Burns v Pryce and Ryan [2000] NTSC 83

PARTIES:	GEORGE WILLIAM BURNS v LEONARD DAVID PRYCE AND CRAIG VICTOR RYAN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA52 and 53 of 2000 (9925855 & 20012058)
DELIVERED:	5 October 2000
HEARING DATES:	3 October 2000
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	Mr D Conidi
Respondent:	Mr C Roberts

Solicitors:

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

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Burns v Pryce and Ryan [2000] NTSC 83
No. JA52 and 53 of 2000

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against conviction and sentence handed down in the Court of Summary Jurisdiction at Alice Springs

BETWEEN:

GEORGE WILLIAM BURNS
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

AND:

GEORGE WILLIAM BURNS
Appellant

AND:

CRAIG VICTOR RYAN
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 5 October 2000)

[1] On 8 August 2000 the appellant came before the Court of Summary Jurisdiction in Alice Springs for sentence in relation to a series of offences which took place in the period between November 1999 and July 2000.

[2] On that occasion the following penalties were imposed in relation to offences that occurred on the identified dates:

	Charge	**Sentence**
(a)	Aggravated assault on a female on 14 November 1999:	convicted and sentenced to three months imprisonment.
(b)	Failure to comply with a restraint order on 4 December 1999:	convicted without further penalty.
(c)	Failure to comply with a restraint order on 1 April 2000:	convicted without further penalty.
(d)	Failure to comply with a restraint order on 2 April 2000:	convicted without further penalty.
(e)	Unreasonably causing substantial annoyance on 31 March 2000:	convicted and sentenced to seven days imprisonment to be served cumulatively upon the above sentences.
(f)	Unreasonably causing substantial annoyance on 12 April 2000:	convicted and sentenced to seven days imprisonment to be served concurrently with the sentence imposed in (e).
(g)	Failure to comply with a restraint order on 22 May 2000:	convicted without further penalty.
(h)	Aggravated assault on a female on 4 July 2000:	convicted and sentenced to six months imprisonment to be served cumulatively upon the other penalties imposed.

[3] The total effective sentence was therefore imprisonment for a period of nine months and 7 days. Her Worship was invited to suspend the operation of that sentence but she declined to do so.

[4] The appellant appeals against two of the sentences; being that imposed for the aggravated assault on 14 November 1999 and that imposed for the aggravated assault on 4 July 2000. There is no challenge to the other sentences.

[5] At the hearing of the appeal the appellant pursued only the following grounds of appeal:

(1) The learned Stipendiary Magistrate failed to give sufficient weight to the appellant's lack of prior convictions when sentencing him;

(2) The learned Stipendiary Magistrate failed to take into account and apply the principle of totality;

(3) The learned Stipendiary Magistrate erred in not suspending part of the total sentence imposed upon the appellant in that:

(a) insufficient weight was given to the appellant's circumstances of mitigation, namely:

(i) his relatively minor criminal history,

(ii) his plea of guilty,

(iii) his remorse and contrition as evidenced by his plea of guilty,

(iv) his age,

(v) his regular employment history;

(b) insufficient weight was given to the appellant's efforts at rehabilitation and prospects for rehabilitation, namely:

(i) his age,

(ii) his admission to CAAAPU,

(iii) his efforts to obtain counselling prior to his arrest,

(iv) efforts to receive counselling whilst in jail;

(c) insufficient regard was given to personal circumstances which have led to recent offences, namely:

(i) the death of his brother and mother and niece leaving unresolved issues of grief,

(ii) his abuse of alcohol,

(iii) poor social skills in coping with these difficulties.

[6] It is to be noted that there was no challenge to the individual sentences imposed in respect of the two assaults but rather the submission was that her Worship erred in failing to apply the totality principle and in failing to suspend part of the total sentence imposed upon the appellant. It was submitted that some part of the sentence in respect of the offence of 14 November 1999 should have been directed to be served concurrently with the sentence in respect of the offence of 4 July 2000 in order to reduce the impact of the aggregate sentence. It was then submitted that part of the resulting sentence should have been suspended upon terms and conditions requiring the appellant to undertake rehabilitation programs within the community.

[7] The offending with which her Worship had to deal was spread over a period of months and involved quite violent conduct on the part of the appellant. The assault of 14 November 1999 was upon a former girlfriend. On that occasion the appellant sprayed lemonade over his victim, slapped her to the face on some four occasions and spat on her face on two occasions. When she sought to escape he pursued her and tackled her to the ground. He then took her back into the house and held her there. The police arrived and when he was interviewed by them he said "it was building up and building and I lost it."

[8] On 17 November 1999 Sonia Lawford, who is also described as an ex-girlfriend of the appellant and who was then pregnant with his child, obtained a domestic violence order against him. The appellant breached that order on 4 December 1999, 1 April 2000, 2 April 2000 and 22 May 2000. Those breaches did not involve any act of actual violence.

[9] The offences of unreasonably causing substantial annoyance related to a male person with whom the appellant stayed on occasions. Each of those offences involved displays of violence including a threat to the victim with a fist and the smashing of property.

[10] The last assault, which occurred on 4 July 2000, was upon a female victim who had been in a relationship with the appellant for about a month and a half. That assault was very violent. The appellant pushed the victim to the floor, punched her in the jaw, punched her on other parts of the body, kicked

her on the legs and back, pushed her so that she fell on a heater, placed his thumb in her mouth forcing her head to the ground, bit her on the cheek and struck her with a baseball bat (which he had seized from her) on the head and legs. That assault took place over a period of time. This offence occurred at a time when the appellant was on bail in relation to earlier matters.

[11] In sentencing the appellant her Worship reviewed the history of the offending in some detail. She then proceeded to deal with the personal circumstances applicable to the appellant. She had the benefit of two reports being a Home Detention Order assessment report dated 4 August 2000 and a psychological report of Ms Dorrington dated 24 June 2000.

[12] It is the submission of the appellant that the combined effect of the two sentences appealed against offends the totality principle. I am unable to accept that submission. There is no complaint that the individual sentences were inappropriate and, given the circumstances surrounding those offences, it is difficult to see how any such contention could have succeeded.

[13] In considering the combined effect of the sentences it is necessary to determine whether the aggregate sentence made up of the individual sentences lacks proportion to the total criminality of the appellant's conduct: *Lade v Mamarika* (1986) 83 FLR 312 at 316 per Nader J.

[14] When one looks at the aggregate sentence in this matter it cannot, in my view, be seen to be excessive or in contravention of the totality principle.

The total offending took place over a period of months with the first aggravated assault occurring on 14 November 1999 and the last on 4 July 2000. The assault offences were each violent in their nature, committed by a male upon a female and involved different victims. The offences were quite separate and distinct. At the time of the last offence the appellant was on bail for earlier offences.

[15] Contrary to the submissions made by Mr Conidi I do not regard the fact that the appellant had continuing emotional problems, engaged in excessive consumption of alcohol and had difficulties coping with the pressures of life throughout the period from November 1999 until July 2000 as being a basis for holding that the offending during that period was part of the one course of offending requiring that the matters should be dealt with concurrently rather than cumulatively. As I have indicated, and as is apparent from the description of the offences by her Worship, the offences were against differing victims involving different circumstances and at different times.

[16] It cannot be said that these offences were part of a single transaction and the sentences should therefore be made concurrent rather than cumulative*: R v Scanlon* (1987) 89 FLR 77 per Martin J (at 90). Further, in my opinion, the aggregate sentence imposed by her Worship made up of the individual sentences does not lack proportion to the total criminality of the offender's conduct: *Lade v Mamarika* (1986) 83 FLR 312 at 316.

[17] The circumstances of the offending in these matters is such that the sentences should be served consecutively unless the aggregate of those sentences offends the totality principle requiring an adjustment downwards. As I have observed, in my view, the aggregate of the sentences did not lack proportion to the total criminality involved and I will not interfere with the sentence imposed by her Worship on this basis.

[18] The major thrust of the submissions of the appellant was related to the failure of the learned Magistrate to suspend part of the total sentence imposed upon the appellant. It was submitted that she should have suspended part of the sentence on conditions requiring the appellant to undergo appropriate rehabilitation courses. In that regard it was said that her Worship failed to give sufficient weight to the circumstances of mitigation and the prospects of the appellant for rehabilitation identified in ground three of the grounds of appeal.

[19] In relation to the matters identified by the appellant most of those were dealt with by her Worship in the course of her reasons.

[20] Her Worship noted and took account of the appellant's plea of guilty, his young age (he is 24 years of age) and his efforts to obtain counselling prior to his arrest and whilst in prison. She also noted that he had a relatively minor criminal history but that one of the offences included in that history was another aggravated assault.

[21] It was submitted on behalf of the appellant that his plea of guilty indicated remorse and contrition. I do not accept that to be so. Whilst the plea was a clear acknowledgment of responsibility for his conduct and something for which he was entitled to credit and, indeed, was given credit by her Worship, it does not follow that it suggested remorse or contrition. The reports that were available to her Worship observed that the appellant was not contrite or filled with remorse. The testing undertaken by the psychologist indicated that the appellant lacked remorse for, or sensitivity to, the way in which his behaviour impacted upon others. He was said to "hold the opinion that his current situation has arisen out of a series of misunderstandings hence he does not seem to appreciate the serious nature of his behaviour". There was nothing to which counsel for the appellant could point, other than the plea of guilty, to demonstrate any remorse or contrition on the part of the appellant.

[22] The appellant submitted that his admission to the Central Australian Aboriginal Alcohol Programs Unit, his efforts to obtain counselling prior to his arrest and his efforts to receive counselling whilst in prison were indicative of efforts at rehabilitation and a positive sign for the prospects of his rehabilitation. Whilst those matters are positive signs and indicate that the appellant is able to be rehabilitated the reports identified problems with his efforts. In relation to the CAAAPU program and supervised release the following was said:

> "The Central Australian Aboriginal Alcohol Programs Unit advised the offender was unsuitable to participate in their program due to his previous aggressive behaviour towards staff members and clients whilst on bail. The offenders attitude towards supervision from Correctional Services was unsatisfactory while on bail."

[23] The psychological report noted that the appellant was searching for assistance in coping with the problems confronting him but then went on to say:

> "Even though the above may be the case, George does not appear to take any of it seriously enough to want to do anything about it. He has been residing at CAAAPU which offers residential treatment for alcohol abuse, but to George it is more the accommodation than the opportunity for treatment which is important. He treats the staff in the same way as members of his family, being very charming when things are going his way then becoming abusive when they are not."

[24] Whilst the psychologist obviously thought that alcohol and grief counselling and the pursuit of coping strategies was important for the rehabilitation of the appellant it seems some of those options were not available to him in the community because of his conduct on earlier occasions. She noted that alcohol and grief counselling and the pursuit of coping strategies was available to the appellant within the prison system.

[25] The circumstances of the appellant in some ways militated against the suspension of any sentence. He had previously shown a capacity to disregard court orders as is indicated by the four counts of failing to comply with a restraint order. He took advantage of the bail granted to him to re-offend. He displayed an attitude to the Central Australian Aboriginal Alcohol Programs Unit that led to him being classified as unsuitable to

participate in their program. He had an unsatisfactory attitude towards supervision from Correctional Services whilst he was on bail. At the time of the psychological report he did not have an appreciation of the serious nature of his behaviour. Whilst he recognised that he had a problem his conduct was such as to suggest that he did not "take any of it seriously enough to want to do anything about it." He is reported as being "both forceful and domineering, and holds a high opinion of himself, blaming others for this problems."

[26] In sentencing the appellant her Worship turned her mind to the prospect of suspending part of the sentence. She adverted to the psychological report and acknowledged that the appellant had indicated that he was aware that he had "a serious problem". She clearly had in mind the history and other matters that she had just recounted. However in all of the circumstances including the seriousness of the offences and the fact that some were committed whilst on bail for other offences she declined to suspend any part of the operation of the sentence. I am unable to find that she was in error in so doing. Although I would have structured the sentence differently the approach adopted by her Worship does not disclose error.

[27] The appeal is dismissed.