Grimley v The Queen [2010] NTCCA 06

PARTIES:	GRIMLEY, Robert
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 2 of 2010 (20732286)
DELIVERED:	10 June 2010
HEARING DATES:	10 June 2010
JUDGMENT OF:	MARTIN (BR) CJ, RILEY AND KELLY JJ
APPEAL FROM:	SOUTHWOOD J

CATCHWORDS:

CRIMINAL LAW – APPEAL – APPEAL AGAINST SENTENCE
Sexual offences against two children – application of totality principle – method of accumulation of sentences – appeal dismissed.

REPRESENTATION:

Counsel:

Appellant:	I Read
Respondent:	R Noble

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Mar1011
Number of pages:	11

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

Grimley v The Queen [2010] NTCCA 06
No. CA 2 of 2010 (20732286)

BETWEEN:

ROBERT GRIMLEY
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, RILEY AND KELLY JJ

REASONS FOR JUDGMENT

(Delivered *ex tempore* 10 June 2010)

Martin (BR) CJ:

Introduction

[1] This is an appeal against sentences imposed for 20 offences committed against two children which resulted in a total sentence of six years imprisonment in respect of which a non-parole period of three years was fixed.

[2] The appellant is now 74 years of age. He was 73 at the time of sentencing. He is in very poor health.

[3] The grounds of appeal, as filed, included a complaint that the sentence was, in view of the appellant's medical condition, crushing. Other complaints

were also made. However, ground 1 alleging that the sentence was crushing has been abandoned together with two other grounds. Only two grounds were argued in this Court and, for the reasons that follow, in my opinion those grounds are not made out and the appeal should be dismissed.

Facts

[4] There were two female victims, EG and RN. The first offending occurred between February 1991 and February 1992 against EG when she was aged four years. EG used to spend Friday nights with the offender and his partner at their house in Tennant Creek and most of the crimes were committed on these Friday nights. EG and RN became friends when EG was aged 13 and RN about 11. The first offending occurred against RN during 2001 when she was aged about seven years.

Count 1 - Indecent dealing with a child under the age of 10 years (s 132 (1) and (2)) – maximum five years – sentence six months.

[5] Between February 1991 and February 1992, when EG was aged four, the appellant placed his hand on the outside of EG's underpants on her vagina and touched her in this way for a couple of seconds.

Count 5 – Sexual intercourse with a child under 16 (s 129(1)(a)) – maximum seven years – sentence 18 months cumulative on count 1

[6] From the age of four the relationship between the appellant and EG was such that she became used to sexual contact with him. On 18 May 2002, when EG was aged 15, her boyfriend was arrested and taken into custody. EG was

upset and at the appellant's home she was crying. The appellant tried to comfort her. Eventually the appellant suggested closer comfort and EG agreed to do anything he wanted. In the appellant's bedroom they both undressed and EG lay on the bed where the appellant gave her cunnilingus and she performed fellatio on the appellant.

Counts 6 and 7 – Taking an indecent visual image of a child under 16 (Section 132(2)(f)) – maximum five years – sentence nine months on each count, concurrent but six months to be served cumulatively on count 5

[7] These offences occurred when EG was 15 and RN was 13. They were staying at the appellant's house. On the first night the appellant asked the victims if they wanted to have some fun and he started taking photographs of them. Nothing indecent occurred on the first night, but the following week the appellant suggested that more photographs be taken and asked the victims to put on full fishnet body suits with nothing underneath. They complied. EG wore a pair of boots and RN a pair of high-heels. The appellant took photographs with his Polaroid camera, telling the victims how he wanted them to pose. Some poses were standing up while others were of the victims lying on a couch. The appellant laid the photographs out on the table.

Counts 8 and 9 – Taking indecent visual image of a child under 16 (s 132(2)(f)) – maximum five years – sentence nine months on each concurrent, but six months cumulative on count 6

[8] About three or four weeks after the offences in counts 6 and 7 were committed, the victims were again at the appellant's house. In the middle of

the day the appellant drove the victims to Mary Ann Dam near Tennant Creek where the victims played in the dam. Then they went for a walk, during which the offender asked if they wanted to take photos. At the request of the appellant, the victims removed their clothing and he took photographs of them while they were naked posing in the water and on dry land.

Count 10 – Exposing a child under 16 to an indecent act (s 132(2)(b)) – maximum five years – sentence six months concurrent with count 8

[9] While taking the photographs of the victims at the Mary Ann Dam, the appellant dropped his pants and held his penis while RN took a photograph of him. At the same time RN was standing with one foot on a rock so that her vagina was exposed.

Counts 11 and 12 – taking an indecent visual image of a child under 16 (s 132(2)(f)) – maximum five years – sentence 12 months on each concurrent but six months cumulative on count 8

[10] On a Friday night the victims got dressed up to go out and asked the appellant if they could use his camera to take photographs of themselves as they were dressed up. After they took the photographs, the appellant also took photographs with the victims in fun poses. The appellant then suggested that the victims pose naked for him. The victims went into EG's room and removed their clothes. With RN wearing nothing and EG wearing only a pair of boots that belonged to RN, the appellant took photographs in various poses suggested by him, including the victims on top of each other, RN sitting on EG's back, the victims bending over backwards and the

victims kissing each other. The appellant urged the victims to show off their genitals and breasts. After taking each photograph the appellant showed it to the victims by laying it out on the dining room table.

Count 13 – Assault in aggravated circumstances including indecent assault and victim under 16 (s 188(1) and (2)(b), (c) and (k)) – maximum five years – sentence six months concurrent with count 11

[11] On the same night that the appellant took the photographs that are the subject of the crimes in counts 11 and 12, the victims later went out and were invited to a gathering. They returned to the appellant's house and asked if they could go to the gathering, but at first the appellant would not let them do so. Eventually he agreed, but said he wanted a hug and a kiss goodnight as he was going to bed by the time they got home. RN approached the appellant and leant forward to give him a peck on the lips, but the appellant put his arms around RN and held her close and tightly while he kissed her and pushed his tongue into her mouth. RN bit down on her teeth so that the appellant's tongue could not go far into her mouth. While the appellant was kissing RN, he rubbed her bottom. RN then pulled her head away.

Counts 14 and 15 – Taking an indecent visual image of a child under 16 (s 132(2)(f) – maximum five years – sentence 12 months on each concurrent but six months cumulative on count 11

[12] These offences occurred towards the end of the last school term when RN was in year 8. RN was then 13 and EG 15. Both were at the appellant's house and the appellant asked them to bring to the house skimpy see-through

underwear so that he could take photographs of them in that clothing. RN took a pink see-through lingerie top which had a split in the middle of the stomach and frills on the seam line as well as a pearl coloured silk top with thin straps. After dinner the appellant asked the victims to get changed and wear only the tops and no pants. Several outfit changes occurred and the appellant took many photographs. In the process he asked the victims to expose themselves and, if their breasts were hidden by a top, he asked them to pull their breasts out or to lift the top up. For one photograph the appellant asked the victims to hold each others breasts. Photographs were taken of the victims standing up and lying down with their legs open. For one of the photographs the appellant had the victims lie down next to each other on the floor with their legs up in the air and spread apart. The same Polaroid camera was used and the appellant laid the photographs out on a table.

Count 16 – Expose a child under 16 to an indecent act (s 132(2)(b)) – maximum five years – sentence 12 months concurrent with count 14

[13] This crime occurred while the appellant was taking the photographs which are the subject of counts 14 and 15. The appellant was wearing cotton boxer shorts and was touching his penis. Initially the appellant put his hands down his pants, but subsequently he pulled his penis out over the top of his boxer shorts. RN noticed that he was moving his hand up and down over his penis.

Count 17 and 18 – Exposing a child under 16 to an indecent film (s 132(2)(e)) – maximum five years – sentence three months on each concurrent but cumulative on count 14

[14] These crimes arise out of the playing of a pornographic movie at the appellant's house. The appellant and the victims were sitting on a lounge in front of the television and the appellant played a pornographic movie which involved a male and two females having sexual intercourse.

Count 19 – Exposing a child under 16 to an indecent act (s 132(2)(b)) – maximum five years – sentence nine months concurrent with count 17

[15] This crime occurred while the victims were watching the pornographic movie that is the subject of counts 17 and 18. RN noticed that the appellant pulled out his penis and was pulling up and down on it. He said "a little bit more, just a bit more, I'm nearly hard". RN was 12 and EG either 14 or 15.

Counts 20 and 21 – Exposing a child under the age of 16 to an indecent film (s 132(2)(e)) – maximum five years – sentence three months on each concurrent but cumulative on count 19

[16] Not long after the occasion involving the pornographic movie which is the subject of counts 17 – 19, the appellant showed a pornographic film to the victims which involved two males and two females in a pool area. One of the males was cooking on a barbeque wearing only an apron and the other male was on a beach chair. The two females were in the pool without tops.

Count 22 – Exposing a child under 16 to an indecent act (s 132(2)(b)) – maximum five years – sentence nine months concurrent with count 20

[17] While watching the pornographic movie that is the subject of counts 20 and 21, the appellant lifted his penis out over the top of his boxer shorts and played with it.

Count 26 –Unlawful assault in circumstance of aggravation of indecent assault (s 188(1) and (2)(b)(k)) – maximum five years – sentence 12 months, six months of which to be served cumulatively on count 22

[18] This offending occurred when RN was aged 16. By this time RN had moved with her family to Batchelor, but she travelled back to Tennant Creek to visit EG whenever she could. On the Anzac long weekend in 2006 the victims spent the night at the appellant's house. After dinner they were using the computer and drinking alcohol. It was RN's turn to pour the drinks, and when she went into the kitchen to do so, the appellant pulled her close to him. He then put his left hand down her underpants near her right hip and slowly moved his hand around to the front of RN's vagina where he touched her on the outside of the vagina. RN made an excuse to get away.

Ground 3

[19] Ground 3 is a complaint that the learned sentencing Judge failed to properly apply the principle of totality. In essence, it was contended that the sentencing Judge failed to take into account the factors of mitigation and, in particular, the health of the appellant in arriving at the individual sentences. Counsel submitted that his Honour restricted the operation of these mitigating factors to an assessment of the total length of the sentence and a

determination of whether the sentences should be concurrent or partially concurrent.

[20] These contentions are based upon the following passage in his Honour's sentencing remarks:

> "In my opinion, imprisonment will be a greater burden on the offender by reason of his state of health. If the offender is not adequately monitored and cared for, there is a risk that he may fall and his health could be significantly adversely affected if he does fall. Consequently, I have taken these factors into account in sentencing the offender by way of mitigation. I have taken them into account to the extent to which I have made the sentence of imprisonment that I have imposed on the offender either concurrent or partially concurrent."

[21] In my view, there is no substance in this complaint. The basis of the contentions is an assumption that the sentence beginning "I have taken them into account to the extent…" is a sentence of qualification to the general statement "I have taken these factors into account in sentencing the offender by way of mitigation." In my view, the second sentence does not qualify the first general statement.

[22] When regard is had to the individual sentences imposed for each count, it is readily apparent that his Honour took into account all the factors of mitigation and, particularly the ill health of the appellant, in arriving at those individual sentences. They are particularly lenient sentences and could only have been imposed by reason of the very poor health of the appellant.

Ground 5

[23] Ground 5 is worded as a complaint that the sentencing Judge "erred by imposing penalties for some offences which were manifestly inconsistent with penalties imposed for other offences". However, counsel for the appellant did not contend that the individual sentences were inconsistent with the facts of the individual crimes. For example, it was not contended that his Honour imposed sentences for some crimes of less seriousness that were longer than sentences imposed for crimes of greater seriousness. This complaint, as it was argued, concerns the manner in which his Honour accumulated various sentences or groups of sentences.

[24] In my view, there is no substance in this complaint. His Honour dealt with the offences in the order in which they were charged. It is apparent that the numerical order was fixed according to groups of offences. In this way, his Honour worked through the individual sentences and the accumulations in numerical order and this had the consequence of also accumulating, from time to time, sentences in groups. This was a perfectly proper way in which to approach the exercise of concurrency and accumulation in order to reach the ultimate sentence of six years that his Honour considered was proportionate to the total criminal conduct. In this exercise his Honour plainly had regard to all the factors of mitigation, particularly the ill health of the appellant, and arrived at a sentence that, in his Honour's view, properly reflected the balance to be achieved in the particular circumstances

between the gravity of the criminal conduct and the matters of mitigation. I am unable to discern any error in his Honour's approach.

[25] As there is now no challenge to the head sentence or the non-parole period, it is unnecessary to discuss those aspects of the sentencing.

[26] For these reasons, in my view the appeal should be dismissed.

Riley J:

[27] I agree and I have nothing to add.

Kelly J:

[28] I agree and I have nothing to add.
