CITATION:	*Gregurke v The Queen* [2018] NTCCA 21
PARTIES:	GREGURKE, Jake 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 21 of 2018 (21735753)
DELIVERED:	17 December 2018
HEARING DATE:	On the papers
JUDGMENT OF:	Kelly J

REPRESENTATION:

Counsel:	
Applicant:	J Murphy
Respondent:	J Karczewski QC
Solicitors:	
Applicant:	North Australian Aboriginal Justice Agency
Respondent:	Director of Public Prosecutions

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gregurke v The Queen [2018] NTCCA 21
No. CA 21 of 2018 (21735753)

BETWEEN:

JAKE GREGURKE
Applicant

AND:

THE QUEEN
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 17 December 2018)

[1] This is an application for an extension of time within which to file an application for leave to appeal against the sentence imposed on the applicant on 21 June 2018.

[2] A person found guilty on indictment may appeal to the Court of Criminal Appeal, against sentence, with the leave of the Court [*Criminal Code* s 410(c)].

[3] Any person desiring to obtain leave to appeal, shall give notice of application for leave to appeal within 28 days after the date of sentence [*Criminal Code* s 417(1)].

[4] The time within which notice of an application for leave to appeal may be given may be extended at any time by the Court of Criminal Appeal [*Criminal Code* s 417(2)].[1]

[5] As noted by the High Court in relation to a similar provision in New South Wales legislation in *Kentwell v The Queen*:[2] "The power to extend the time within which a notice of intention to apply for leave to appeal is required to be given to the Court under the Act is wide."

[6] The principles applicable to an application for leave to appeal out of time against a conviction were set out in *Green v The Queen*.[3]

> Public policy balances the right of the application to appeal with the requirement that it be exercised within a fixed time. That time may be extended in exceptional circumstances. In deciding whether the circumstances are exceptional the court will take into account the likelihood of an appeal succeeding. But the longer the delay the more exceptional the circumstances and the clearer it must be that an appeal would succeed. Where there has been extreme delay the point may be reached where only a manifest miscarriage of justice will justify an extension of time.

[7] In *Kentwell v The Queen*[4] the High Court determined that this was not the test applicable to applications for an extension of time for an application for

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1 The power to grant an extension of time within which to file an application for leave to appeal may be exercised in the first instance by a single judge, but if the application is reused, the applicant is entitled to have the matter dealt with by the Court of Criminal Appeal.

2 [2014] HCA 37 at [12]

3 [1989] NTCCA 5; 95 FLR 301

4 [2014] HCA 37 at [28]-[30], [31]-[35]

leave to appeal against a sentence that is still being served. The following principles can be distilled from that case.[5]

(a) The interests of justice in the review of a sentence that has been imposed upon wrong sentencing principle and that is still being served are different from the interests of justice in the review of a stale conviction. (The latter may involve a retrial with attendant stresses and considerations of possible unavailability of witnesses, and other loss of evidence; the former does not.)

(b) The wide discretion conferred on the Court of Criminal Appeal under the Act and Rules is to be exercised by consideration of what the interests of justice require in the particular case. That does not involve consideration of whether refusal of the application would occasion substantial injustice.[6]

(c) The provisions of the Act and Rules providing for appeals against conviction and sentence are exceptions to finality in the trial and sentencing of offenders. The principle of finality finds expression in the time limit for bringing appeals or applications for leave to appeal. However, in the case of an out-of-time challenge to a sentence that is

5 [2014] HCA 37 at [28]-[29]

6 [2014] HCA 37 at [30]-[31]

being served, the principle of finality does not provide a discrete reason for refusing to exercise the power.[7]

(d) The prospects of success on the appeal is a relevant consideration on an application to extend time.[8]

(e) Regard must be had to the terms of the statute[9] which provides:

> On an appeal … against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

(f) If there has been specific error in the sentencing process, the appellate court's power to intervene is enlivened and it has a duty to re-sentence, unless in the separate and independent exercise of its discretion it concludes that no different sentence should be passed. (A sentence may be so lenient that the appellate court concludes that there is no prospect that a lesser sentence would be imposed were the appeal to be entertained.)[10]

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7 [2014] HCA 37 at [32]

8 [2014] HCA 37 at [33]

9 [2014] HCA 37 at [34]; The provision being considered in *Kentwell* was s 6(3) of the *Criminal Appeal Act 1912* (NSW). The same provision appears in the NT legislation in s 411(4) of the *Criminal Code*.

10 [2014] HCA 37 at [35]

(g) If there has been no demonstrated specific error, the appellate court may only intervene if it concludes that the sentence falls outside the permissible range of sentences for the offender and the offence.[11]

[8] Applying those principles to the circumstances of the present application, it does not seem to me that the justice of the situation requires that an extension of time be granted within which to make application for leave to appeal against the sentence.

[9] The applicant pleaded guilty to eight offences and was sentenced to a term of imprisonment for three years suspended after 12 months on 21 June 2018. The time within which to lodge an appeal/application for leave to appeal therefore expired on 19 July 2018.

[10] On 2 July 2018 North Australian Aboriginal Justice Agency ("NAAJA"), who had acted for him on the plea, sent him a letter advising him of his sentence, his right to appeal, and the 28 day time limit. On 16 July the applicant sought advice from NAAJA in relation to an appeal and NAAJA initiated its internal merits review process. It also sent a "Barr" letter to the Director of Public Prosecutions ("DPP") advising that the applicant was seeking counsel's advice on appeal against his conviction and sentence and because of the time that may take, it may be necessary to seek leave to appeal out of time.

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11 [2014] HCA 37 at [35]

[11] On 19 July NAAJA determined to grant aid to appeal against his sentence. Aid was not granted for an appeal against his convictions. (This is hardly surprising given that the applicant had pleaded guilty.) On 20 July NAAJA advised the applicant by phone that they had sent a letter "to protect his appeal position given 28 days to appeal period". (These words appear in quotation marks in the chronology prepared by the applicant's solicitor. I assume this has been taken from a file note.)

[12] On 23 July 2018, a NAAJA lawyer visited the applicant at the prison and told him that he had a grant of aid to appeal against sentence only. The applicant did not instruct NAAJA to lodge such an appeal. Instead, he chose to try to pursue an appeal against his convictions. He was told that he would need to apply to the Northern Territory Legal Aid Commission ("NTLAC").

[13] There followed a series of contacts with NTLAC, and on 1 October 2018, NTLAC advised the applicant that his application for legal aid to appeal against his convictions had been refused.

[14] Further contacts between the applicant and NAAJA followed. On 15 October 2018, NAAJA ordered a transcript of the applicant's proceedings in the Supreme Court and on 19 October 2018 NAAJA determined that the applicant would suffer financial hardship if required to pay the court filing fee. On 25 October 2018, three months and six days after the expiration of the appeal period, three months and two days after the applicant had been granted aid by NAAJA to appeal against his sentence, NAAJA filed an

application for leave to appeal, an application for an extension of time, and affidavit in support.

[15] The proposed grounds of appeal are:

(a) that the sentence for count 2 was manifestly excessive,

(b) that the sentence for count 3 was manifestly excessive, and

(c) that the total sentence for counts 2 and 3 is manifestly excessive.

[16] I do not think that there are sufficient prospects of success on an appeal to warrant granting an extension of time within which to file an application for leave to appeal.

[17] The applicant pleaded guilty to eight counts involving seven different victims – all of them school girls aged between 13 and 15. The applicant was aged between 18 and 21 at the time he committed the offences.

[18] The most serious offences, counts 2 and 3, were committed against the same victim, AS, as was count 1. (Count 3 also involved another young girl.) Count 2 was a charge of unlawful sexual intercourse with a child under the age of 16 which carries a maximum penalty of 16 years imprisonment. Count 3 was a charge of procuring a child under the age of 16 to perform an indecent act which carries a maximum penalty of imprisonment for 10 years. Count 1 was a charge of using a carriage service in a harassing and offensive manner – as were counts 4, 5, 6, 7 and 8.

[19] In summary, the applicant met AS when she was 13 and the applicant was 18. AS told the applicant her age. Not long afterwards, AS accepted the applicant's friend request on Facebook and the applicant repeatedly requested her to send him nude pictures of herself. This continued repeatedly for two weeks and then she blocked him on Facebook. This constituted count 1.

[20] After AS turned 15, AS met the applicant in a park. They sat and talked. He then asked her for sex. She was initially reluctant but then agreed. They engaged in penile vaginal intercourse in the park for some time. AS did not know if the applicant had worn a condom. It was her first experience of sexual intercourse. This constituted count 2.

[21] A few hours after the encounter in the park, the applicant messaged AS over Facebook and again requested nude images of her. This went on for several days. Eventually she sent him naked images of her body which did not show her face. He then requested a topless image of herself and another female. She initially refused. He persisted with his requests. Eventually she sent him a topless image of herself and her friend BG which did not show their faces. He then requested a video of the pair, topless and kissing. AS refused but he sent multiple messages throughout the day and eventually she and BG complied. This constituted count 3.

[22] His next step was to tell AS and BG that his parents had found their video and was going to take it to the police and to their parents, but that this

would not happen if they sent him more nude pictures. BG sent him a generic picture from Google to appease him. When he discovered it was fake, the applicant became angry. He called BG a liar and abusive names. The applicant repeatedly requested more nude images from BG and threatened to publicise the image and video he had of her if she did not comply. He also threatened to send the images to her mother. This constituted count 4.

[23] Counts 5 to 8 were constituted by somewhat similar behaviour. The applicant sent abusive, angry and threatening messages to three other young girls, requesting a nude image from one; threatening to publish nude images (which he did not have) of several of them and threatening to publish images from the internet and say it was another of the girls.

[24] The learned sentencing judge sentenced the applicant to a term of imprisonment for two years on count 2 and two years on count 3 to be served concurrently for one year, and to imprisonment for four months on each of counts 1, 4, 5, 6, 7 and 8, all to be served totally concurrently with the sentences for count 2 and 3, bringing the total sentence to imprisonment for three years. Her Honour directed that the sentence be suspended after 12 months on conditions and fixed a two year operational period.

[25] The applicant seeks leave to appeal against the sentences on counts 2 and 3 only, arguing that each sentence is manifestly excessive and that the total of three years for those two charges is manifestly excessive.

[26] The applicant submitted that the sentence for count 2 was manifestly excessive, based on a comparison with selected other sentences for the same offence in which young men received sentences in the range of eight to 12 months imprisonment with a significant portion of the sentence suspended. These cases are of little assistance. Several of the cases cited were "boyfriend/girlfriend" cases, and in none of them were there the aggravating factors the sentencing judge noted in this offending. One could cite other cases where the offender received significantly higher sentences.

[27] The sentencing judge took into account the considerable emotional harm done to the victim; the initial reluctance of the victim to have sex with the applicant; the fact that it was not an early plea and that "remorse is not a strong feature in this case"; and the context in which count 2 took place, preceded and followed by the sexually predatory conduct the subject of counts 1 and 3. Her Honour noted that "the episodes of offending occurred over a reasonable lengthy period" and that the applicant "engaged in a disturbing course of conduct with predatory features". Given these circumstances, and having regard to the maximum penalty, which is imprisonment for 16 years, it cannot be said that the sentence for count 2 is manifestly excessive.

[28] In relation to count 3, the applicant submitted that it was towards the lower range of objective seriousness for offences of this kind and again cited a range of other cases said to be more serious in which comparable or lesser sentences were imposed. (The cases cited were not really comparable at all.

For the most part they involved indecent physical contact with older men.) Among the matters relied on to support the contention that the offending was at the lower end of the range of seriousness were that the act procured was of short duration and that the victim did not feel threatened or otherwise intimidated. However, though the physical act may have been over quickly, the image was sent to the applicant and there is a potential for the consequences of that to surface in the future – perhaps years later - to the further distress of the victim. As far as feeling threatened or intimidated, there were no threats of physical harm but the applicant engaged in persistent pressure to get what he wanted and resorted to abuse and threats when thwarted. The sentencing judge remarked:

> The threatening and repeated nature of the conduct involved in count 3 and threats to publish images after procuring the girls elevates the gravity of the offending for that count.

[29] Again, taking into account the maximum penalty, which is imprisonment for 10 years, the sentence for count 2 cannot be said to be manifestly excessive.

[30] The applicant has confined his appeal to the sentences in relation to counts 2 and 3 only. That is to ignore the structure of the sentence. The total sentence of three years was imposed for the eight charges on the indictment, and it is not open to the applicant to selectively pick apart bits of the sentence for challenge on appeal. Even if it could be shown that the sentences for counts 2 or 3 were excessive (and I do not consider that they were), the total sentence is plainly not manifestly excessive. The sentencing judge allowed

substantial concurrence in the sentences for counts 2 and 3 although the only common factor was that one of the victims was the same. Each count involved a separate decision to engage in criminal conduct and one might have expected almost total accumulation.

[31] Similarly, each of counts 1, 4, 5, 6, 7 and 8 involved separate decisions to engage in criminal conduct against separate victims at different times and one might have expected those sentences to be cumulative. The major reason for those sentences to be made concurrent with each other, and with the sentences for counts 2 and 3, was the application of the totality principle which her Honour plainly had in mind, imposing a sentence that was proportionate to the total criminality of the applicant's conduct over the eight charges. Her Honour remarked:

> The offending overall possesses disturbing and predatory features and there is significant community concern over this form of conduct which can be very harmful to young vulnerable victims. This was a course of conduct of unwanted sexual advances towards young girls, with some of it quite nasty with threatening undertones. There will, however, be concurrency between many of the counts, given their similarity, the timeframes, and the other points of commonality, and the pleas of guilty. <u>The final sentence is to represent the overall course of conduct</u>.

[32] For these reasons, I consider that the prospects of successfully appealing against the sentence are extremely low and, in the circumstances, the interests of justice do not require the granting of an extension of time within which to file an application for leave to appeal against the applicant's sentences.

[33] The application for an extension of time is refused.