Regina v The Queen [2004] NTCCA 9

PARTIES:	REGINA, Joseph Richard 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 5 of 2004 (20306398)
DELIVERED:	12 November 2004
HEARING DATES:	25 October 2004
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & BAILEY JJ

CATCHWORDS:

CRIMINAL LAW

Jurisdiction, practice and procedure – judgment and punishment – totality principle – multi-jurisdictional offender – cultivation of cannabis – five years imprisonment – whether total period of sentencing is to be regarded as too severe – appeal dismissed.

Misuse of Drugs (NT); s 7(1); Sentencing Act (NT), s 53(1).

Mill v The Queen (1988) 166 CLR 59, p 63; *R v Todd* [1982] 2 NSWLR 517, pp 519-520; *R v Harrison* (1990) 48 A Crim R 197, pp 198-199; *Postiglione v The Queen* (1997) 189 CLR 295, p 308; *Vlek v R* [1999] WASCA 1038, paras 8 and 11; *Serra v The Queen* [2004] NTCCA 3, par 19, considered.

REPRESENTATION:

Counsel:

Appellant:	S Cox QC
Respondent:	M Carey

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

Judgment category classification:	A
Judgment ID Number:	Mar0417
Number of pages:	19

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

Regina v The Queen [2004] NTCCA 9
No. CA 5 of 2004 (20306398)

BETWEEN:

JOSEPH RICHARD REGINA
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & BAILEY JJ

REASONS FOR JUDGMENT

(Delivered 12 November 2004)

Martin (BR) CJ:

[1] This is an appeal against a sentence of five years imprisonment imposed for the crime of cultivating a commercial quantity of cannabis plants contrary to s 7(1) of the Misuse of Drugs Act. The appellant also complains that the learned sentencing Judge erred in declining to fix a non-parole period.

Facts

[2] In mid October 1996 the appellant and his co-offender, S, travelled to an area approximately 150 kilometres southeast of Tennant Creek with the intention of establishing a campsite and cannabis plantation. They erected a camouflaged campsite and, between mid November 1996 and 23 July 1997,

they planted and cultivated cannabis plants at the campsite and at other nearby sites.

[3] The appellant and S left the area before police attended on 25 July 1997. Five sites of cannabis cultivation were discovered by police. The summary of the facts related to each site given by the learned sentencing Judge was as follows:

> "The first site was located about 3.3 kilometres to the east of the campsite and it consisted of 118 small cannabis seedlings, 559 large cannabis seedlings and 96 larger plants, about 5 foot in height.
>
> Several of the plants were on a dripper system which was serviced by an above ground pool. Water was fed into the pool via a large poly-pipe and pumping station which led to a nearby waterhole. All the cannabis plants had been recently watered and were in good condition.
>
> The second site consisted of the campsite and 724 cannabis seedlings growing in polystyrene cups. A large area had been cleared adjacent to the campsite where 164 cannabis plants, most in excess of 6 foot in height, were growing and 1.2573 kilograms of cannabis leaf was drying.
>
> There was clear evidence of several areas where fully matured plants had been harvested, probably in the vicinity of another 600 plants. An above-ground pool containing water was at the same site and a water trailer. All cannabis plants within the area had been recently watered and were in good health.
>
> The third site consisted of 15 cannabis plants about 6 foot in height which were growing in a riverbed near the first site. The cannabis plants were healthy and in good condition. There was evidence of where another 200 plants had been harvested.
>
> The fourth site was located about 1.7 kilometres to the west of the campsite, consisting of a large garbage bag of cannabis leaf weighing 3.1827 kilograms.

> The fifth site was located 4.8 kilometres to the west of the campsite, consisting of 61 cannabis seedlings and 20 large cannabis plants, some 4 foot in height. These plants were growing in plastic buckets and from bags of potting mixture. An above-ground pool containing water was located at the site. The cannabis plants had been recently watered and were in a healthy condition.
>
> At a point about 1.8 kilometres north-west of the campsite was a riverbed containing a large pool of water. Located at this position was a petrol water pump and poly-piping, which was used to pump water into the water trailer which in turn serviced the above-ground pools at all sites."

[4] There is no challenge to the accuracy of the summary by the sentencing Judge. Nor is there any challenge to his Honour's description of the offending as "an organised commercial cultivation designedly conducted in a remote part of the Territory to avoid detection". As his Honour said, the offending demonstrated a high degree of criminality on the part of those who organised it and were responsible for putting it into effect.

[5] It was the appellant who introduced S to the criminal enterprise. The appellant dealt directly with a third man who the appellant said was the financier and principal in the enterprise. The sentencing Judge correctly regarded the appellant as more closely associated with the organisation of the crop and far more deeply implicated in the criminal enterprise than S. His Honour accepted that S expected to receive $30,000 for his involvement and inferred, correctly in my view, that the appellant had much more to gain from the enterprise than S had the enterprise succeeded.

[6] The appellant has a very lengthy criminal record in the Northern Territory, Queensland and New South Wales. That record includes offences of dishonesty and violence. In 1977 the appellant was sentenced to nine years imprisonment for the crime of armed robbery.

[7] The appellant's prior offending also includes offences against the drug laws. In April 1985 the appellant was sentenced to 18 months imprisonment for possession of cannabis. In April 1992 he was convicted of cultivating and supplying prohibited drugs and two offences of breaking, entering and stealing. After an appeal a total sentence of five years imprisonment was imposed together with an additional term of one year and eight months. That sentence was backdated to commence on 27 March 1991. In 1993 the appellant escaped from prison while serving that sentence. In June 1994 while an escapee, the appellant committed an offence of cultivating a commercial quantity of a dangerous drug. On that occasion he cultivated 73 cannabis plants adjacent to the Barkly Highway approximately 63 kilometres east of the Stuart Highway. In September 1994 the Judge who sentenced the appellant on the occasion under consideration sentenced the appellant to two years imprisonment and declined to fix a non-parole period.

[8] The maximum penalty for the appellant's crime is 25 years imprisonment. Leaving aside the impact of the totality principle which is discussed later in these reasons, in my opinion the sentence of five years imprisonment was well within the range of the sentencing discretion.

Non-Parole Period

[9] The learned trial Judge declined to set a non-parole period. His Honour concluded, correctly in my view, that the appellant is hardened in his criminal ways and was completely without remorse. Previous gaol terms had not deterred the appellant from his criminal ways. The need for personal deterrence and the protection of the public were of primary importance. In 1994 the sentencing Judge found that the appellant was not a fit candidate for the fixing of a non-parole period and his Honour's judgment proved to be correct.

[10] Section 53(1) of the Sentencing Act provides that the court shall fix a non-parole period unless the court considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of a non-parole period inappropriate. In my opinion there was ample basis upon which his Honour could conclude that by reason of the matters identified in s 53 the fixing of a non-parole period was inappropriate.

Totality

[11] The only issue that has given me cause for concern relates to the question of totality. This issue arises because, prior to being extradited from New South Wales to the Northern Territory in respect of the crime under consideration, the appellant had been in custody in New South Wales.

[12] It is necessary to have regard to the sequence of events and sentences. As mentioned, on 27 March 1991 the appellant commenced serving a sentence of five years imprisonment. That sentence was comprised of two years and six months for the offences of cultivating and supplying a prohibited drug and two years and six months for two offences of breaking, entering and stealing. The appellant escaped at the end of 1993 after serving two years and eight months of that sentence.

[13] A little over six months after escaping, the appellant committed the offence of cultivating a commercial quantity of a dangerous drug in the Northern Territory for which he was sentenced in September 1994 to two years imprisonment. Notwithstanding the existence of a warrant in New South Wales for his arrest, the appellant was not extradited upon his release in 1996. Within a short time of his release, he commenced the cultivation offence under consideration which continued into 1997.

[14] The appellant was next taken into custody on 14 January 1999 in Queensland. He was fined for property offences and given no time to pay. The court ordered imprisonment for 30 days in default of payment.

[15] At the time of his arrest in Queensland, the appellant was wanted in both New South Wales and the Northern Territory. It appears that after he was arrested in Queensland the Northern Territory police spoke to the appellant for the first time about the offending under consideration. Counsel advised

the sentencing Judge that when police saw the appellant in 1999 he offered to provide information and to have the charge disposed of at an early time.

[16] While the appellant was serving the 30 days in default of payment, he was extradited to New South Wales. On 16 February 1999 he was committed for trial on the escape charge. At that time the appellant remained liable to serve the balance of the previous sentences, namely, two years and four months. On 29 April 1999 the appellant was sentenced for the escape to a minimum term of two years imprisonment commencing on 28 April 2001 and concluding on 27 April 2003. The timing of that sentence suggests it was almost entirely cumulative upon the unserved balance of two years and four months.

[17] After the appellant had served a total of four years and three months he was extradited to the Northern Territory to face the matter under consideration. As mentioned, the current sentence of five years was backdated to 27 April 2003 to coincide with the date on which the sentence for the New South Wales escape expired.

[18] The end result is, therefore, that the appellant has been in custody since 14 January 1999. As a consequence of the head sentence of five years imposed in the matter under consideration, before the appellant is released he will have been in continuous custody for a period of nine years and three months. Counsel for the appellant urged that such a period is too severe and is out of proportion to the total criminality of the appellant's offending.

[19] The totality principle is a well recognised principle of sentencing. In a joint judgment in *Mill v The Queen* (1988) 166 CLR 59 at 62, the High Court approved of the following statement in Thomas, Principles of Sentencing, 2nd Ed (1979) pp 56 and 57 as a succinct statement of the principle:

> "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'."

[20] The High Court recognised that the application of the principle is more complicated where an offender commits a number of offences within a short space of time in more than one State. The court approved the following remarks of Street CJ in *R v Todd* [1982] 2 NSWLR 517 at 519-520 as applicable to the fixing of both the head sentence and non-parole period, and as reflecting "a just and principled approach to the problem of sentencing when an offender comes to be sentenced many years after the commission of an offence because during the intervening period he has been serving a sentence imposed in another state in respect of an offence of the same nature and committed at about the same time" (64-66):

> "it would be wrong, in my opinion, to disregard the practical situation that the appellant had already served a substantial period of imprisonment in Queensland for offences so closely related in time and character to the Sydney offences …
> … where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense as to what will happen to him when in due course he comes up for sentence on the subsequent occasion, and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach – passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner."

[21] The circumstances before the High Court in *Mill* involved an offender who committed two armed robberies in Victoria and one in Queensland within a period of six weeks during December 1979 and January 1980. In September 1980 the offender was sentenced to imprisonment for ten years in respect of the Victorian offences. On his release on parole he was extradited to Queensland where, in March 1988, he was sentenced to eight years imprisonment. In that situation, the court expressed the view that the proper approach was (66):

> "to ask what would be likely to have been the effective head sentence imposed if the applicant had committed all three offences of armed robbery in one jurisdiction and had been sentenced at one time."

[22] The court acknowledged that in order to comply with the principle the only course open to the second sentencing court was to impose a lower head sentence which reflected the long deferment which had taken place while the

offender had been in custody in Victoria and that the lower head sentence would fail to reflect adequately the seriousness of the crime in Queensland in respect of which it was imposed. Recognising that such a consequence was unfortunate, the court said that such a consequence was (67):

> "to be preferred to the injustice involved in the imposition of a longer head sentence because of the inadequacy of the law to cope satisfactorily with the intervention of State boundaries."

[23] In *Mill*, the remarks of the Court were directed to the situation where the offender committed offences in different States of the same character and within a relatively short period of time. A similar situation existed in Todd.

[24] The circumstances of the appellant's offending and in which he came to be sentenced were different from those that existed in *Mill* and *Todd*. The criminal conduct in respect of which the appellant was required from 1999 to 2001 to complete service of the sentences was committed in 1991 and sentence was imposed in April 1992. The appellant did not complete service of those sentences because he escaped from lawful custody. While an escapee the appellant again offended against the drug laws and was sentenced to two years imprisonment. He took advantage of the failure of the New South Wales authorities to extradite him on completion of that sentence and committed the cultivation under consideration. It was not until he was arrested in 1999 in Queensland that service of the balance of the 1992 sentences commenced.

[25] The Crown challenged the application of the totality principle to the circumstances of the appellant. Counsel pointed out that the appellant's circumstances are complicated by reason of his escape from lawful custody and are vastly different from the type of crime spree over a relatively short period contemplated in *Mill* and *Todd*. This is not a situation where the advent of State boundaries prevented the court from sentencing on the one occasion for a number of offences committed within a relatively short period of time.

[26] In *R v Harrison* (1990) 48 A Crim R 197, the New South Wales Court of Criminal Appeal was concerned with sentencing for crimes in different States committed over a period of approximately three years. Hunt J, with whom Wood and Finlay JJ agreed, said (198-199):

> "The duty of the court in the second State which is sentencing a prisoner in those circumstances is to consider what sentence should be imposed for the local offences additional to that already imposed in the other State as if all the offences had been committed in the one State, bearing in mind the principle of totality. But, because there is no power to backdate any new sentence to a time when the prisoner was in custody serving the sentence earlier imposed in the other State, the new sentence should be reduced in order to reflect properly the totality of the prisoner's criminal behaviour, notwithstanding that the reduced sentence by itself will not reflect adequately the seriousness of the local crime in respect of which it is imposed (and not withstanding that it may indeed appear by itself to be quite unduly lenient when that crime is viewed alone).
>
> Where there has been a lengthy delay in the prisoner being dealt with in the second State, weight must be given to the staleness of the local crime, to the effect upon the prisoner of the uncertainty as to what was to happen by way of punishment for that crime, and to the progress of the prisoner's rehabilitation during that period whilst serving the sentence earlier imposed.

> That is the approach laid down by this Court in *Todd*, as approved by the High Court in *Mill*. The principle of totality, of course, applies not only to sentences imposed for offences committed as part of a connected and roughly contemporaneous series of offences. *It must also be applied wherever a prisoner is being sentenced for an offence whilst he is serving a sentence for some other offence – whether committed roughly contemporaneously or at widely different times.*" (citations omitted) (my emphasis).

[27] The reasoning of Hunt J in *Harrison* was approved by McHugh J in *Postiglione v The Queen* (1997) 189 CLR 295. After discussing the totality principle as it applied to a court sentencing an offender in respect of multiple offences, his Honour observed that the ambit of the totality principle had been extended (308):

> "Recent decisions in the Court of Criminal Appeal [*R v Bakhos* (1989) 39 A Crim R 174; *R v Harrison* (1990) 48 A Crim R 197; *R v Gordon* (1994) 71 A Crim R 459] have extended the ambit of the totality principle. Those decisions hold that, in order to comply with the totality principle, a sentencing judge must consider the total criminality involved not only in the offences for which the offender is being sentenced, but also in any offences for which the offender is currently serving a sentence.
>
> The most recent statement to this effect was made by Hunt CJ at CL in *R v Gordon* [(1994) 71 A Crim R 459 at 466]:
>
> > "When a custodial sentence is to be imposed which will be cumulative upon, or which will overlap with, an existing custodial sentence, the judge must take into account that existing sentence so that the total period to be spent in custody adequately and fairly represents the totality of criminality involved in all of the offences to which that total period is attributable.""

[28] A similar approach was taken by the Western Australian Court of Criminal Appeal in *Vlek v R*, unreported, 29 March 1999. Anderson J, with whom

Pigeon and Ipp JJ agreed, recognised the difficulty facing a court in evaluating an offender's overall culpability in respect of matters previously dealt with by another court. Having made that observation, his Honour said:

> "Nevertheless, there is now a long line of authority to the effect that the totality principle must be applied, as best the court can, not only to sentences imposed in the one court for offences committed as part of a connected and roughly contemporaneous series of offences (about which the Court will know all that needs to be known), but also wherever a prisoner is being sentenced for an offence whilst he is still serving a sentence for some other offence about which the Court might not know very much."

[29] The appellant was not being sentenced at a time when he was still serving a sentence for another offence or offences. In my opinion, however, the totality principle is applicable. State boundaries prevented the appellant from being dealt with earlier by the Northern Territory court at a time when the appellant was serving the sentences in New South Wales. The appellant has remained continuously in custody since January 1999.

[30] The applicability of the totality principle can be tested by assuming that all the offending and the escape occurred in New South Wales or the Northern Territory. In either locality, when imposing sentence for the offending under consideration the totality principle would apply. First, the court would be required to have regard to the total criminality of the offender's criminal conduct. Secondly, if the court was sentencing both for the escape and the crime under consideration, the court would be obliged to take into account the total period to be served by also having regard to the balance of two years and four months remaining to be served of the sentences

interrupted by the escape. Alternatively, if the appellant was already serving or had completed serving the balance of two years and four months and the sentence for the escape, the court would be required to have regard to the total period to be served and to view that period against the total criminal conduct for which sentences had been and were being imposed.

[31] The application of the totality principle is made more difficult by the appellant's escape from lawful custody. As a consequence of that escape, the continuous period of custody to which regard must be had includes approximately half of the sentences for the New South Wales drug and breaking and entering offences. The fact that the period relates only to approximately half of those sentences severs the direct relationship between the criminality of the conduct for which the sentences were imposed and the balance being served which is part of the total period of custody to which the court must have regard. Notwithstanding that difficulty, however, the court must do its best to apply the principle in a practical and effective manner.

[32] The application of the principle to the appellant's particular circumstances can be checked by having regard to the results of two different approaches to the problem created by the escape. First, the total period in custody of nine years and three months can be viewed against the criminality of the conduct involved in the offending in Queensland, the escape from lawful custody and the offending under consideration, together with a broad brush view of the criminality of the earlier offending in New South Wales that

equated approximately to half of the total sentence of five years imposed for all of the New South Wales offending.

[33] Alternatively, the balance of two years and four months that the appellant was required to serve and the criminality of the conduct involved in those prior offences could be put aside. If that period and conduct are put aside, in substance the appellant received a cumulative sentence of six years and eleven months for the offending in Queensland, the escape and the cultivation under consideration.

Application of Totality principle

[34] The sentencing Judge was aware that the appellant had been in custody since January 1999. He was also aware that the appellant finished serving the New South Wales sentences on 27 April 2003. However, neither counsel nor the sentencing Judge mentioned the principle of totality. Counsel did not submit that his Honour should take into account the period of four years and three months that the appellant had served since January 1999.

[35] The totality principle is well known, but its application to the circumstances under consideration was not so obvious at the time of submissions and sentencing that it resulted in specific mention. It is usually a feature of sentencing that results in specific remarks by either or both counsel and a sentencing Judge.

[36] There is a further feature arising from the sentencing remarks which requires consideration. The sentencing Judge spoke of the offence as serious and as

demonstrating a high degree of criminality. His Honour regarded the offending as graver by reason of the appellant's long standing criminal record of a serious nature. His Honour drew the following conclusion as to the nature of the sentence that was required:

> "The present offender deserves a stern sentence. Such is called for because of his hardened criminal ways, his complete lack of remorse, the real need for personal deterrence – gaol terms in the past having seemingly no apparent effect – as retribution and to denounce his crime publicly."

[37] In my view, a reading of the sentencing remarks in their entirety demonstrates that in fixing the period of five years imprisonment the sentencing Judge was of the view that he was imposing a "stern" sentence. This stands in contrast to a recognition that a sentence has been moderated by reason of the principle of totality. In my view there exists a real possibility that the Judge overlooked this principle.

[38] Ultimately, the critical question for this Court is whether the total period of nine years and three months is so long that it can properly be regarded as too severe. Although earlier authorities speak of the totality principle as enabling a court to mitigate what would otherwise be a "crushing" sentence imposed for individual crimes, it is not necessary for the appellant to establish that the sentence is "crushing" before interference by this Court is justified.

[39] In *Vlek*, Anderson J observed that "sentences which are not crushing may nevertheless offend the totality principle by being, in the aggregate, just too

long having regard to the overall criminality in the conduct of the offender." His Honour concluded that the court was concerned with the principle of "proportionality between offence and sentence".

[40] In *Serra v R* [2004] NTCCA 3, this Court found that the sentencing Judge was in error in failing to take into account the totality principle. The Court then noted that by reason of s 411(4) of the Criminal Code, notwithstanding the error in the sentencing process, the Court would not interfere unless it formed a positive opinion that some other sentence was warranted in law and should have been passed. Having earlier spoken of the totality principle as enabling a court to avoid a sentence that is "crushing", the Court determined that it should interfere because the trial Judge was misled into imposing a sentence which, "when considered with the balance of the sentence that the appellant was liable to serve because of the revocation of parole orders, was *too severe*" (my emphasis).

[41] I have not found this question easy to resolve. The appellant is a hardened criminal. There is not the slightest indication of any remorse for the offending under consideration or for the appellant's criminal way of life. Nor is there the slightest indication that the period in custody since January 1999 has resulted in any rehabilitation or change in attitude by the appellant. The offending under consideration was a serious example of the crime of cultivation of a prohibited drug. This type of offending is prevalent and questions of both general and personal deterrence were important features of the sentencing.

[42] On the other hand the appellant is now 62 years of age. He wishes to return to former Czechoslovakia to see his brothers and sisters who he has not seen for in excess of 30 years. The appellant is entitled to limited credit for his plea of guilty.

[43] Regardless of how the application of the totality principle is applied to the particular circumstances of the appellant, and recognising that the total period to be served by the appellant is undoubtedly severe, I have reached the view that this Court should not interfere with the sentence of five years imprisonment imposed for the offending under consideration. Even if it is assumed that the sentencing Judge erred in failing to have regard to the totality principle, by reason of the gravity of the total criminal conduct and the appellant's hardened criminal ways I am not of the opinion that the total period is too severe or that a different sentence should have been passed.

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

Mildren J:

[45] I agree with the judgment of the Chief Justice and have nothing to add.

Bailey J:

[46] I have had the advantage of reading the judgment in draft of Martin (BR) CJ. I agree that the appeal should be dismissed for the reasons referred to by his Honour. Application of the totality principle in the circumstances of the

appellant’s case to effect a reduction in sentence would amount to a wholly unmeritorious reward to the appellant for his escape from lawful custody.