had adjusted sentences where need be to arrive at a total head sentence which, in his view, was warranted. His Honour referred to not imposing a sentence which was too crushing and, on the other hand, expressed concern at the serious danger posed by the appellant and the likelihood that he would continue to be violent.

[24] In support of the claim of manifest excess the appellant argued that the sentencing Judge had erred in not properly taking into account accumulation, concurrency and totality in imposing the total sentence. No concurrency or accumulation was ordered. Although the sentencing Judge indicated that sentences had been lowered there was no indication of how that occurred in relation to individual sentences.

[25] As the High Court noted in *Mill v The Queen*[1] in relation to sentences of imprisonment imposed by a single sentencing court "an appropriate result may be achieved either by making sentences wholly or partly concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a number of sentences are being imposed" and "where practicable the former is to be preferred". In this case it would have been preferable for the sentencing Judge to identify the appropriate sentences and proceed by way of making the sentences partially concurrent. However, the alternative approach was open.

[26] The sentencing Judge made specific reference to applying the totality principle and ensuring that the sentence was not "too crushing" on the appellant. His Honour also noted that "I have adjusted sentences where need be to arrive at a total head sentence across the offending, which in my view is warranted".

[27] In all the circumstances I do not think it can be said that his Honour failed to take into account accumulation and concurrency nor can it be said that his Honour failed to apply the totality principle. In my opinion the total sentence itself, whilst on the high side, cannot be said to be manifestly excessive.

(c) The non-parole period

[28] The final submission made on behalf of the appellant was that the non-parole period imposed on the total sentence was manifestly excessive. The head sentence was of imprisonment for 38 months and the non-parole period set at 28 months. No explanation was provided by his Honour as to why a non-parole period of that order was required. Reference had been made to the protection of the victim and to the violence of the appellant but not that those matters required a minimum period of imprisonment of 28 months. The "basic theory of the parole system" was discussed by the High Court in

[1] (1988) 166 CLR 59 at 63.

R v Shrestha[2] where it was said that one purpose of parole "was to provide for possible mitigation of the punishment of the prisoner only where the stage is reached where 'the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence'". In my opinion in the present case the non-parole period significantly exceeds that minimum time.

[29] In my opinion the non-parole period was manifestly excessive and I allow the appeal in this regard. I substitute a non-parole period of 19 months.

Conclusion

[30] The appeal is allowed in respect of the aggregate sentence imposed in relation to the offending of 1 and 2 July 2016 and the sentences I have indicated are substituted. The appeal is allowed in relation to the setting of the non-parole period and the new non-parole period of 19 months is substituted. Otherwise the appeal is dismissed.

[2] (1990-1991) 173 CLR 48 at 67-69