CITATION:	*Ou v Kirkby* [2024] NTSC 33
PARTIES:	OU, Andrew v KIRKBY, Paul Michael
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 38 of 2023 (22313757)
DELIVERED:	19 April 2024
HEARING DATE:	17 April 2024
JUDGMENT OF:	Riley AJ

REPRESENTATION:

Counsel:

Appellant:	L Waugh
Respondent:	A Gallagher

Solicitors:

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

Judgment category classification:	C
Judgment ID Number:	Ril2402
Number of pages:	16

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

Ou v Kirkby [2024] NTSC 33
No. LCA 38 of 2023 (22313757)

BETWEEN:

ANDREW OU
Appellant

AND:

PAUL MICHAEL KIRKBY
Respondent

CORAM: RILEY AJ

REASONS FOR JUDGMENT

(Delivered 19 April 2024)

[1] This is an appeal against a sentence imposed upon the appellant by the Local Court on 30 November 2023. On that occasion the appellant was sentenced in relation to offences under the *Misuse of Drugs Act 1990* (NT) to a total effective period of imprisonment of four months with that sentence wholly suspended from the date of sentence.

[2] The principal ground of appeal (ground 1) is that the sentence in relation to counts 3, 8 and 9 was manifestly excessive. In addition the appellant has sought to add: ground 2, that the learned sentencing Judge erred in finding the appellant's guilty plea was not an early plea with respect to counts 3, 8 and 9; ground 3, his Honour erred in ordering that the aggregate sentence of

imprisonment imposed with respect to counts 8 and 9 be served wholly cumulative on the sentence of imprisonment with respect to count 3; and ground 4, his Honour erred in imposing an aggregate sentence with respect to counts 8 and 9 in circumstances where those offences were not the only offences joined in the same complaint.[1]

[3] The application to amend was not opposed by the respondent. In all the circumstances I extend the relevant time and allow the amendments.

The circumstances of the offending

[4] On 4 May 2023, Australian Federal Police and Northern Territory Police executed a search warrant at the appellant's address in Milner. During the search, police located drug paraphernalia including five ice pipes, a set of digital scales, 23 clip seal bags and one home-made "bong". In addition police located a knuckle knife, a crossfire butterfly knife, an Mtech USA flick knife and two extendable batons. Each of those weapons was a prohibited weapon under the *Weapons Control Act 2001* (NT). Further, police located an air pistol containing pellets and 17 brass ammunition rounds. The appellant was not the holder of a relevant firearms licence permitting him to possess these items.

[5] The appellant pleaded guilty to the following offences:

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1 The grounds of appeal were contained in three notices of appeal. I have renumbered the grounds for convenience.

a) Count 1, intentionally possess a thing used in the administration of a dangerous drug, namely five ice pipes, for which the maximum penalty is imprisonment for six months;

b) Count 2, intentionally possess a thing used in the administration of a dangerous drug, namely the bong, for which the maximum penalty is imprisonment for six months;

c) Count 3, possess prohibited weapons namely the knuckle knife, crossfire butterfly knife, the Mtech USA flick knife and two extendable batons, for which the maximum penalty is imprisonment for two years;

d) Count 8, possessing ammunition, namely 17 x .22 rounds, without a licence or permit, for which the maximum penalty is imprisonment for three months; and

e) Count 9, possess a firearm, namely the air pistol, without a licence, for which the maximum penalty is imprisonment for two years.

[6] The learned sentencing Judge recorded convictions in relation to each count. In relation to counts 1 and 2 his Honour noted that there was a mandatory minimum term of 28 days actual imprisonment unless he was of the opinion that a term of actual imprisonment should not be imposed. His Honour noted that he was so satisfied and then imposed an aggregate fine of $810. In relation to count 3 his Honour imposed a term of imprisonment of three months. In relation to counts 8 and 9 his Honour imposed an aggregate

sentence of imprisonment for one month. It was ordered that the aggregate sentence in relation to counts 8 and 9 should be served cumulatively upon that in respect of count 3, giving a total effective period of imprisonment of four months. That sentence was wholly suspended upon conditions of supervision and with an operational period of two years.

Ground 4 – an aggregate sentence in respect of counts 8 and 9

[7] It is convenient to deal with ground 4 first as error on the part of the Local Court has been conceded by the respondent.

[8] In imposing an aggregate sentence in respect of counts 8 and 9 his Honour purported to exercise the power provided by s 52(1) of the *Sentencing Act 1995* (NT) which, at the relevant time, was in the following terms:

> 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 were imposed in respect of each offence.

[9] The section has recently been repealed and replaced with a differently worded provision. The transitional provisions of the *Sentencing Act* (s 130(5)) continue the application of the previously worded section for the purposes of any resentencing.

[10] In the present case, each count was joined in the same complaint. The operation of that provision at the relevant time was considered in *Tomlins v*

The Queen[2] where it was made clear that the section only enabled a court to impose one term of imprisonment in respect of all counts on an indictment and did not enable the court to pass a number of aggregate sentences for different groups of counts on an indictment.

[11] In *Gibson v Jones*[3] that reasoning was extended to charges laid on complaint. It was observed that a sentencing judge cannot impose an aggregate sentence of imprisonment in relation to only some of the offences on a complaint.

[12] In this matter, the sentencing Judge imposed a range of sentences in relation to the five offences dealt with in the same complaint. The respondent acknowledges that in so doing, his Honour erred by imposing an aggregate sentence on two of the five charges on complaint being in relation to counts 8 and 9 whilst not including count 3 in that aggregate sentence and similarly imposing an aggregate sentence where counts 1 and 2 were dealt with by way of fine.

[13] In those circumstances the appeal on this ground must be allowed. It is convenient for this Court to resentence the appellant according to law. I will return to this matter shortly.

Ground 2 – the discount for the plea

2 [2013] NTCCA 18 at [38]-[41]

3 [2020] NTSC 68 at [37]

[14] The appellant submits that the sentencing Judge erred in finding that the appellant's guilty plea was not an early plea. This is presented as a distinct ground of appeal but it is noted that the considerations are also relevant to the ground of manifest excess.

[15] At the time of sentencing, the Local Court Judge commenced by observing that the appellant had "pleaded guilty at an early opportunity, not the earliest opportunity, because I see that on 7 June the matter was sent to the directions hearing list".[4] His Honour then queried what happened between certain dates and counsel for the appellant advised negotiations were on foot and that an offer had been sent by the appellant in early September. Counsel for the appellant observed that it was "not an early plea" and his Honour then concluded it was "a plea of very real utilitarian value, but not an early plea".

[16] Before this Court counsel for the appellant revealed that the defence made representations on 12 September 2023 which were subsequently accepted by the prosecution. A plea of guilty was entered consistent with the agreement although there was delay in entering the plea as a consequence of the appellant seeking medical materials for presentation to the Local Court. It was asserted that the plea was thus at the earliest opportunity.

[17] In sentencing, his Honour did not specify the extent of the discount extended to the appellant on account of his guilty plea. His Honour was not required

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to do so.[5] It is apparent that his Honour had the broad history of the plea negotiations and knew that the matter had been initially referred into the directions hearing list where it remained until an offer of settlement made in September was accepted and the Local Court informed on 9 October 2023. The plea was in fact entered on 30 November 2023 following delays due to the appellant seeking further information. His Honour was aware that the plea was indicated before any contested hearing took place and after negotiations between the parties led to a successful resolution. Chronologically, the appeal was not early but there were reasons, of which his Honour was aware, for the time-lapse.

[18] It can be accepted that this was a plea at the earliest available opportunity.[6] His Honour made an allowance for a plea which was of "very real utilitarian value" notwithstanding that it was not an early plea in the circumstances of the history as he understood it. Whether that made a difference of significance or at all for present purposes cannot be known. The appropriateness of the sentence is to be considered in light of the discussion regarding the sentences imposed and the submission of manifest excess.

Ground 3 – the accumulation of counts 8 and 9 on count 3

5 *Booth v The Queen* [2002] NTCCA 1 at [15]-[30]

6 See the discussion in *Cameron v The Queen* [2002] 209 CLR 339 at [20]-[21] and [75]

[19] The appellant advised that this is a distinct ground of appeal and also submitted the considerations are relevant to the ground of manifest excess.

[20] In the submission of the appellant the sentencing Judge erred in failing to order concurrency between the sentences imposed in relation to counts 8 and 9 and that imposed in relation to count 3. It was submitted that it was not open to order that the sentences of imprisonment be wholly cumulative because the offences arose from substantially the same circumstances and the offending items were all of a similar nature and discovered in the possession of the appellant on the same day.

[21] The overriding concern in the sentencing process is that sentences for individual offences and the total sentence imposed should be proportionate to the criminality of each case.[7] Concurrency may be appropriate where the crimes which give rise to the convictions are closely related and interdependent.

[22] As was observed in *Nguyen The Queen*[8] the sentencing structure is a discretionary matter and the sentencing judge is "required to impose an appropriate sentence for each offence and structure the sentences such that the overall sentence was just and appropriate to the totality of the (applicants) offending behaviour". In that case it was said:[9]

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7 *Carroll v The Queen* [2011] NTCCA 6 at [44]

8 (2016) 256 CLR 656 at [37]-[64]

9 Supra at [64]

> Ultimately the object of the sentencing exercise is to impose individual sentences that, so far as possible, accurately reflect the gravity of each offence while at the same time rendering a total effective sentence which, so far as possible, accurately reflects the totality of criminality comprised in the totality of offences. That is an exercise which involves a significant measure of discretionary moderation and accumulation of individual sentences according to the particular circumstances of each case.

[23] In *Hampton v The Queen*[10] it was observed that:

> 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". It has been observed that there is no fetter upon the discretion exercised by the court and the prima facie rule can be displaced by a positive decision.

[24] In the present case, whilst the offending in each of those counts involved items discovered in the appellant's possession on the same day and each related to what could be loosely described as weapons, there were differences. Put another way, the offences, whilst similar, were not substantially the same. Count 3 related to weapons that were of various types of prohibited knives and two extendable batons. Counts 8 and 9 related to a firearm and ammunition.

[25] It is also to be noted that the extent of the accumulation was for a period of one month only. In all the circumstances I regard the structure imposed by his Honour as being within the legitimate exercise of judicial discretion.

[26] As with the consideration of ground 2, whether that made a difference of significance for present purposes is also to be considered in light of the

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10 [2008] NTCCA 5 at [35]

discussion regarding the appropriateness of the overall sentence imposed and the submissions relating to manifest excess.

Ground 1 – the sentences imposed in respect of counts 3, 8 and 9 were manifestly excessive

[27] The principles applicable to this ground of appeal are well settled and are reflected in the observations of the Court of Criminal Appeal in *Emitja v The Queen*[11] where it was said:

> It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The presumption is that there is no error. An appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it is shown that the sentencing Judge committed error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing Judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously, not just arguably, excessive.

[28] In *Forrest v The Queen*[12] the Court of Criminal Appeal made similar comments and observed:

> Manifest excess is a conclusion which does not depend upon attribution of specific error in the reasoning of the sentencing Judge. The relevant test is whether the sentence is unreasonable or plainly unjust. It must be shown that the sentence was clearly and not just arguably excessive. In approaching the task of determining whether a sentence is unreasonable or plainly unjust, the appeal court does so within the context that there is no single correct sentence.

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11 [2016] NTCCA 4 at [39]

12 [2017] NTCCA 5 at [63]-[64]

[29] In *Truong v The Queen*[13] the Court of Criminal Appeal observed that the "excess must be obvious, plain, apparent, easily perceived or understood and unmistakable" and the sentence must be "so far outside the range of a reasonable discretionary judgment as to itself bespeak error".[14]

[30] In support of this ground the appellant submitted that a sentence of imprisonment in all the circumstances was not warranted and pointed to a number of matters in relation to which it submitted his Honour may have fallen into error.

[31] The first of those related to count 3, being the possession of prohibited weapons which, his Honour observed, was the "most serious count before the court". The appellant pointed to a discussion between the sentencing Judge and counsel in which his Honour observed that the weapons may be an "indicia of violent behaviour" and asked "why would one have these sorts of items unless one plans to use them in some way". Defence counsel suggested they may be in his possession as "collectables" but his Honour indicated he did not accept that explanation. In the sentencing remarks his Honour stated "I am more concerned that (the prohibited weapons) have, to some degree at least, a more negative aspect." The appellant submitted that his Honour "may have proceeded to sentence the appellant on the basis that the prohibited weapons were in the appellant's possession because he had

13 (2015) 35 NTLR 186 at [37]

14 Referring to *Hanks v The Queen* [2011] VSCA 7 at [22]

used them, or had plans to use them, to commit violent acts" and thereby fell into error.

[32] In my opinion, his Honour did not fall into error in the manner suggested. It was apparent that he was concerned by the nature and number of prohibited weapons seized but there is nothing to suggest that his Honour sentenced on the basis that the appellant had engaged or was going to engage in violence using the weapons. The observation that, in the absence of an acceptable explanation, the possession of the weapons had "a more negative aspect to them" is unexceptional. His Honour had indicated that he did not accept that the items were part of an innocent collection and no evidence was called to support such a suggestion. Further, no other explanation was provided by the appellant. The weapons were prohibited and the appellant had five of them in his possession in circumstances where he had previously been convicted of similar offending. In the circumstances his Honour was justified in being concerned that there was an unidentified but more negative aspect to the possession.

[33] The appellant submitted that the sentencing Judge may have fallen into error by failing to properly gauge the objective seriousness of the offending. It was argued that each of the offences fell to the lower end of seriousness for offending of its kind. Indeed, it would seem his Honour approached each of the matters in those terms. In relation to count 3, the offence of possessing the knives and extendable batons, the maximum penalty for the offence was imprisonment for two years. The sentence imposed by his Honour was

imprisonment for three months. In relation to counts 8 and 9, the offences of possessing ammunition and the air pistol, the maximum penalties were imprisonment for three months and for two years respectively. The sentence imposed by his Honour was, mistakenly, an aggregate sentence of imprisonment for one month. Each of those sentences suggests his Honour regarded the offending as being toward the lower end of seriousness for offending of its kind.

[34] The appellant then submitted the sentencing Judge may have fallen into error by failing to have proper regard to the appellant's health issues. It was noted that at the time the appellant was beset with health issues including chronic pain in his lower back, an acquired brain injury and depression.

[35] A fair reading of the sentencing remarks makes it clear that his Honour was acutely aware of the health issues suffered by the appellant and how those health issues were relevant to the sentencing exercise. His Honour made specific reference to the appellant's congenital heart abnormality and that he suffered a stroke in 2020 which continued to cause him cognitive impairment and physical impairment. His Honour expressly took the medical history of the appellant into account in not imposing the mandatory minimum sentence of imprisonment for 28 days in relation to counts 1 and 2. Further, his Honour accepted that the medical materials before the Court demonstrated that time in custody for the appellant would be harsher

than for somebody of similar circumstances in terms of "age and social position and the like".[15]

[36] The appellant further submitted that the sentencing Judge may have fallen into error by failing to have due regard to the rehabilitation of the appellant. It was observed that the appellant had a limited criminal history and had support in place to help in relation to his rehabilitation including applying for NDIS funding, being reviewed each three months by an alcohol and other drugs service, having monthly appointments with a psychiatrist and enjoying the continued support of his mother.

[37] While his Honour made no specific reference to the appellant's prospects of rehabilitation, his Honour did discuss the appellant's criminal history, the gap in his offending, his health issues both physical and cognitive, his opioid addiction which is controlled through proper medical channels and his acceptance of responsibility through his plea which was of "very real utilitarian value".

[38] Similarly, while his Honour did not specifically refer to general deterrence and specific deterrence, reference was made to factors relevant to those matters. Sentencing was carried out by a very experienced Local Court Judge in a busy Local Court list. In light of the range of matters referred to in the sentencing remarks I would not assume that his Honour failed to consider basic sentencing principles.

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[39] In my opinion the sentence of imprisonment of four months in respect of the possession of weapons, ammunition and a firearm in the circumstances of the appellant could not be said to be manifestly excessive. The terms upon which the sentence was suspended and the operational period were unexceptional. Indeed, in my opinion, the sentence was comfortably within range.

Resentencing

[40] As I have observed the parties agree that the appeal in relation to ground 4 has been made out. I allow the appeal on that ground. It is therefore necessary for me to resentence. With respect, I regard the aggregate sentence imposed by his Honour as being appropriate for the relevant offending albeit an aggregate sentence was not available. I set the aggregate sentence aside and instead sentence the appellant to imprisonment for two weeks in respect of count 8 and four weeks in respect of count 9. I direct that the sentence in relation to count 8 be served concurrently with that in relation to count 9 giving a total term of imprisonment of four weeks, or one month, in relation to that offending.

[41] In all other respects the appeal is dismissed.
