Burrunali v Trenerry [1999] NTSC 123

PARTIES:	BURRUNALI, Nehemiah v TRENERRY, Robin Laurence
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Counsel:

Appellant:	P Strickland
Respondent:	T Austin

Solicitors:

Appellant:	NAALAS
Respondent:	DPP

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Mar99036

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

Burrunali v Trenerry [1999] NTSC 123
No. 99102249

BETWEEN:

NEHEMIAH BURRUNALI
Appellant

AND:

ROBIN LAURENCE TRENERRY
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 12 November 1999)

[1] Appeal against sentence. The appellant was convicted upon his pleas of guilty in the Court of Summary Jurisdiction at Darwin on 20 June 1999 on three counts of aggravated unlawful assault. The offences all took place on 10 May 1999 in rapid succession. Each offence carried a maximum penalty of 5 years imprisonment, but the learned Magistrate had a jurisdictional limit of 2 years in each case. He sentenced the appellant to 12 months imprisonment on each of two of the charges to be served cumulatively and 4 months on the other to be served concurrently with the other two.

[2] The only ground of appeal in the Notice of Appeal is that the sentence was manifestly excessive, but as argument developed it was clear that the

appellant was saying that his Worship erred in the exercise of the discretion by ordering accumulation; he should have allowed s 50 of the *Sentencing Act* 1995 (NT) to operate so that all sentences would be served concurrently. Alternatively, it was put that his Worship failed to consider the totality of the sentences and should have reduced the total by ordering only a partial accumulation. These considerations amount to allegations of specific or assigned error and if relied upon, should be specifically alleged in the grounds of appeal and not left to be enmeshed in argument directed to the manifestly excessive ground

[3] The respondent's position was that he was not prejudiced by the way the matter developed and that the total sentence was wholly justified.

[4] The circumstances of the offending were these:

[5] *Count 1* At about 7.45am on 10 May the appellant was loitering in the front of the Karama Shopping Centre and Ms Woodward came out and went to her motor vehicle. The appellant followed her and she was aware of that. She went to the car and got inside, saw the appellant approaching the driver's side door, so she locked it and tried to start the car. The appellant walked up to the car and banged on the driver's window with his fist about five or six times. Ms Woodward drove off.

[6] *Count 2* At about 8.20am on the same day, the appellant was seated near the entrance to a primary school when Ms Gentle walked by him. As she did so he said something to her and she asked him what he wanted and

he said, “I want to walk with you”. She replied “No, I’m busy, you can not walk with me” and continued on her way. The appellant put his arm around her shoulders, she shrugged him off, but he continued to follow her. She called her husband on her mobile phone and whilst she was doing that the appellant approached her again, stood in front of her and grabbed her firmly on the right breast. Ms Gentle noticed that he smelt of alcohol. She pulled away and told the appellant not to touch her, but he moved forward and grabbed her crotch area. She told him that she was on the phone to the police and he started walking away. A short distance away he stopped, turned around and made a sexual thrusting motion with his hips.

[7] As to Count 3, having left Ms Gentle, the appellant walked down a lane way as a 14 year old girl, Ms McGregor, was walking home and went by him. He stopped her and asked for money and a cigarette which she refused, and he then grabbed her by both arms holding them tightly. He was pushing her backwards and forwards and saying something which she could not understand, she kept telling him she had to go to school, she struggled and tried to get away. At that time the appellant grabbed her on her right breast and on her buttocks near her thighs. Ms McGregor continued to struggle and the appellant attempted to put his leg behind her legs in an effort to trip her over. At that time Mr Gentle arrived and intervened.

[8] The police apprehended the appellant shortly after these events. They noticed he smelt of alcohol and that his eyes were glazed and when

interviewed he made partial admissions saying that he wanted to touch those women on the breast and buttocks.

[9] It will be noted at once that the three offences all occurred within a short period of time, all assaults were upon females and two of them were indecent. All arose in similar circumstances, an innocent approach by the appellant to each victim, a rejection followed by the assault. It is not suggested that any of the victims acted other than properly in rebuffing the accused, who was not known to any of them, and who caused them to be frightened by his manner. He is an aboriginal man who has difficulty in communication due to severe hearing impairment which has produced a speech impediment. He apparently has some ability to lip read. Those natural disabilities were compounded by his voluntary alcohol intoxication.

[10] Little else is known of the appellant. He was 26 years old, had lived most of his life on an outstation near Oenpelli, and was employed under CDEP at $320 per fortnight. He was said to have gone to school and reached grade 7, but his level of attainment is not disclosed. Single, he lives with his parents who are said to be very supportive of him. A hearing aid has been made available, but it was destroyed by the appellant as he did not know how to use it effectively.

[11] It was put on the appellant's behalf that his disabilities led to rejection, which in turn made him angry and to respond offensively. The indecent elements of the assault were said by counsel for the appellant not to have

lasted for any length of time – just a grabbing. His Worship took the view that none of the sexual elements of the offences were planned, but were a means whereby the appellant registered his disapproval for being rejected.

[12] The learned Magistrate indicated that the circumstances of the plea entitled the appellant to leniency, and noted his embarrassment and that which was caused to his family, presumably as being indicative of remorse. It was also rightly noted that the appellant had a history of prior offending going back to 1988. There were instances of assault, including one causing grievous harm, for which the sentence imposed was 2 years imprisonment suspended after a short period. The related good behaviour bond was breached leading to the appellant being in prison for 21 months and the fixing of a non-parole period of 12 months. That was ordered in October 1997.

[13] The appellant has no prior convictions for assaults involving acts of indecency. His Worship said that the record led to the appellant's not qualifying for leniency usually available to a first offender. He regarded personal and general deterrence as being important.

[14] Having imposed the sentences, his Worship said that he had stepped back to look at the result and nevertheless considered 2 years imprisonment to be appropriate. He fixed a non-parole period of 12 months and made recommendations concerning counselling for the appellant whilst in custody.

[15] Concurrency being the starting point (*Sentencing Act*, s 50) a discretion must be exercised to order sentences to be served cumulatively, s 51. The

exercise of that discretion depends upon the application of well known guidelines, which necessarily present problems in particular cases. The particular circumstances of the offending must be looked at to characterise just what amounted to the criminal conduct; did that conduct amount to "separate invasions of the community right to peace and order", (*Attorney-General v Tichy* (1982) 30 SASR at 92-93 and the other references at the footnote 526 at p 713 in Sentencing State and Federal Law in Victoria, Fox and Freiberg, 2nd Edition).

[16] To my mind, this series of offences fall to be considered as a "continuing episode" or "one transaction". It amounted to the one course of criminal conduct, "a single invasion of the same legally protected interest" (DA Thomas, Principles of Sentencing 1979 at p 53). But that does not necessarily mean that total concurrency prevails as the total punishment must be appropriate to the cumulative extent of the wrong doing (*Clair and Brough* (1985) 83 FLR 319 at 325 approved by Kearney J in *Marshall v Llewellyn* (1995) 79 A Crim R 49).

[17] In my opinion the circumstances of the offending in this case did not justify the total accumulation of the separate sentences of 1 year's imprisonment. The accumulated extent of the wrongdoing did not warrant a sentence of 2 years in gaol. I bear in mind that in the overall scheme of things these assaults although frightening to the victims, were not very serious and did not cause physical harm. They were not planned or prolonged.

[18] The offences must be placed in context of the appellant's prior record of aggression. With respect, I agree with his Worship that this man needs counselling, treatment and advice. It seems that his physical disabilities are a cause of his anti-social behaviour, especially when coupled with abuse of alcohol.

[19] The individual sentences are affirmed. The order accumulating the two sentences of 1 year's imprisonment is quashed. The second sentence of imprisonment for 1 year is to commence after the expiry of 6 months of the first sentence of 1 year's imprisonment. I direct that the appellant not be eligible to be released on parole for a period of 9 months from the commencement of the sentence.

[20] Had it been open to do so, I would have reconstructed the sentences entirely so as to differentiate between the two indecent assaults and mark the distinction between the age of the victims. There is a particular need for the courts to protect young women from attacks such as this.
