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IN THE COURT OF CRIMINAL
APPEAL OF THE NORTHERN
TERRITORY OF AUSTRALIA
AT DARWIN

No. CA 19 of 1993

BETWEEN:

BRIAN WHITLAM
Appellant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY, THOMAS JJ AND GRAY AJ

REASONS FOR JUDGMENT

(Delivered 29 July 1994)

KEARNEY J

I concur in the reasons and conclusions of Gray AJ, and in the order his Honour proposes.

THOMAS J

I have read the draft reasons for judgment of Gray AJ. I agree with his reasons and I would dismiss the appeal.

GRAY AJ:

This is an appeal, by leave, against a sentence for manslaughter passed upon the appellant by Angel J on 3 September 1993. The appellant, who is presently 38 years, had been previously

sentenced by Mildren J on 21 December 1992 for a dangerous act causing death. Mildren J imposed a sentence of 4 years imprisonment and fixed a non parole period of 12 months. Angel J sentenced the appellant to 8 years imprisonment. His Honour directed that the sentence be served cumulatively upon the sentence imposed by Mildren J and fixed a new non parole period of 6 years to commence from 21 December 1992.

The grounds of appeal in respect of which leave was given are confined to allegations that the sentence offended against the totality principle, or alternatively, was manifestly excessive.

One question which was raised at the outset concerns the practical operation of the two sentences to which I have referred.

The victim in the earlier case was a man named Jeff. The second victim was named Hurrell. Jeff was killed on 21 January 1990 but the appellant was not interviewed about the matter until 21 October 1991. He was charged and released on bail. On 24 December 1991, Hurrell was killed. The appellant was charged on that day and bail was refused. The appellant pleaded guilty to a dangerous act in relation to Jeff's death on 18 December 1992 and was sentenced by Mildren J on 21 December 1992. At that time the appellant had been in custody for nearly a year, but not in relation to the matter of Jeff's death.

Mildren J correctly concluded that he had no power to back date the sentence but said that he would take the appellant's period in custody into account in fixing the sentence and the non parole period.

The sentence passed by Angel J was expressed to be cumulative upon the earlier sentence and the new non parole period was directed to start from the date of Mildren J's sentence, namely 21 December 1992.

The total head sentence to be served is 12 years commencing from 21 December 1992, although the appellant has been in custody from 24 December 1991. The head sentence is one year less than it would have been had the appellant not been in custody for a year prior to being sentenced by Mildren J. But the earning of remissions on the head sentence presumably did not start until 21 December 1992.

This means that the non parole period of six years must be considered in the light of a head sentence which will have been reduced by two years at the time the appellant is eligible for parole. The differential between the head sentence and non parole period is, in my view, entirely appropriate.

For the purposes of considering the appellant's complaint that the sentence imposed by Angel J was manifestly excessive, it can be accepted that the total sentence which resulted is one of 13 years with a non-parole period of 7 years.

Mr Barr, of counsel, who appeared as amicus curiae to assist the appellant, raised the question whether the totality principle applied to a case in which different judges pass separate sentences in cases which involve different crimes committed at widely spaced intervals of time. Mr Barr submitted that the judge

who passes the later sentence must adhere to the totality principle. This was said to be so because of the provisions of sections 4 and 4A of the Parole of Prisoners Act which require the judge to specify a new non parole period which is appropriate to the aggregate term remaining to be served.

I have no difficulty in accepting that, in this case, Angel J was subject to the totality principle. The totality principle, in a case such as the present, means no more than that the later sentencing judge is under an obligation to avoid passing a sentence which, in its overall effect, is manifestly excessive or inadequate. *Mill v The Queen* [1988] 166 CLR 59.

The use of the expression "totality principle" is relatively new. It is merely a convenient label to attach to the obligation upon a judge sentencing a multiple offender or an offender previously sentenced. It adds nothing to the law. The stated obligation has always been present, but it can be conveniently expressed as being required by the "totality principle".

Because this court is concerned with forming a judgment about the overall criminality involved in the two offences, it is necessary to say something about the facts of each case.

In the case dealt with by Mildren J, the agreed facts showed that the appellant carried out a vicious assault upon an invalid pensioner of 64 years. The assault caused severe injuries resulting in death. The appellant had forcibly entered the victim's flat in Palmerston following a complaint by the appellant's de facto

wife that the victim had made improper advances to her. The appellant was heavily intoxicated at the time of the attack. As the appellant had pleaded guilty to a dangerous act, Mildren J accepted that there had been no actual foresight of death.

Before the shooting incident in which Hurrell was killed, the appellant had been charged with the killing of Jeff. He was released on bail on 21 October 1992. The agreed facts surrounding the death of Hurrell on 24 December 1992 are set out in Angel J's reasons for sentence. After describing how the appellant was a member of a group of five people who had gone to Gunn Point for a fishing holiday, his Honour's narrative continues:-

> "Some time later, possibly about 2 pm that day, Kelvin Hurrell and Jack Jelenic returned by car from fishing and walked into the camp. They'd only been in the campsite for a short time when Kelvin Hurrell was shot. There was no conversation or any other form of interaction between you and the deceased. Nothing occurred to precipitate what followed. Kelvin Hurrell was standing next to a camping table apparently about to make himself a cup of coffee when you shot him.
>
> At some time prior to the shooting you'd obtained a .22 calibre rifle. You'd previously placed the rifle in the vehicle and retrieved it upon Kelvin Hurrell's return. The rifle was loaded. You approached within less than four metres of Hurrell and the rifle was held by you as to point in his direction. The rifle was held in a raised position and discharged. This necessitated some conscious act on your part and, in the circumstances, you were aware that the death of your victim might be a possible consequence of your conduct. This is a fact which you acknowledge.
>
> The bullet struck Kelvin Hurrell in the left temple and he fell to the ground. Death was almost instantaneous. The rifle had been found some years ago in a rubbish tip by Michael Marks who had then given it to the deceased. The deceased had taken the rifle with him on that fishing trip. Michael Marks had seen the rifle earlier on Christmas eve in the back of the deceased's camper van.

> Immediately after the shooting, Michael Marks, who had been putting on some cassette tapes, was on the other side of the camper van to where the shooting took place, came around the van and saw the deceased lying on the ground and he saw you holding the rifle on its side in the horizontal position. Michael Marks approached you and pulled the ammunition magazine from the rifle. You then went over to the body of the deceased which was lying back to the ground and face up.
>
> You placed the rifle across the deceased's abdomen and chest with the barrel near the head and the butt near the hips. You placed the deceased's hands on the weapon so that it might appear as if the deceased had committed suicide.
>
> As you did this, you said words to the effect, "Make out he done suicide to himself." You later told police you said that because you'd panicked. There were various conversations between you and the police officers during the next few hours. You were then conveyed to the Berrimah Police Station where later the same day you took part in a video record of interview."

The appellant admitted a large number of previous convictions commencing in May 1979. They include 7 convictions for offences concerning firearms, 2 aggravated assaults, 3 convictions for dishonesty and a number of motor car offences suggestive of heavy drinking.

The appellant's personal history is characterised by the usual accompaniments of heavy drinking. Since 1980 the appellant has had no regular employment. He has had 2 de facto relationships which have each produced a child. The younger son was present at the fatal shooting. The learned trial judge accepted that the appellant had cared for his children responsibly. A psychiatrist Dr McLaren opined that the appellant has an inadequate personality and suffers from bouts of reactive depression. He said that the appellant did not express any remorse in respect of either of the two killings. Nor

did the appellant accept that he is an alcoholic who must learn to control his drinking.

Dr McLaren stated that the essence of the inadequate personality is that the person concerned habitually repeats his mistakes until somebody gets hurt.

The learned trial judge called for and received a pre-sentence report from an officer of the Department of Correctional Services. The writer stated that the appellant was unlikely to benefit from a remedial programme for alcoholics because of his belief that no such help is required.

Thus it can be seen that the learned trial judge was justified in concluding that the appellant's prospects of rehabilitation were bleak and that the protection of the community was an important factor to be considered.

The appellant himself read a submission to the Court in which he claims to have now recognised that he is an alcoholic and to have attended Alcoholics Anonymous while in custody. His submission was to the effect that his two head sentences be made concurrent.

In considering the application of the totality principle, regard must be had to the overall level of criminality in relation to the effective aggregate of the two sentences.

It was not suggested to this Court that the head sentence passed by Mildren J was itself excessive. So the question is whether the sentence passed by Angel J. and the non parole period he fixed

have produced an aggregate sentence which offends the totality principle.

Disregarding the first sentence for a moment and looking at the circumstances presented by the evidence before Angel J, it is apparent, in my view, that his Honour could quite properly have passed a heavier sentence than he in fact did.

The admitted facts are almost entirely devoid of any mitigating circumstance. The appellant picked up a loaded firearm, pointed it in the direction of the victim and pulled the trigger, whilst foreseeing the possibility of the victim's death. The facts show something on the very borderline of murder, although acceptance of the plea to manslaughter precludes a finding of murderous intent.

Nor was the appellant's conduct in any way influenced by provocative conduct or aggressive behaviour on the victim's part. The appellant was not insane nor excessively intoxicated. The killing is indeed, as the learned trial judge said, inexplicable. But the inexplicable character of the event does not affect the gross degree of the criminality involved.

This aspect is aggravated by the fact that two months earlier the appellant had been charged with the unlawful killing of another man and was on bail awaiting trial on that matter.

It is well settled that the learned trial judge was entitled to have regard to these circumstances. See *R v Driver* [1990] 70 NTR 9; *R v Richard* [1981] 2 NSWLR 464 per Street CJ at p465.

The result of the appellant's grossly criminal conduct was that a young man met his death. As I earlier said, I consider that a very heavy sentence was justified. The crime carries a maximum penalty of life imprisonment and, in my view, this was a very serious instance of this class of crime.

The learned trial judge resolved that the second sentence should be served cumulatively upon the first sentence because the two crimes were in no way related. Having thus decided, his Honour passed what might otherwise be regarded as a lenient sentence for the crime before him. His Honour was doubtless mindful of the obligation imposed by the totality principle. In my view, it cannot be successfully contended that an effective sentence of 13 years is excessive having regard to the degree of criminality involved in the two killings. To conclude otherwise would be to place a singularly cheap value on human life. Nor can the effective minimum term of 7 years be considered excessive. It is, in my view, entirely appropriate and well within his Honour's sentencing discretion.

I would dismiss the appeal.

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