Murphy v The Queen [2005] NTCCA 15

PARTIES:	MURPHY, Shaun Jabaltjari v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 10 of 2005 (20417309)
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JUDGMENT OF:	MILDREN, RILEY & SOUTHWOOD JJ

CATCHWORDS:

CRIMINAL LAW – APPEAL – SENTENCE

Two offences of aggravated assault and one offence of doing a dangerous act – whether sentence manifestly excessive – previous criminal history – whether sentences should be served cumulatively – three offences were separate facets of the one multifaceted course of conduct – partial accumulation of the sentences appropriate.

Sentencing Act (NT) s 50

Attorney-General v Tichy (1982) 30 SASR 84 at 92 and 93, applied.
Brown v Lynch (1982) 15 NTR 19 at 11 and 12, applied.
Dicker v Ashton (1974) 65 LSJS (SA) 150 at 151, applied.
Dooley v The Queen [2003] NTCCA 6, cited
Miles v The Queen [2004] NTCA 9 at [36], applied.
Salmon v Chute (1994) 94 NTR 1 at 24, applied
Veen v The Queen (No 2) (1987-1988) 164 CLR 465 at 477, applied.

REPRESENTATION:

Counsel:

Appellant:	V. Whitelaw
Respondent:	W.J. Karczewski QC with C. Roberts

Solicitors:

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

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

Murphy v The Queen [2005] NTCCA 15
No CA 10 of 2005 (20417309)

BETWEEN:

MURPHY, Shaun Jabaltjari
Appellant

AND:

THE QUEEN
Respondent

CORAM: MILDREN, RILEY and SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 11 November 2005)

MILDREN J:

[1] I have read a draft of the judgments prepared by Riley and Southwood JJ. I agree that the appeal should be allowed for the reasons given by their Honours. I also agree with the sentencing orders proposed by Riley J.

RILEY J:

[2] On 7 April 2005 the appellant pleaded guilty to three offences that occurred on 27 July 2004. The offences consisted of an aggravated assault committed

upon CB, an aggravated assault committed upon JJ and the doing of a dangerous act.

[3] On 27 July 2004 the appellant and CB were living in McLaren Creek. They had been in a relationship for about four weeks. On that day the appellant, CB and others had been drinking beer at a location near to the McLaren Creek community. They subsequently returned to their home and continued drinking. At about 11.30 pm an argument developed between them and a short time later the appellant left the house saying that he was going to hang himself. He had a rope and began to tie it to the house. The victim, CB, grabbed him around the waist in order to prevent him harming himself and as she was doing so the appellant punched her with his right clenched fist on the left side of her jaw and then bit her on the left forearm. The two fell to the ground with the appellant sitting on top of his victim. He grabbed her by the right foot and bit her on the little toe, causing it to bleed. That conduct is the basis of count 1 on the indictment.

[4] Thereafter the appellant released his victim and went to his father's house which was a short distance away. The victim ran back to House 18 which she shared with the appellant and lay down on the mattress in the bedroom. The appellant obtained a Stirling .22 Magnum bolt-action rifle and put a quantity of bullets in his pocket. He then walked back to House 18 and, as he did so, loaded one bullet into the rifle. He entered the bedroom holding the rifle. CB grabbed the rifle barrel and pushed it up. The appellant pulled the trigger, discharging a bullet into the ceiling of the room. CB then

pushed the appellant away and ran to the lounge room through the back door. He followed. The victim closed the back door and attempted to lock the door from the inside. The appellant then fired the rifle at the door with the bullet passing through the door near to the handle and narrowly missing the hand of CB which was still on the door handle. She ran out the front door and the appellant followed her with the rifle. That conduct constituted count 2, the offence of committing a dangerous act.

[5] The appellant then stood in front of the house where the victim was hiding and called out for her. A number of the occupants of the house came out and saw him holding the rifle in his right hand, by his leg. The appellant approached the second victim, JJ, who was standing in the doorway to his house. The appellant had the rifle in his hands and was standing about 5½ metres away from JJ. JJ was not sure if the rifle was loaded but, in any event, he walked towards the appellant and told him to put the rifle down. When he was about 1½ metres from the appellant, the appellant raised the rifle to his shoulder, pointed the rifle into the air and fired one bullet. JJ stopped walking. The appellant then reached into his pants pocket and pulled out another bullet which he placed in the breech and he started to push the bolt forward. JJ approached the appellant and placed his finger into the breech preventing the bolt going forward. JJ's finger was jammed in the breech and started bleeding. At that time the appellant was restrained and disarmed. That conduct constituted count 3 on the indictment. The

police were called and the appellant was detained. The following evening he was interviewed by police and made partial admissions.

[6] On 8 April 2005 the appellant was sentenced to imprisonment for 12 months in respect of count 1, five years in respect of count 2 and two years in respect of count 3. At the time he was already serving a sentence of imprisonment for two years imposed by the Court of Summary Jurisdiction for an earlier offence of assault occasioning bodily harm. Each of the sentences imposed by the learned sentencing judge were directed to be served cumulatively, giving a total sentence of imprisonment for eight years for the offending on 27 July 2004. That sentence was then directed to be served cumulatively upon the sentence of imprisonment for two years imposed by the Court of Summary Jurisdiction, giving a total effective sentence for all of the offending of imprisonment for 10 years. His Honour set a new non-parole period of seven years. The sentence was deemed to have commenced on 2 June 2004 being the date upon which the sentence imposed by the Court of Summary Jurisdiction had commenced.

[7] The appellant appeals against the severity of the sentence imposed and the primary ground for the appeal is that the head sentence of imprisonment for eight years is manifestly excessive. Further grounds of appeal included that the learned sentencing judge erred: (a) in ordering that the sentences be served cumulatively; (b) by failing to accord sufficient weight to the principle of totality; and (c) by failing to accord sufficient weight to the appellant's plea of guilty.

[8] A significant factor in determining an appropriate sentence was the criminal history of the appellant. The learned sentencing judge observed that the conduct of the appellant was "particularly worrisome and in the area of violence, previous warnings of the Court have simply gone unheeded". The criminal history was described as being "a very bad record" including, at the time of the offending, some 13 prior convictions for assault. A number of those assaults were aggravated assaults, including assaults with weapons. The appellant was described as having "an extensive prior record of offences of violence", and it was observed by his Honour that the offending dealt with in April 2005 occurred whilst other charges were current.

[9] Matters of special significance in the criminal history of the appellant included the convictions and sentence imposed by Kearney J on 30 July 1993 when he sentenced the appellant for unlawfully causing grievous harm resulting from a knife attack, unlawfully causing bodily harm resulting from a knife attack and robbery aggravated by being armed with an offensive weapon (a knife) and by causing bodily harm resulting from the use of the knife. Kearney J sentenced the appellant to imprisonment for a period of five years with a non-parole period of 2½ years. Following serving that sentence the appellant was convicted of the offence of aggravated assault on five further occasions being in June 1996 (for which he was sentenced to imprisonment for two months), February 2000 (imprisonment for two years), November 2001 (imprisonment for 15 months), March 2002 (imprisonment for 14 months and two weeks) and September 2004 (imprisonment for two

years). Some of the sentencing remarks relating to the offending were before the learned sentencing judge. His Honour quoted the following from the sentencing remarks of Kearney J made on 30 July 1993:

> "I have been a Judge for a long time, Mr Murphy, and I have seen a lot of young men like you. Not many young men of your age have got such a record of violence which almost inevitably in your case will lead to homicide at some time. Some time in your life you will use a knife on someone and kill them. When that happens, you will be charged with murder and that is the end of the road for you."

[10] In April 2005 the learned sentencing judge referred to those sentencing remarks and other observations of Kearney J and then noted that the appellant continued to reoffend. As the respondent to this appeal submitted, the appellant's criminal history clearly demonstrated that the offending then before the court was not an uncharacteristic aberration but, rather, was a manifestation of the appellant's continuing attitude of disobedience of the law: *Veen v The Queen (No 2)* (1987-1988) 164 CLR 465 at 477.

[11] As the majority (Mason CJ, Brennan, Dawson and Toohey JJ) observed in *Veen v The Queen (No 2)* (supra at 477):

> "… (T)he antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences …The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates

> the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind."

[12] The principal focus of the submissions made to the Court was that the sentence imposed in respect of count 2, the dangerous act, was manifestly excessive and the failure to order concurrency of some or all of the sentences with each other and with the sentence then being served was in error.

Count 2

[13] The dangerous act committed by the appellant was to fire a bullet through a door of House 18 whilst the victim, CB, was on the other side of that door. The maximum penalty for the offence is imprisonment for nine years and the appellant was sentenced to imprisonment for five years.

[14] The respondent pointed out that the danger resulting from the conduct of the appellant was real because, as the appellant knew, CB was in close proximity behind the door. As the agreed facts revealed, the bullet narrowly missed her hand. The appellant stood to be punished for the serious actual danger occasioned by the deliberate discharge of the rifle in those circumstances. The respondent also placed emphasis upon the violent history of the appellant which, it was submitted, demonstrated a dangerous propensity on his part. There was a clear need for personal deterrence and a sentence which served to protect the community.

[15] On the other hand the appellant pointed out that whilst his conduct was serious it occurred in circumstances where he was suicidal and, importantly, no-one was injured as a consequence. The sentence was to be considered in light of the fact that the appellant pleaded guilty to an ex officio indictment at the first reasonably available opportunity. He was entitled to credit for so doing.

[16] There is no tariff in respect of such offending. This Court has observed that an offence against s 154 of the Criminal Code covers a wide range of conduct and allows no statistical range: *Dooley v The Queen* [2003] NTCCA 6. However, the researches of counsel failed to reveal any case in which a sentence of this order for similar offending had been imposed. This, of itself, does not mean that the sentence was manifestly excessive. For that to be so the sentence must be clearly outside the range of permissible sentences open to the sentencing judge. It must be so very obviously excessive that it was "unreasonable or unjust": *Salmon v Chute* (1994) 94 NTR 1 at 24. As has been observed on many occasions, a submission that a sentence is manifestly and not merely arguably excessive is not one which is capable of a great deal of elaboration.

[17] Mr Karczewski QC, very experienced counsel appearing on behalf of the Crown, acknowledged that the sentence was "very high" but submitted that in light of all the circumstances, including the prior offending, it was not manifestly excessive. In my view the sentence was manifestly excessive. It was so markedly in excess of other sentences as to warrant intervention.

Counts 1 and 3

[18] Notwithstanding the somewhat faintly put submission of the appellant to the contrary, the sentences in relation to counts 1 and 3 are in my opinion not manifestly excessive.

Accumulation

[19] The learned sentencing judge directed that the sentences imposed by him be served cumulatively upon each other and, further, cumulatively upon the sentence being served at the time. The effective period of imprisonment was for 10 years when all sentences were taken into account.

[20] In directing that the sentences be served cumulatively his Honour said:

> "I take account of the principle of totality. I take account of the fact that he is already serving a sentence and I take account of the fact that there are three counts, each of which might attract more heavier (sic) sentences than I will be imposing. I am very conscious of not passing a crushing sentence in the circumstances. … Each of those offences whilst committed on the same day constitute clearly separate incidents and it seems to me appropriate to accumulate those three sentences which makes it an accumulation of eight years imprisonment. That will be accumulated upon the sentence that he is presently serving and it is for me to fix a new non-parole period. I fix a non-parole period of seven years imprisonment."

[21] Whilst it is the case that there were separate incidents involved in the offending on 27 July 2004, that offending occurred in circumstances which constituted one course of conduct. The incidents were linked in terms of time, approximate location and, in two cases, commonality of victim. The offending took place over a period of approximately 30 minutes and started

with the appellant seeking to hang himself. The three offences then occurred in quick succession. They were all part of the one episode. They all involved or arose out of the ongoing assault upon, and the pursuit of, CB. There was no suggestion that the appellant had time to cool down. Counsel for the appellant described the appellant as being in a state of "wild, suicidal acting out". That may be an overly colourful description of the emotional state of the appellant but it is clear that each offence occurred in close proximity to the others in terms of both time and location and also at a time when the appellant was in the same ongoing state of high agitation.

[22] Section 50 of the Sentencing Act creates a prima facie rule that terms of imprisonment are to be served concurrently unless the court "otherwise orders". However there is no fetter upon the discretion exercised by the court and the prima facie rule can be displaced by a positive decision: *Miles v The Queen* [2001] NTCA 9.

[23] In *Attorney-General v Tichy* (1982) 30 SASR 84 Wells J observed (at 92-93):

> "It is both impracticable and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether the sentences should be ordered to be served concurrently or consecutively … What is fitting is that a convicted prisoner should be sentenced, not simply and indiscriminately for every act that can be singled out and brought within the compass of a technically identifiable conviction, but for what, viewing the circumstances broadly and reasonably, can be characterised as his criminal conduct. Sometimes, a single act of criminal conduct will comprise two or more technically identified crimes. Sometimes, two or more technically identified crimes will comprise two or more courses of criminal conduct that, reasonably

> characterised, are really separate invasions of the community's right to peace and order, notwithstanding that they are historically interdependent; the courses of criminal conduct may coincide with technical offences or they may not. Sometimes, the process of characterisation rests upon an analysis of fact and degree leading to two possible answers, each of which, in the hands of the trial judge, could be made to work justice."

[24] In *Brown v Lynch* (1982) 15 NTR 9 Forster CJ said (at 11-12):

> "In a number of unreported decisions of this Court it has been held that, save in special circumstances, when a number of offences arise from substantially the same act or same circumstances or a closely related series of occurrences, cumulative penalties should not be imposed, and many sentences passed from day to day have demonstrated adherence to this principle."

[25] Wells J expressed similar views in *Dicker v Ashton* (1974) 65 LSJS (SA) 150 (quoted with approval in *The Queen v Scanlon* (1987) 89 FLR 77) where his Honour said (at 151):

> "I am of the opinion that, unless the circumstances are exceptional or the offences in question are the terminal product of separate and independent courses of criminal conduct that happen to have occurred together, a court is not ordinarily justified in imposing cumulative sentences of imprisonment for offences that are of a similar character or ordinarily associated and that simply represent facets of one course of conduct."

[26] The assessment will always be a matter of fact and degree. Reasonable minds might reach different conclusions as to the need for accumulation especially in cases that may be described as borderline. In many cases there will be no clearly correct answer and the overriding concern is that the sentences for the individual offences and the total sentence imposed be

proportionate to the criminality in each case: *Miles v The Queen* (supra at para 36).

[27] In the present case there was one ongoing course of conduct. The offending could legitimately be described as separate offending given the differences in the nature of the conduct, the precise location of the offending and, in one case, the identity of the victim. However, the underlying common denominator was the course of conduct embarked upon by the appellant over a short period of time. The three offences were separate facets of the one multifaceted course of criminal conduct: *Attorney-General v Tichy* (supra at 93).

[28] In my view it would have been appropriate for the learned sentencing judge to partially accumulate the sentences in order to reflect the principles I have discussed. It was an error to wholly accumulate the sentences for the offences which occurred on 27 July 2004.

[29] In my view the appeal must be allowed.

Re-sentencing

[30] This Court is required to re-sentence the appellant. I see no reason to interfere with the sentences imposed by the learned sentencing judge in respect of counts 1 and 3. In relation to count 2 I would impose a sentence of imprisonment for three years and six months. The total head sentence for the three counts before the Court would therefore be imprisonment for six

years and six months. In light of the observations I have made regarding cumulation, I would direct that the sentences in counts 1 and 3 be served concurrently with the sentence on count 2 to the extent of 12 months giving an effective head sentence in respect of all of the offending of imprisonment for five years and six months. As the learned sentencing judge observed, the appellant is presently serving a sentence of imprisonment for two years in respect of other matters. There is nothing relating to that sentence which calls for concurrency with the sentences now imposed. I would make the sentence for the offending in July 2004 cumulative upon that sentence, giving a new total period of imprisonment for all of the offending of seven years and six months. I have considered that sentence in light of the totality principle and I see no reason to interfere further. I would set a non-parole period of imprisonment for five years. The sentence should be deemed to have commenced on 2 June 2004 in accordance with the reasons of the learned sentencing judge.

SOUTHWOOD J:

[31] I have had the benefit of reading a draft of his Honour Riley J's reasons for judgment. I agree that the sentence of five years imprisonment imposed on the appellant for count 2 was manifestly excessive and that the three offences for which the appellant was sentenced are separate facets of the one multifaceted course of criminal conduct. The learned sentencing judge should have partially accumulated the sentences of imprisonment that he

imposed on the appellant. The aggregate sentence of imprisonment that was imposed on the appellant was disproportionate to the whole of the offender's criminal behaviour. The appeal should be allowed.

[32] I agree with the sentencing orders proposed by Riley J.

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