Tomlins v The Queen [2013] NTCCA 18

PARTIES:	**TOMLINS, Jack**
	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 20 of 13 (21237448)
DELIVERED:	11 December 2013
HEARING DATE:	29 October 2013
JUDGMENT OF:	RILEY CJ, SOUTHWOOD and BARR JJ
APPEALED FROM:	KELLY J

CATCHWORDS:

SENTENCING — Aggregate sentences — Power to impose — Offences 'joined in the same information, complaint or indictment' — Aggregate sentence must be imposed upon all offences joined in indictment — Power not available where one offence on indictment a violent offence — *Sentencing Act 1995* (NT) s 52.

SENTENCING — Totality — Offences arising from related circumstances — Concurrency required.

Brown v Lynch (1982) 15 NTR 9; *Hooten v The Queen* [2011] NTCCA 2, applied.

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; *Hampton v The Queen* [2008] NTCCA 5; *Kline v Official Secretary to the Governor General* [2013] HCA 52; *McKay v The Queen* (2001) 11 NTLR 14; *R v Edirimanasingham* [1961] AC 454; *R v Ruggerio* (1998) 104 A Crim R 358, referred to.

Richard Fox and Arie Freiberg, *Sentencing State and Federal Law in Victoria* (Oxford University Press, 2nd ed. 1999), cited.

REPRESENTATION:

Counsel:

Applicant:	J Hunyor
Respondent:	M Nathan and with him I Taylor

Solicitors:

Applicant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Judgment ID Number:	Sou1313
Number of pages:	17

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

Tomlins v The Queen [2013] NTCCA 18
No. CA 20 of 13 (21237448)

BETWEEN:

JACK TOMLINS
Applicant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, SOUTHWOOD and BARR JJ

REASONS FOR JUDGMENT

(Delivered 11 December 2013)

The Court:

Introduction

[1] On 5 June 2013 the applicant was sentenced to an aggregate sentence of four years and six months imprisonment for two counts of making a demand with menaces with intent to obtain the use of a motor vehicle and for two counts of unlawful use of a motor vehicle (counts 1, 2, 3 and 6), and to 12 months imprisonment for unlawfully assaulting his aunt (count 5). The sentence of 12 months imprisonment for the unlawful assault was ordered to be served cumulatively on the sentence of four years and six months imprisonment giving a total sentence of five years and six months imprisonment. The sentencing judge fixed a non-parole period of three years.

[2] The applicant has applied for leave to appeal against these sentences of imprisonment. The proposed grounds of appeal are:

1. The sentencing judge failed to give adequate weight to the applicant's continued participation in the Tobacco, Alcohol and Other Drugs Program while on remand and the availability of employment to him upon his release from prison.

2. Contrary to s 52(1) of the *Sentencing Act 1995* (NT), the sentencing judge erred in imposing an aggregate term of imprisonment of four years and six months for counts 1, 2, 3 and 6 as such a term of imprisonment exceeded the maximum term of imprisonment for an offence contrary to s 218(1) of the *Criminal Code*.

3. The sentencing judge erred in setting the sentence by reference to a nominal sentence for an offence of robbery.

4. The sentencing judge erred in failing to allow any concurrency for the sentence imposed for the unlawful assault (count 5).

5. The sentencing judge erred in applying the principle of totality, in failing to ensure that the total sentence did not exceed the overall culpability of the applicant.

[3] During the hearing of the application for leave to appeal, it became apparent to the Court that the sentencing judge may have erred by imposing an aggregate sentence of imprisonment for counts 1, 2, 3 and 6 contrary to s 52(3) of the *Sentencing Act* because count 5 on the indictment is a violent offence and s 52(3) of the Act states that s 52(1) of the Act, which contains the power to pass an aggregate sentence, does not apply in those circumstances.

The facts

[4] The facts of counts 1 and 2 on the indictment are as follows.

[5] At 8.30 pm on 28 September 2012 the applicant and two accomplices attended unit 4/88 Bonson Terrace, Moulden and the applicant approached a young man, NM, who was standing in the front yard of the unit. NM was known to the applicant as they had been in the Darwin Correctional Centre at the same time.

[6] The applicant said to NM, “You don’t run with the boys anymore. Somebody’s gotta pay.” He grabbed NM by the throat but NM pulled his hand away. The applicant then went into NM’s unit and picked up a lap top computer which was retrieved from him by another resident.

[7] The applicant then left the unit and went out to the front yard where BR was standing and demanded that BR give him the keys to BR’s motor vehicle. BR refused and the applicant clenched his fist and said to BR, “give me the fucking keys before I knock you the fuck out.” He then grabbed BR’s keys and left the area in BR’s motor vehicle with his two accomplices. As he left the applicant said, “If you call the cops we are going to come back and run through your house.”

[8] The applicant drove the motor vehicle at high speed and crashed into a tree. The motor vehicle burst into flames and was completely destroyed by the fire. The applicant and his two accomplices managed to get out of the motor vehicle before it burst into flames.

[9] The facts of counts 3, 5 and 6 on the indictment are as follows.

[10] After the collision, the applicant and his two accomplices went to unit 9/48 Davoren Circuit which is in the same block of units as the unit at 4/88 Bonson Terrace. They went through unit 9 to a courtyard at the back of the unit where the applicant approached his aunt, TH, and her partner, TG, who lived at the unit.

[11] The applicant demanded TG give him the keys to TG's motor vehicle. TG refused and the applicant said, "well, you are fucked." The applicant then turned off the outside light, punched TG on his right cheek and kicked him in the chest. TG fell to the ground and the applicant's two accomplices kicked TG while the applicant continued to punch him.

[12] TH and another person attempted to stop the applicant and his two accomplices kicking and punching TG. The applicant pushed TH to her right shoulder and she fell backwards and hit a pole. One of the accomplices then kicked her to her body and she fell to the ground. The applicant reached into TG's pockets and took the keys to his motor vehicle. He and the two accomplices then drove away in TG's motor vehicle.

[13] As a result of the attack TG suffered bruising to his face and jaw, split lips, a small laceration to his tongue, a contusion to the left ankle and a tender right hand and lower left ribs. TH also suffered injuries. She sustained a contusion to her forehead and bruising to the right side of her ribs and left leg.

Ground 1 – failure to take into account the applicant's attempts at rehabilitation

[14] During the plea on sentence, counsel for the applicant told the sentencing judge that the applicant had been voluntarily undertaking the Alcohol and Other Drugs Program since November 2012 while on remand for these offences and had expressed a desire to continue with alcohol counselling after his release. Further, the applicant had a firm offer of a job upon his release from prison.

[15] Counsel for the applicant submitted that the above factors had persuasive weight in mitigation and should have tempered the head sentence but the sentencing judge failed to mention them in her sentencing remarks. It was submitted that it may be inferred they were ignored by the sentencing judge and her Honour failed to take into account relevant factors in the sentencing process.

[16] In our opinion, this proposed ground of appeal is without merit. While the applicant's conduct on remand does demonstrate that he may be starting to develop some insight into the factors which precipitated his criminal conduct, the sentencing judge's failure to mention them in her remarks does not mean that her Honour did not take them into account. Her failure to mention them does not constitute an appealable error. The applicant's fledgling attempts at rehabilitation were not indicative of remorse or good prospects of rehabilitation. The applicant has settled criminal habits, he has an extensive criminal record which extends for nineteen pages, his level of

offending was escalating and his pleas of guilty were not early pleas. The applicant had largely forfeited any entitlement to leniency.

[17] It was appropriate for the sentencing judge to give the greatest weight to the sentencing objects of denunciation, punishment, deterrence and protection of the community. Further, the total sentence was not a crushing sentence and the applicant will have the opportunity to undertake further rehabilitation programs and vocational courses while in prison.

Ground 2 – imposing an aggregate term of imprisonment that was greater than the maximum penalty for count 6 on the indictment

[18] Subsection 52(1) of the *Sentencing Act* states:

> Where an offender is found guilty of two or more offences joined in the same information, complaint or indictment, the court may impose one term of imprisonment in respect of both or all of those offences but *the term of imprisonment must not exceed the maximum term of imprisonment that could be imposed if a separate term was imposed for each offence* (emphasis added).

[19] The applicant submits that under s 52(1) of the *Sentencing Act* the maximum term of imprisonment that may be imposed by a court as an aggregate sentence is the lowest maximum penalty of all of the counts on the indictment. Count 6 on the indictment had the lowest maximum penalty. As the maximum penalty for count 6, unlawful use of a motor vehicle contrary to s 218(1) of the *Criminal Code*, was two years imprisonment the aggregate sentence of four years and six months imprisonment was greater than the maximum term of imprisonment permitted by s 52(1) of the Act.

[20] In our opinion, this ground of appeal must fail as it is based on a misunderstanding of s 52(1) of the *Sentencing Act*. It is not supported by the text, context or purpose of the subsection.

[21] The text of the s 52(1) of the *Sentencing Act* clearly contemplates a "maximum term of imprisonment" that is calculated by having regard to the total sentence of imprisonment that could be imposed on an offender if the maximum penalty for each offence on the indictment were passed and the sentences were ordered to be served cumulatively. While such a sentence of imprisonment would be extremely rare, a court is not precluded from imposing such a sentence subject to all relevant sentencing principles being considered by the court including proportionality, totality and concurrency. In this case, subject to the principles of proportionality, totality and concurrency, the maximum term of imprisonment that could be imposed by the court is 42 years.

[22] Where discrete sentences of imprisonment are passed for each offence on an indictment and there is some cumulation in order to pass a sentence that is proportionate to the whole of the offender's criminal conduct it is not unusual for the total sentence to exceed at least one of the maximum penalties fixed for the offences on the indictment. It would be at odds with the provisions in the *Sentencing Act* dealing with accumulation and concurrency if an aggregate sentence were limited in a different way to sentences imposed separately and could not exceed the *lowest* maximum penalty for any of the offences. The purpose of provisions such as s 52(1) of

the Act, which enable a court to impose an aggregate sentence, is to allow a sentencing court to view an offender's criminal conduct as a whole and to impose a sentence that is proportionate to the whole of the offender's criminal conduct. This could not be done in all cases if s 52(1) of the *Sentencing Act* were constrained in the manner contended by the applicant.

Ground 3 – the sentencing judge erred in sentencing the applicant by reference to a nominal sentence for an offence of robbery

[23] The applicant submitted that the approach taken by the sentencing judge was in error because her Honour started the exercise of sentencing the applicant as follows:

> *Now, if you had been charged with robbery, the starting point in each case would have been imprisonment for six years.* I have taken into account that there is a lower maximum penalty on the counts that you were charged with, and you were charged with those because it was explained by the prosecution that demanding the use of a car is not technically stealing, therefore, it is not technically a robbery. So I do have to take into account that there is a lower maximum penalty (emphasis added).

[24] The applicant said the error arose because the difference in the fault elements between counts 1 and 3, on the one hand, and robbery, on the other, was not a mere technicality but a substantive difference going to the nature of the applicant's criminal conduct. It was significant that the mental element of stealing had not been made out against the applicant.

[25] It would be an error in principle to take, as a starting point, the sentence that may have been imposed for a more serious offence and work backwards.

However, in our opinion, this proposed ground of appeal cannot be sustained.

[26] The fact that the applicant did not have an intention to permanently deprive either BR or TG of their motor vehicles was not completely clear on the admitted facts. It is not surprising that the sentencing judge asked counsel why the applicant had not been charged with robbery. The actual exchange between the sentencing judge and the Crown prosecutor was as follows:

> HER HONOUR: Why isn't this, an aggravated robbery which carries life imprisonment?
>
> PROSECUTOR: … because of the intention of the accused to, for want of a better term, borrow the motor vehicle without an intention to permanently deprive or an intention, at the time of taking the motor vehicle, to convert it to his own use in a manner that is entirely inconsistent with the owner, it does not fall within the definition of stealing. That is the only reason.
>
> HER HONOUR: Thank you for that.
>
> PROSECUTOR: Ultimately, every other part is really on all fours, it is simply that technical definition of stealing.

[27] It is apparent that the sentencing judge clearly understood the Crown prosecutor's explanation and all her Honour did was repeat the explanation in her sentencing remarks. Importantly, the sentencing judge had regard to the correct maximum penalty and her Honour properly dealt with all of the facts of the offending including the applicant's level of culpability. While

the sentencing judge made reference to the likely penalty if the applicant had intended to permanently deprive his victims of their motor vehicles, her Honour did not take the sentence of six years as the starting point of the sentences that she imposed. The aggregate sentence her Honour imposed for counts 1, 2, 3 and 6 is significantly less than the sentence of six years imprisonment that her Honour referred to for the crime of robbery.

[28] The sentencing judge transparently set out her reasoning and it is apparent that her Honour took into account the differences in the fault elements between counts 1 and 3 and the crime of robbery and the difference in the maximum penalties. The sentence of four years and six months imprisonment was proportionate to the totality of the applicant's criminal conduct when committing counts 1, 2, 3 and 6 on the indictment.

Ground 4 – failing to allow any concurrency for the sentence imposed for count 5

[29] The applicant submitted that, as the unlawful assault upon TH arose out of the same circumstances as the offending against TG, it was appropriate that there be an appreciable degree of concurrency. In our opinion, there is some force in this submission and the ground of appeal should be upheld. It may fairly be said the assault on TH arose when TH tried to intervene and stop the assault on TG. It arose from a closely related series of occurrences and the sentencing judge erred in finding that it was completely separate.

[30] In *Brown v Lynch*[1] Foster CJ stated:

> [S]ave in exceptional 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…

[31] In *Hooten v The Queen*[2] the Court of Criminal Appeal of the Northern Territory held:

> 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. Generally speaking a court will not impose wholly cumulative sentences for a series of offences that are of similar character or ordinarily associated and which simply represent facets of the one course of conduct. An assessment must be made in each case as to the appropriate response to the offending in all the circumstances. Consideration of the extent to which the offences are separate and independent or, alternatively, overlapping is required. If the offences are closely related and interdependent that may lead to a conclusion that they arise out of the one transaction and require concurrency. Each case must depend on its own facts.

[32] As TH was only attacked because she intervened and tried to stop the attack on TG it is appropriate for there to be some level of concurrency. The fact that TH was attacked while going to TG's aid goes more to the objective seriousness of the assault against her and what constitutes just deserts for the applicant than to the level of concurrency. However, the level of concurrency is constrained by the fact that the unlawful assault was a

[1] (1982) 15 NTR 9 at 11; cited with approval in *Hampton v The Queen* [2008] NTCCA 5 at [35].
[2] [2011] NTCCA 2 at [13] (citations omitted).

discrete offence against another person. We deal with this when re-sentencing.

Ground 5 - totality

[33] Save for the fact that there should have been some level of concurrency for the sentence imposed for count 5, the unlawful assault on TH, the total sentence imposed on the applicant was proportionate to the whole of the applicant's criminal conduct. The applicant's conduct on the day in question was brazen and sustained and the level of his criminality increased when the applicant committed the second series of offences after he had destroyed the first motor vehicle. He unlawfully obtained the use of two motor vehicles with the use of threats or actual violence and he and his accomplices seriously assaulted his aunt in order to obtain the use of the second motor vehicle. The offences were committed in company and were directed at three innocent victims with no regard for their welfare.

Section 52 of the *Sentencing Act* (NT)

[34] It is a general rule of sentencing that a separate sentence must be passed on each count on an indictment. However, as Fox and Freiberg state in *Sentencing State and Federal Law in Victoria*,[3] there are common law[4] and statutory exceptions to the general rule and, for a period of time, statutory authority to impose an aggregate sentence was becoming increasingly common. However, the situation has become more complicated with some

[3] (Oxford University Press, 2nd ed. 1999) at 730.
[4] *R v Edirimanasingham* [1961] AC 454.

offences attracting mandatory terms of imprisonment and others attracting different minimum non-parole periods.

[35] In the Northern Territory the authority to pass an aggregate sentence is governed by s 52 of the *Sentencing Act*. In our opinion, it is the intention of parliament that the section covers the field, to the exclusion of any power that may exist at common law.

[36] Section 52 states:

> (1) Where an offender is found guilty of 2 or more offences joined in the same information, complaint or indictment, the court may impose *one term of imprisonment in respect of both or all of those offences* but the term of imprisonment must not exceed the maximum term of imprisonment that could be imposed if a separate term were imposed in respect of each offence.
>
> (2) A court must not impose one term of imprisonment under subsection (1) where one of the offences in respect of which the term of imprisonment would be imposed is an offence against section 192(3) of the Criminal Code.
>
> (3) Subsection (1) does not apply if one of the offences in the information, complaint or indictment is a violent offence or a sexual offence. (emphasis added)

[37] Subsections (2) and (3) of s 52 provide express constraints on the circumstances in which an aggregate sentence may be imposed on an offender. Interestingly, the text of the two subsections is not the same. While we are not deciding this issue as it was not argued before us, s 52(2) of the Act appears to permit an aggregate sentence to be passed for some counts on an indictment provided a discrete sentence is imposed for any

offence contrary to s 192(3) of the *Criminal Code*. There is no such allowance under s 52(3) of the Act. That subsection appears to impose a wider constraint than s 52(2) because it clearly states that s 52(1), which provides the power to pass an aggregate sentence, does not apply if one of the counts *on an indictment* is a violent offence or a sexual offence.

[38] Save for the exception contemplated by s 52(2) of the *Sentencing Act*, and subject to s 52(3) of the Act, read literally, s 52 of the Act only enables a court to impose one term of imprisonment in respect of all counts on the indictment. It does not enable a court to pass a number of aggregate sentences for different groups of counts on an indictment. Nor does it enable a court to pass a discrete sentence of imprisonment for a violent offence or a sexual offence pleaded on an indictment and an aggregate sentence of imprisonment for the balance of non-violent or non-sexual offences pleaded in an indictment.

[39] In *McKay v The Queen*[5] the Court of Criminal Appeal stated:[6]

> *The conclusion to be arrived at by an analysis of these provisions is that the legislative intent is that where separate offences are joined on the same indictment which includes at least one sexual offence, property offence or violent offence, there must not be an aggregate sentence imposed.* The purpose of this seems to be to ensure that any mandatory terms required to be imposed are not only imposed but are seen to be imposed; and that the requirements of the Act relating to minimum terms of actual imprisonment and the cumulation of mandatory minimum sentences for property offences where required, are not only met, but are seen to be met and separately identifiable (emphasis added).

[5] (2001) 11 NTLR 14.
[6] (2001) 11 NTLR 14 at [20].

[40] The respondent has submitted that the Court should not adopt a literal reading of s 52 of the *Sentencing Act* because it would lead to a number of manifestly absurd outcomes and would be inconsistent with the purpose of s 52 of the Act. That purpose involves "considerations of administrative convenience and the creation of a sentencing regime in which due allowance could be made for the recognition of the totality principle without having to resort to "juggling" with individual sentences in an artificial manner, to achieve the same result."[7] It was submitted that s 52 of the Act should be interpreted so as to allow aggregate sentences to be imposed for different groups of counts on an indictment.

[41] As desirable as that may be, we do not accept this submission. The respondent's submission would involve impermissibly reading too many words into the section and what is said to be absurdity, in truth, involves no more than a sentencing court being required to apply the general sentencing principle which is referred to in par [34] above, as inconvenient as that may be on some occasions. Such a process does not preclude due allowance being given to the principle of totality.

[42] As was stated by the majority of the High Court of Australia in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*:[8]

> The task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials

[7] *R v Ruggerio* (1998) 104 A Crim R 358 at 364 per Olsson J.
[8] (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ (citations omitted); see also *Kline v Official Secretary to the Governor General* [2013] HCA 52 at [32].

> cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention.

[43] We find that the sentencing judge erred in imposing an aggregate sentence for counts 1, 2, 3 and 6. Her Honour was precluded from doing so by both s 52(1) and (3) of the *Sentencing Act*.

[44] In the circumstances, we would grant leave to appeal and allow the appeal on this basis and on ground 4. The application as to the other proposed grounds of appeal is dismissed. The applicant must be re-sentenced.

Re-sentence

[45] For count 1 on the indictment we sentence the applicant to two years imprisonment. For count 2 on the indictment we sentence the applicant to two years imprisonment. The sentence of imprisonment that we have imposed for count 2 is to be served wholly concurrently with the sentence of imprisonment we have imposed for count 1. For count 3 on the indictment we sentence the applicant to three years and six months imprisonment. Three years of the sentence of imprisonment that we have imposed for count 3 is to be served cumulatively on the sentence of imprisonment that we have imposed for count 2. For count 6 on the indictment we sentence the applicant to 12 months imprisonment. The sentence we have imposed for count 6 on the indictment is to be served wholly concurrently with the sentence of imprisonment that we have imposed for count 3. For count 5 on the indictment we sentence the applicant to 12 months imprisonment. Six

months of that sentence of imprisonment is to be served cumulatively on the sentence of imprisonment that we have imposed for count 3. That gives a total sentence of 5 years and six months imprisonment. As a result of the applicant's pleas of guilty, we discount the total sentence of five years and six months imprisonment by six months which gives a final total sentence of five years imprisonment.

[46] The sentence of five years imprisonment is back dated to 9 October 2012 to reflect the time that the applicant has already been in prison for these offences. We fix a non-parole period of three years. The non-parole period is also to start on 9 October 2012.

[47] In re-sentencing the applicant we have had regard to both the objective seriousness of the offending and the applicant's subjective circumstances. The applicant's offending conduct was brazen, sustained and repetitive and escalated in its level of violence. The applicant has effectively lost any entitlement to leniency as a result of his criminal history and he has poor prospects of rehabilitation. It will be necessary for him to undertake intensive rehabilitation programs while he is in prison and he should also be encouraged to undertake vocational education and training and work while he is in prison if he is to reduce his risk of re-offending and improve his prospects of being successfully re-integrated into the community.

****