HENRY v R

Court of Criminal Appeal of the Northern Territory of Australia

Nader, Martin JJ. & Gray A/J

14 March & 11 April 1991 at Darwin

CRIMINAL LAW & PROCEDURE - Appeal against sentence - Severity - Offences involving unlawful entry, stealing & sexual assault - Whether sentences should run concurrently - Whether totality principle applied correctly - Whether non-parole period excessive - Whether date for commencement appropriately fixed

CRIMINAL LAW & PROCEDURE - Appeal against sentence - Whether sentences should run concurrently - Invasion of property distinct from invasion of person - Trial Judge did not err in accumulating sentences

CRIMINAL LAW & PROCEDURE - Appeal against sentence - Whether totality principle applied correctly - Principle explained - Need for aggregate to be 'just & appropriate' -Correct result may be achieved by making sentences wholly or partially concurrent - Each sentence held to be within range; aggregate held to be excessive

CRIMINAL LAW & PROCEDURE - Appeal against sentence - Whether non-parole period excessive - Need to consider period of non-parole in context of remission scheme - Balance sought to ensure effective parole system - non-parole period held to be excessive

CRIMINAL LAW & PROCEDURE - Appeal against sentence - Whether date for commencement appropriately fixed - Period in custody related to sentence for other offences - Criminal Code s. 405(3)

Cases applied:

Antoniazzi & Smith v R Unreported Full Fed Crt Aust 10.5.85, NTG 18 & 19/84

Cases referred to:

Bugmy v R (1990) 169 CLR 525
Griffiths v R (1989) 87 ALR 392
Mill v R (1988) 166 CLR 59
R v Faulkner (1972) 56 Crim App R 594
R v Scanlon (1987) 89 FLR 77

Counsel for the appellant : S Cox
Solicitors for the appellant : NAALAS

Counsel for the respondent : T Pauling QC, J Karczewski
Solicitors for the respondent: DPP

mar910008

mar910008

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

No. CA 8/90

BETWEEN:

EDWARD GABRIEL DOMINIC HENRY
Applicant

AND:

THE QUEEN
Respondent

CORAM: NADER, MARTIN JJ. & GRAY AJ.

REASONS FOR JUDGMENT

(Delivered 11 April 1991)

This is an application for leave to appeal against sentence. The applicant was sentenced to a total of 13 years imprisonment and the period before which he would not be eligible for parole was fixed at 8 years, in respect of a number of offences committed during the evening of 26 March 1990. The principle grounds of the application, as presented upon the hearing, were that the learned sentencing Judge ought to have made the individual sentences for the several offences concurrent, that his Honour erred in relation to the application of the totality principle of sentencing, and that the non-parole period fixed was manifestly excessive. It was a further ground of the

application that the sentence was manifestly excessive. A number of other matters described as "grounds" of the application were set out in it, but I regard them as being no more than particulars of one or other of the true grounds. I hasten to add that the giving of particulars in support of a ground of an application or indeed a ground of appeal is to be encouraged.

The applicant pleaded guilty on 26 March 1990 for that:

1(a) On 5 November 1989 at Darwin he entered a building with intent to commit therein an offence with the following circumstances of aggravation, that is, that he intended to steal, that the building was a dwelling house and that he entered the said building at night time. The maximum penalty which may be imposed in those circumstances is 20 years imprisonment and he was sentenced to 2 years imprisonment.

1(b) He stole goods to a value of $1,700 from that building for which the maximum penalty is 7 years imprisonment and he was sentenced to 12 months imprisonment.

2(a) On 6 November 1989 at Darwin he entered another building with intent to commit a crime namely

stealing, the building being a dwelling house and he having entered the same at night time, the maximum penalty was 20 years imprisonment and he was sentenced to 3 years imprisonment.

2(b) He stole property having a total value of approximately $2,000 from that building, the maximum penalty being 7 years imprisonment and he was sentenced to 2 years imprisonment.

3(a) On the same date he unlawfully entered another building with intent to commit a crime namely stealing, the building being a dwelling house and the entry having been made at night, the maximum penalty being 20 years imprisonment and he was sentenced to 3 years imprisonment.

3(b) He stole approximately $20 in cash from that building, the maximum penalty being 7 years imprisonment and he was sentenced to 3 months imprisonment.

All the above mentioned sentences were ordered to be served concurrently.

He further pleaded guilty upon the same indictment for that:

4(a) On 6 November 1989 he entered a building with intent to commit a crime namely sexual assault, the building being a dwelling house, the entry being at night time and that at the time of entry he was armed with an offensive weapon, a knife. For that the maximum penalty is imprisonment for life and he was sentenced to 6 years imprisonment.

4(b) On the same date he unlawfully assaulted Angela Filitsi with intent to have carnal knowledge of her and thereby had carnal knowledge of her, the maximum penalty is imprisonment for life and for that he was sentenced to 10 years imprisonment to be served concurrently with the period of 6 years imprisonment imposed for the unlawful entry with intent to commit sexual assault.

It was further ordered that the sentence of 10 years imprisonment in respect of the last two counts on the indictment be served cumulatively with the 3 years term of imprisonment imposed in respect of the first six counts. The sentences were ordered to commence on 7 May 1990.

The whole of the offences occurred over the course of a few hours on the night of 5 November and the early morning of 6 November 1989. As to the first two related matters, (1(a) & (b)), the applicant entered a flat at 12 Vanderlin Drive at about 9.30pm by removing a fly screen, he

then proceeded to remove the property, taking about 4 trips to remove the goods including, for example, a colour television set and video recorder to his premises. All the property was recovered.

Later during the evening, (2(a) & (b)), the applicant again set out and went to a block of adjoining flats, and whilst walking through the area of those flats noticed the woman Angela Filitsi, the occupant of one of those flats, closing her curtains before retiring for the night. She was at the time wearing only panties. He also noticed a number of beer cans outside the door of her flat. He apparently departed the block of flats, but returned at about 1am on 6 November and found the door to her flat closed, but not locked, and thus gained entry and noticed her asleep. He proceeded to steal a handbag and the property comprising cash and jewellery having a value of approximately $2,000 referred to above. All that property was also recovered.

On the third occasion, (3(a) & (b)), the applicant again left his home and returned to the flats where he had noticed the lady asleep, but went to another flat where he gained entry, stepped over a couple sleeping on the floor and stole $20 which he found in a handbag. That sum was also recovered.

A little later the applicant decided to return to

the flat occupied by the young woman with a view to having sexual intercourse with her, and in preparation for that he returned to his home, armed himself with a kitchen knife and made a crude mask. He then returned to her flat and entered through the door which he had left ajar after his previous visit. At the time that he entered the flat Miss Filitsi was still asleep and the first she knew of his presence was his hand shaking her. When she awoke she immediately saw the knife in his right hand, he said he had a gun and rudely informed her of his carnal intentions. Holding the knife, he rolled her onto her back and mentioned the gun again, but, saying he did not want to use it, he warned her not to scream or yell and that if she kept quiet he would not harm her. He then proceeded to remove her pants and to have non-consensual sexual intercourse. At some stage, it is not clear when, the young lady told him to get rid of the knife and he did so. Whilst having intercourse he held Miss Filitsi's hands above her head with both or one of his hands, he said that he was planning to have a few hours with her and described certain gross indecencies he intended to perpetrate upon her person. He told her not to call the police and threatened her if she did. During the act of intercourse he ejaculated. The assault was interrupted when the young lady's husband arrived. They had been living apart, but in different flats in the same block. Her husband saw his wife lying on the bed with the applicant on top of her and she shouted out warning him that the applicant had a knife. The husband ran from the flat and

the applicant departed.

Police happened to be in the vicinity and within a short while after that offence was committed they apprehended the applicant. He was subsequently interviewed concerning the various matters as to which he made full admissions and cooperated totally with the police.

In the course of those admissions he explained how he was intoxicated in various degrees when the offences were committed having been drinking in between each escapade. He volunteered to having medical specimens taken and later that morning took part in an identity parade where he was identified by Miss Filitsi, at which time she said to him "It was you wasn't it?" and he said "Yes, I told the police".

The learned sentencing Judge rejected a submission made on the applicant's behalf that he did not intend the use of the knife and that the knife was not used to effect the sexual assault, finding that the victim had no reason to believe other than that he would use the knife if necessary to achieve his purpose. Similarly, although he in fact did not have a gun, his Honour held that the presence of the knife and the applicant's statements about the gun clearly put the victim in fear and his Honour had no doubt that she submitted because of his threats. His Honour also rejected a submission that the assault was minimal, categorising it

rather as being very serious, having commenced when the victim was woken and confronted with the knife putting her in fear of her safety if she did not cooperate. His Honour particularly drew attention to the fact that the victim was assaulted in her own home at night. In mitigation it was also put that the victim complied with the applicant's demands, but his Honour quite rightly pointed out that the fact that the victim had the presence of mind not to resist, either out of terror or to avoid apprehended physical harm or both, was to her credit and not the applicant's. He rejected other submissions upon the basis that there was no evidence to support them. His Honour's concluding remarks in respect of the sexual offence were as follows:

> "Your crime can only be described as outrageous; it is deserving of a heavy penalty. It was calculated and premeditated and displays a high level of culpability. I note that you told the psychiatrist that at the time you knew what you were doing, that it was wrong and that you were likely to get caught. People who break into other people's homes at night, particularly when they are armed and rape the occupants, can expect nothing other than heavy penalties, and in the absence of exceptional circumstances the retributive and deterrent factors must outweigh matters of rehabilitation.
>
> The sanctity of peoples' homes and bodies are of paramount importance and outweigh any leniency that might be extended to you, whether on account of your drinking or self pity at the time or any other reason that's been advanced for your crime."

It has not been shown that the learned sentencing Judge erred in relation to his findings of fact. He

certainly took a stern view of the facts and circumstances surrounding the rape, but we would not disagree with him. The views he expressed were well open on the material before him. The offence of rape calls for strong disapproval and it does not follow that because a sentencing Judge expresses himself in a robust manner when condemning the perpetrator of that crime he thereby discloses an error in his approach to the fixing of an appropriate sentence.

His Honour noted that the applicant fully cooperated with police, entered a plea of guilty and saved the victim from the trauma of having to give evidence. He also reviewed his personal circumstances noting amongst other things that he was born on 13 October 1962, that he was part Aboriginal and educated to secondary year 10 level, and that he was of average intelligence. He described his work record as "reasonable". Turning to the applicant's extensive record of prior convictions, which include many drink related offences and others for dishonesty (including for unlawful entry and the stealing) and yet again a number involving violence, his Honour stated the obvious and that is that the applicant was not of good character and had no right to credit as being a first offender.

At the time these particular offences were committed the applicant was awaiting trial before a Court of Summary Jurisdiction in relation to a number of charges arising from events of early September 1989. He was

convicted and dealt with in respect of those matters on 29 November 1989. They are unrelated to the types of offences the sentences for which are now under consideration. Counsel for the applicant tendered upon the plea a psychiatric report of Dr Walton. Dr Walton said the applicant was suffering from no formal psychiatric disorder, but may be described as an alcoholic dependent person. In the Doctor's opinion the burglaries appeared to have occurred as a deliberate attempt "to acquire money or saleable goods with a view to briefly enjoying "the good life" prior to what was a "forthcoming period of incarceration". As to the sexual assault, he reported "This incident fits into the pattern of this man maximising sensual pleasure prior to being incarcerated". The Doctor thought he would benefit from a period of alcohol rehabilitation, but noted his poor motivation to become involved, considering his continuing involvement of the alcohol "... is a matter of free personal choice which, when he is again at large, he may or may not choose to exercise". The Doctor was of the opinion that he expressed less than comprehensive remorse though being angry with himself for being foolish and ashamed that he had lost respect within his community. The Doctor went on to describe how the applicant commenced taking alcohol at about the age of 14, and its subsequent abuse, but reiterating the applicant's attitude that he did not wish counselling. The applicant was assessed to be of at least average intelligence and certainly free from any signs of major psychiatric

disturbance.

There was also before his Honour a report from a forensic psychologist put in the applicant's case upon the plea, which also affirmed that the applicant expected to go to prison and that he wanted a good time before he went inside. It was stated in that report that the applicant was greatly ashamed by his behaviour. In conclusion, Mr Konapacki stated that the applicant was a young man of part Aboriginal descent and of average intelligence, articulate and socially at ease and free of gross pathology. It was also noted that the applicant was concerned about the effects of the offences on his own and his family's social standing and his plans to deal with this in part by "shooting through when I get out". Mr Konapacki also confirmed the applicant's attitude towards his drinking problem, in that the applicant stated to him "that he does not need assistance in the form of treatment or counselling to assist him in controlling his behaviour". There was also tendered an extensive pre-sentence report which casts no further significant light upon the offences nor the offender, except perhaps for the statement "Given his propensity for re-offending, it is considered that the offender lacks a sufficient degree of maturity or morale character to enable him to lead a law-abiding life style. Henry has asserted that he could abstain from the excess consumption of alcohol without the assistance of an appropriate treatment agency. ... It is felt that the

offender lacks sufficient motivation to enable him to refrain from consuming excess alcohol in the future, simply on his own initiative."

All of those reports were before his Honour and he also had the advantage of observing the applicant during the course of the plea which was conducted on 26 March and 13 June 1990. His Honour did not accept a submission that the applicant recognised the shame that he had brought upon his family. That matter was but the subject of a passing reference in only one of the reports, and in any event, his Honour observed that the applicant displayed sufficient attributes of conceit and self-centeredness to satisfy his Honour that he never concerned himself with the welfare of others. He specifically referred to the pre-sentence report concerning the applicant's lack of maturity and morale character and he went on to say that he had come to the same conclusion independently of the pre-sentence report based upon the other materials before him and his observations of the applicant in the course of the proceedings.

We are not satisfied that his Honour failed to take into account any of the relevant matters going to the circumstances of the offence and the circumstances of the offender which were appropriate to take into account in this case, nor are we satisfied that he fell into any error in the remarks which he made based upon the material before him and his observations.

His Honour expressly declared that he had given thought to the question of whether the sentences for the various offences should be cumulative or concurrent, concluding that whilst "separate crimes in themselves, the break-ins constitute a spree over one night; however the sexual assault is quite another matter. In my view it was a separate criminal enterprise ... " and, as related above, proceeded to accumulate the sentences related to the sexual assault upon those in respect of the aggravated unlawful entry and stealing matters. In our opinion the discretion of the learned sentencing Judge has not been shown to have miscarried in accumulating the sentences in the way he did. The accused had carried out a series of property offences at two separate blocks of flats, one of which included the sexual victim's flat, over a period of some hours. On the one hand there was an invasion of the property of the occupiers of the flats, and on the other, an invasion of the person of the victim to the rape. As to the general question of concurrent and cumulative sentences, see the decision of this Court in R v Scanlon (1987) 89 FLR 77 and the cases there referred to. In this case the real issue is not as to whether his Honour's exercise of discretion in that regard should be set aside, but whether the recognised principle of sentencing known as the totality principle was properly applied.

In Mill v The Queen (1988) 166 CLR 59 the High Court adopted the succinct description of that principle as

outlined in Thomas, Principles of Sentencing, 2nd Edition (1979), at pages 56 to 57 which (omitting references) reads as follows:

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'. The principle has been stated many times in various forms: 'when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong ['];
> 'when ... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences'."

Or, in the language of Lord Parker LCJ in Reg. v Faulkner (1972) 56 Crim Cr App R 594 at 596 "At the end of the day, as one always must, one looks at the totality and asks whether it was too much ". (Affirmed by the High Court in Mill at p. 63). As the High Court also observed at p. 63, where the principle falls to be applied in relation to sentences of imprisonment an appropriate result may be achieved either by making the sentences wholly or partially concurrent. To the same effect see the remarks of Brennan and Dawson JJ. in Griffiths v R (1989) 87 ALR 392 at 396.

Although of the view that each of the sentences imposed in this case fell within the range of sentences for offences of this nature, (although particularly in the case of the rape towards the upper end of the range), and that his Honour's discretion as to whether the various sentences should be concurrent or cumulative has not miscarried (although another Judge may have ordered that the sentences in respect of the unlawful entry and stealing from Ms Filitsi's flat and the subsequent rape upon her be served concurrently), and, having done the arithmetic we are not content that the arithmetical result is the appropriate sentence for the totality of the applicant's criminal behaviour on the night in question. It is likely that the aggregate sentence imposed looks wrong because although none of the individual sentences were in themselves excessive, they were for the most part towards or at the upper end of the scale of sentences for the type of offence involved. When viewed as a whole the aggregate sentence does not seem to us to be just and appropriate. We would not disturb the head sentences in any case, but rather order that the concurrent sentence of 10 years in respect of the unlawful entry and rape (4(a) & (b)) be served as to 3 years concurrently with the concurrent sentences in respect of all other matters and cumulatively as to the remaining 7 years, producing a total head sentence of 10 years.

The non-parole period fixed by the learned sentencing Judge of 8 years in relation to a head sentence

of 13 years was also called in question in the application. It is common ground that the ordinary prisoner earns a remission of one third of the maximum length of his sentence pursuant to a determination made under The Prisoners (Correctional Services) Act of 1980. A prisoner sentenced to 13 years, who earns the remission, would be released after serving 8 years and 8 months and not be subject to supervision upon parole for the unexpired portion of the head sentence, 4 years and 4 months. In Antoniazzi & Smith v The Queen Muirhead, Morling and Wilcox JJ., sitting in the Federal Court of Australia on appeal from the Supreme Court of the Northern Territory, had occasion to look at this difficult area of sentencing law. They said:

> "It is well established that in fixing a non-parole period the court should ensure that it is duly proportioned to the head sentence in a manner which will encourage the prisoner to seek parole and secondly, which will ensure that the parole scheme (an objective of which is to safeguard the community) is such as to provide prospects of rehabilitation and integration of the prisoner within the community. A non-parole period, too closely approximating the date of probable release, after taking remission of sentence into account, is unlikely to achieve these objectives (See Rich & Bourke v R (unreported decision of the Full Court of the Federal Court delivered on 7th September 1981); Bain v R 47 ALR 472 at 475; R v Eckardt (1971) 1 SASR 347 at 351 et seq 1). In Power v The Queen (1973) 131 CLR 623 at 628, the High Court stated "In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention" but that does not intrude upon those authorities which require a balance to be maintained to ensure that the parole system may be utilised effectively."

In adopting what was there said and applying it to the sentence of 13 years originally imposed upon the applicant, we would have thought the non-parole period of 8 years was excessive and would have reduced it by some months. Taking the head sentence which we propose should now be imposed, 10 years, taking into account the principles in relation to the fixing of non-parole periods as recently affirmed in the High Court in Bugmy v R (1990) 169 CLR 525, and noting the remission on sentence to which the applicant will be entitled if he fulfils the conditions attaching to it, we would fix a non-parole period of 5 1/2 years.

His Honour did not err in fixing the date for the commencement of the sentence at 7 May 1990. Although the applicant had been in custody prior to sentencing for these matters for a longer period that was because he was serving a sentence for other offences. (See s. 405(3) of the Criminal Code).

We would grant the application for leave to appeal, affirm the sentences imposed in respect of each of the offences, but order that of the 10 years concurrent sentences imposed in respect of the unlawful entry with intent to commit a sexual assault and rape, 3 years be served concurrently with the concurrent sentences on all other counts and as to 7 years cumulatively thereon, a total period of 10 years. We would fix a non-parole period

of 5 1/2 years, and order that the sentence commence to run from 7 May 1990.