Turner v Thompson & Ors [2016] NTSC 66

PARTIES:	TURNER, Rodney v THOMPSON, Richard and Ors
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOs:	LCA 17 of 2016 (21518724) LCA 18 of 2016 (21518725) LCA 19 of 2016 (21557446) LCA 20 of 2016 (21536359) LCA 21 of 2016 (21534964) LCA 22 of 2016 (21618999) LCA 23 of 2016 (21618993)
DELIVERED:	8 December 2016
HEARING DATES:	18 and 29 November 2016
JUDGMENT OF:	RILEY J
APPEAL FROM:	Local Court Youth Justice Court

CATCHWORDS:

CRIMINAL LAW – Sentencing – Appeal against sentence – sentencing across offences committed as youth and as adult – consideration of partially suspended sentence and non-parole period – whether non-parole period manifestly excessive – appeal allowed.

CRIMINAL LAW – Sentencing – Appeal against sentence – sentencing across offences committed as youth and as adult – statutory power of Local Court and Youth Justice Court to impose single non-parole period across a sentence of the other court – appeal allowed.

Braun and Ebatarintja v The Queen (1997) 6 NTLR 94

Grassby v R (1989) 168 CLR 1 at 16

Juvenile Justice Act

Local Court Act

Local Court (Criminal Procedure) Act

Sentencing Act 1995 (NT) ss 4, 53, 54, 55

Whitehurst v The Queen [2011] NTCCA 11 at [28]

Youth Justice Act 1995 (NT) ss 53, 82, 83, 83(1)(m), 85, 85(1), 85(2)

Youth Justice Act 2005 (NT)

REPRESENTATION:

Counsel:

Appellant:	C Ingles
Respondents:	C Roberts

Solicitors:

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

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

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BETWEEN:

RODNEY TURNER

Appellant

AND:

RICHARD THOMPSON AND ORS

Respondents

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 8 December 2016)

[1] On 11 August 2016 the appellant pleaded guilty to a range of offences and was sentenced to imprisonment for a period of 21 months with a non-parole period of 15 months. The appellant has made no complaint regarding the head sentence and has not lodged any appeal against the individual sentences imposed or the total sentence of 21 months.

[2] He has, however, appealed against the non-parole period on four grounds namely: (1) the non-parole period is manifestly excessive; (2) error occurred in fixing a non-parole period rather than imposing a partially suspended sentence; (3) the learned Judge erred in failing to direct a further mental health assessment of the appellant; and (4) the learned Judge erred in imposing a non-parole period across the sentences imposed in the Youth Justice Court and the Local Court.

[3] On the hearing of the appeal ground 3 was not pressed.

The offending

[4] The initial offences occurred on 5 and 6 April 2015 when the appellant was a youth for the purposes of the *Youth Justice Act 2005* (NT).

[5] At about 3 am on 5 April 2015 the appellant, who was in the company of a co-offender, saw three women walking home. They assessed the women as being heavily intoxicated and, consequently, vulnerable. The women separated to return to their individual homes. The offenders followed the complainant to her accommodation. The appellant and his co-offender climbed the fence to her property and entered a carport attached to the house. They entered a motor vehicle and tried to roll it from the premises but were not successful. The offenders then climbed up to the first floor of the residence and used a spanner to break a window in order to gain admission. They entered through the broken window and ransacked both the first floor and the second floor, looking for cash.

[6] The offenders discovered their female victim deeply asleep on a couch on the first floor. She was wearing only her underwear. They intended to remove her underwear and in attempting to do so touched her breasts and vagina through her bra and her underwear. At different times each offender climbed on top of the complainant. The complainant woke and screamed. She grabbed the appellant who used his right hand to punch her to the left

eye in order to escape. A struggle ensued and the offenders ran from the residence taking a mobile phone as they went. The victim said she "sat in the corner of my room afraid to move" and that she could hardly speak.

[7] The offending had what his Honour described as "devastating effects" on the victim. In her victim impact statement she talked of feeling unsafe, not being able to sleep, crying continuously and feeling afraid for her life. She decided to leave Australia for a period as a consequence. She had previously felt safe in her own home which was in a gated complex. As a result of the offending she felt "completely violated".

[8] The following day, with the same co-offender, the appellant committed further offences. He unlawfully entered a restaurant by damaging the roof sheeting. He and his co-offender stole alcohol and cash to the value of $700. They smashed the cash register in order to obtain the money.

[9] On 29 April 2015 the appellant was arrested and he was granted bail on conditions that he live with his parents and that he not enter Alice Springs. On 25 May 2015 he failed to appear. He was arrested on 1 July 2015 and bailed to appear on 20 July 2015. He failed to appear. On 24 July 2015 he handed himself in to police and was granted further bail to appear on 27 July 2015. He failed to appear. On 19 November 2015 he was arrested and was again granted bail and again failed to appear. Finally he was arrested in Alice Springs on 19 April 2016 and remained in custody thereafter. He pleaded guilty to each of the offences of breach of bail.

[10] On 6 February 2016, whilst on bail, he, along with others, unlawfully entered the Todd Tavern where alcohol to the value of $2000 was stolen. The stolen alcohol was consumed that night.

[11] Each of these offences was committed at a time when the appellant was the subject of a suspended sentence imposed upon him on 27 February 2015. On that occasion he had been sentenced to imprisonment for a period of seven

months and 14 days with the sentence fully suspended on a range of conditions including that he not consume alcohol and not enter Alice Springs save for certain presently irrelevant circumstances. The suspended sentence related to offences which occurred in 2014 and included: breaking into the Todd Tavern; breaking into the Barkly Regional Council building (and stealing and damaging a motor vehicle therefrom); unlawfully entering premises and stealing from Territory Records; stealing property and damaging property from the Memorial Club; unlawfully entering and stealing from a Caltex Service Station; unlawfully entering the IGA Eastside Supermarket; damaging the glass window of a gallery in Todd Mall; and unlawfully entering Rockies Pizza, damaging the glass window and stealing property valued at $800.

The sentences

[12] In relation to the offending of 5 April 2015 which included, among other offences, the very serious offences of unlawful entry of a dwelling house at night and indecent assault, the sentencing Judge imposed a sentence of imprisonment which totalled 15 months. In relation to the offending of 6 April 2015 his Honour imposed a sentence of imprisonment of four months, two months of which was to be served cumulatively upon the earlier sentence. In respect of the breaches of bail the appellant was sentenced to imprisonment for seven days on each with the sentences to be served concurrently. In relation to the offending of 6 February 2016, which occurred when he was an adult, he was sentenced to imprisonment for a period of six months. Four months of the sentence was directed to be served cumulatively upon the earlier sentences. The total effective sentence was therefore imprisonment for 21 months. His Honour dealt with the breach of the suspended sentence by resentencing the appellant under the *Youth Justice Act* to the same sentences as had previously been imposed and directing that they commence on 19 April 2016.

[13] At the time of sentencing the appellant was 19 years of age. In 2015, at a time when he had already committed some of his offences, his 14-year-old sister committed suicide. At that time he disengaged himself from his family. He gave a history of substance abuse including daily cannabis use from the age of 15 until the time of his incarceration. He had also been involved with volatile substance abuse until 2015 and binge drinking of alcohol approximately once per week. He had been involved with Mental Health Services as the result of hearing voices. A psychiatric registrar reported that the appellant did not have any symptoms of acute mental illness at the time of assessment but, rather, his volatile substance abuse and heavy cannabis use increased his risk of psychosis. While in custody he was placed on antipsychotic medication to reduce that risk and it was recommended that this continue into the future.

A partially suspended sentence?

[14] The first complaint of the appellant was that the sentencing Judge erred in fixing a non-parole period rather than ordering a partially suspended sentence.

[15] The decision whether to proceed by way of a partially suspended sentence or a non-parole period will be influenced by many things including "relevant legislative provisions, the nature of the offending, the minimum period of imprisonment which must be actually served to reflect the seriousness of the offending, and the personal circumstances of the offender including any prospects for rehabilitation".[1] In considering the personal circumstances of the offender and the prospects for rehabilitation, factors that may be of assistance include "how any prospects for rehabilitation may be addressed and enhanced; whether there is a need for supervision and, if so, the nature of that supervision; the existence of, and the nature of any support

[1] *Whitehurst v The Queen* [2011] NTCCA 11 at [28].

mechanisms available to the offender outside the custodial setting; the identification of impediments and risks to rehabilitation and so on".[2]

[16] In the present case the sentencing Judge declined to suspend the sentence observing that the appellant had, by his actions and notwithstanding the opportunities provided to him, disregarded previous orders of the court. It was noted that the present offences were committed while the appellant was on a suspended sentence and that the offending of 5 and 6 April 2015 "took place approximately one month and 10 days into the 18 months suspended sentence". In addition his Honour observed that the Department of Correctional Services had served a breach notice "because he failed supervision". Notwithstanding those matters the youth of the appellant led his Honour to a conclusion that his prospects for rehabilitation continued. He was "not without hope".

[17] In all the circumstances the sentencing Judge felt that it was preferable to set a non-parole period so that the appellant could "prove to the Parole Board that he is worthy of being on parole" and that he would comply with any conditions imposed in relation to his release from custody. His Honour observed that:

> He will be given a non-parole period and should he prove himself suitable to the Parole Board then he can look forward to being released early and no doubt the Parole Board will also impose conditions of no alcohol and possibly that he reside at a particular premises.

[18] It is apparent that the sentencing Judge gave due consideration to the prospect of imposing a partially suspended sentence but, for good reason, determined to impose a non-parole period. I see no error on the part of his Honour.

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[2] *Whitehurst v The Queen* [2011] NTCCA 11 at [28].

The non-parole period

[19] The appellant submitted that the non-parole period was manifestly excessive and that the learned Judge erred in imposing a non-parole period pursuant to the *Sentencing Act 1995* (NT). Some of the offending occurred whilst the appellant was a youth and some whilst he was an adult. In particular the most serious offences, being those committed on 5 April 2015, occurred when he was a youth for the purposes of the *Youth Justice Act*.

[20] The head sentence imposed in relation to the whole of the offending was imprisonment for 21 months with a non-parole period of 15 months. This is a non-parole period of a little over 70%. No explanation was provided by his Honour as to why a non-parole period of that order was appropriate. In the course of discussions with counsel his Honour said:

> It does not appear to me to be legally impermissible for me to accumulate some of these sentences and set a non-parole period because he is serving them as an adult.

[21] It was submitted that this observation, coupled with the setting of a non-parole period of 70%, may suggest that his Honour erroneously applied s 55 of the *Sentencing Act* which requires a non-parole period of not less than 70%. However, that is unlikely because s 55 relates only to an offence of sexual intercourse without consent. The mandatory minimum sentence imposed by that section would not apply to the present offending.

[22] Section 85 of the *Youth Justice Act* permits a sentencing Judge, when sentencing a youth, to fix a lower non-parole period unconstrained by the minimum non-parole periods mandated in the *Sentencing Act*.

[23] Whether or not his Honour erred in that way, in my opinion the non-parole period was in any event manifestly excessive and reflected error. The appeal will be allowed on this ground.

The setting of a non-parole period

[24] In detailed and very helpful written submissions counsel for the appellant submitted that there is no statutory power for the Local Court or the Youth Justice Court to impose a single non-parole period across a sentence of the other court. This submission was supported by counsel for the respondent.

[25] At the time of sentencing his Honour exercised jurisdiction in the Youth Justice Court and also in the Local Court. His Honour was necessarily exercising the jurisdiction of the Youth Justice Court under the provisions of the *Youth Justice Act* in imposing the term of imprisonment of 17 months for the offending which occurred when the appellant was a youth. The offending which occurred when the appellant became an adult was dealt with in the Local Court under the terms of the *Sentencing Act* and a sentence of imprisonment for six months was imposed. The learned Judge specified that two months of the six-month sentence would run concurrently with the 17 months sentence giving a total effective sentence, across all offences, of 21 months imprisonment. A single non-parole period of 15 months was set. It was submitted that the Local Court judge was in error in proceeding in that way.

[26] Both the Youth Justice Court and the Local Court are creatures of statute and do not exercise the inherent power available to superior courts. However, such courts may have powers which can arise by necessary implication on the basis that a grant of power carries with it everything necessary for its exercise.[3]

[27] By operation of s 85 of the *Youth Justice Act*, and save for an exception not relevant for present purposes, the Youth Justice Court is obliged to impose a non-parole period if the sentence of imprisonment or detention is longer than 12 months and not fully or partially suspended. Contrary to the position applicable to adults under the *Sentencing Act* there is no minimum non-

[3] *Grassby v R* (1989) 168 CLR 1 at 16.

parole period mandated for any offence for which a youth is sentenced under the *Youth Justice Act*. Having sentenced the appellant under that Act to imprisonment for 17 months, his Honour was obliged to set a non-parole period the term of which was at the discretion of the Judge.

[28] The position is different in relation to the offending which occurred as an adult and was dealt with in the Local Court. Section 53 of the *Sentencing Act* provides for the fixing of non-parole periods where a court sentences an offender to be imprisoned for life or for 12 months or longer where the sentence is not suspended in whole or part. The section is expressed to be subject to other identified sections of the Act. Section 54 provides that a court cannot fix a non-parole period of less than eight months and that the non-parole period must be greater than 50% of the period of imprisonment imposed. Section 55 of the Act provides for a minimum non-parole period of not less than 70% for certain sexual offences and drug offences. As the sentence imposed upon the appellant in the Local Court was for a period of four months, considered alone, it could not be the subject of a non-parole period.

[29] The *Youth Justice Act*[4] permits the Supreme Court to exercise, in addition to its own powers, the powers of the Youth Justice Court. The Supreme Court may also make any order in relation to detention or imprisonment that it could make in relation to a sentence of imprisonment under the *Sentencing Act*. There is no similar provision in relation to the Local Court in the Act.

[30] There is no express provision in the *Local Court Act*, the *Local Court (Criminal Procedure) Act* or in the *Sentencing Act* permitting the Youth Justice Court to exercise the powers of the Local Court in sentencing. Indeed the *Sentencing Act*, in s 4, provides:

> This Act applies to all courts other than the Youth Justice Court continued in existence by the *Youth Justice Act*.

[4] Section 82.

[31] This section was considered by the Court of Criminal Appeal in relation to the Juvenile Court (which preceded the Youth Justice Court) in *Braun and Ebatarintja v The Queen*[5]. At that time the section was worded as follows:

> This Act applies to all courts other than the Juvenile Court established under the Juvenile Justice Act and the Supreme Court when exercising its jurisdiction under or in pursuance of that Act.

[32] In *Braun* a majority held that s 4 excluded the provisions of the *Sentencing Act* from the sentencing of a juvenile where the sentencing judge deals with the juvenile pursuant to the special powers vested in the Supreme Court under the *Juvenile Justice Act*. As the Act then applied, a sentencing judge, in dealing with a juvenile, may exercise the powers available under the *Sentencing Act* or those under the *Juvenile Justice Act* but not a combination of the two. Notwithstanding the subsequent amendments to legislation, in my view those observations must continue to apply and bind lower courts. The later passing of the *Youth Justice Act* in 2005 clarified the situation with respect to the Supreme Court by providing that the Supreme Court may "exercise, in addition to its powers, the powers of the Youth Justice Court".[6] There has been no relevant modification regarding the Local Court.

[33] The *Youth Justice Act* does contain some provisions that adopt the powers of the Local Court for the Youth Justice Court. An example is s 53 of the Act which provides that parts of the *Local Court (Criminal Procedure) Act* and of the *Local Court Act* apply to the Youth Justice Court as if it were the Local Court. Those provisions are directed at procedural matters and not matters related to sentencing.

[34] The section also provides that "in a provision of any other Act relating to unlawful activity or alleged unlawful activity" a reference to the Local Court includes, in relation to a youth, a reference to the *Youth Justice Act*.

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[5] (1997) 6 NTLR 94.
[6] *Youth Justice Act 1995* (NT) s 82.

In my opinion the expression "any other Act" cannot be read to include the *Sentencing Act* because this would place the provision in direct conflict with s 4 of the *Sentencing Act*. At the time the *Youth Justice Act* was passed, the interpretation of s 4 by the Court of Criminal Appeal in *Braun* had been in existence and applied for some years. If it had been intended by the legislature to modify the operation of the section, such an intention would be expected to have been clearly flagged. It was not.

[35] Section 83(1)(m) of the *Youth Justice Act* provides:

> (1) If the Court finds a charge proven against a youth it may, whether or not it proceeds to conviction, do one or more of the following:
>
> …
>
> (m) make any other order in respect of the youth that another court could make if the youth were an adult convicted of that offence other than a community-based order or community custody order under the *Sentencing Act*.

[36] The function of s 83 of the *Youth Justice Act* is to provide the Youth Justice Court with a broad range of powers and flexibility in the sentencing of young offenders. The terms of subsection (m) are designed as a catchall in relation to such powers and not directed to permitting the Youth Justice Court to impose sentences which would otherwise be the province of the Local Court. Had that been the intention a provision such as that relating to the Supreme Court[7] would have been adopted.

[37] Finally, s 85(1) of the *Youth Justice Act* provides for the imposition of non-parole periods by "the Court" and then goes on to state in subsection (2):

[7] *Youth Justice Act 1995* (NT) s 82.

> If the sentence is in respect of more than one offence, the non-parole period fixed under subsection (1) is in respect of the aggregate period of detention or imprisonment that the youth is liable to serve under all the sentences imposed.

[38] In my opinion this provision does not permit the Youth Justice Court to fix a single non-parole period for sentences imposed on the same occasion in the Local Court and the Youth Justice Court. It plainly refers to sentences imposed by "the Court" which expression is defined to mean "the Youth Justice Court as mentioned in section 45 and, if the context requires, includes the Supreme Court exercising the jurisdiction under this Act". It does not include the Local Court.

[39] Similar observations apply to s 53 of the *Sentencing Act* which refers to "a court" which cannot include the Youth Justice Court because of s 4 of the *Sentencing Act*.

[40] In my opinion the Local Court Judge erred in his approach to sentencing by setting a single non-parole period in relation to sentences imposed by the Local Court and by the Youth Justice Court. As was submitted by the appellant, and conceded by the respondent, there is no statutory power for either the Youth Justice Court or the Local Court to impose a single non-parole period across sentences imposed by the two different courts. The appeal will also be allowed in this regard.

[41] I draw the attention of the authorities to the difficulties created by the legislation as identified in these reasons and commend legislative reform.

[42] The appeal is allowed. The non-parole period is set aside. The sentence of imprisonment for six months imposed by the Local Court remains and will commence on the date the appellant was taken into custody being 19 April 2016. The sentence imposed in the Youth Justice Court, being a total effective sentence of imprisonment for 17 months, shall be deemed to have

commenced from the date four months after the appellant was taken into custody. I set a non-parole period under the terms of the *Youth Justice Act* of six months to commence on the same date. Otherwise the appeal is dismissed.