The Queen v Rudd [2015] NTCCA 3

PARTIES:	THE QUEEN v RUDD, Sarah Dawn
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 15 of 2014 (21325643 & 21325649)
DELIVERED:	25 FEBRUARY 2015
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JUDGMENT OF:	RILEY CJ, SOUTHWOOD & HILEY JJ
APPEALED FROM:	BLOKLAND J in proceeding No 21325643 and 21325649

CATCHWORDS:

CRIMINAL LAW – sentencing – Crown appeal against sentence - home detention order – duration of sentence and home detention order – s 44 *Sentencing Act 1996* (NT)

CRIMINAL LAW – sentencing – aggregate sentencing – different groups of counts - error in imposing separate sentences for different groups of counts – s 52 *Sentencing Act 1996* (NT)

Sentencing Act 1996 (NT), ss 44, 52

Tomlins v The Queen [2013] NTCCA 18, applied.

Jongmin v McMaster (2004) 145 A Crim R 260, followed.

R v Bunning [2007] VSCA 205; *R v Williams* (1992) 109 FLR 1; *The Queen v James Dean*, SC 21218991, 23 November 2012; *R v Bird* [2004] QCA 196; *Ranford v Western Australia (No 2)* (2006) 166 A Crim R 451; *R v Williams* (1992) 109 FLR 1, referred.

REPRESENTATION:

Counsel:

Appellant:	D Morters
Respondent:	M Burrows

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Maley & Burrows

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Rudd [2015] NTCCA 3
No. CA 15 of 2014 (21325643 & 21325649)

BETWEEN:

THE QUEEN
Appellant

AND:

SARAH DAWN RUDD
Respondent

CORAM: RILEY CJ, SOUTHWOOD & HILEY JJ

REASONS FOR JUDGMENT

(Delivered 25 February 2015)

THE COURT:

Introduction

[1] On 13 November 2014 the respondent was sentenced to imprisonment for a period of two years and six months suspended upon the respondent entering into a home detention order for one year. She had pleaded guilty to 12 offences which were committed over a period of nearly 3 months in the course of her employment as a prison officer. The offending involved offences relating to the administration of justice and the supply of drugs.

[2] This is a Crown appeal against the above sentence.

The offending

[3] The respondent trained to be a prison officer and graduated in 2009. She then worked at the Darwin Correctional Centre until her arrest on 14 June 2013. During this period she was a regular user of methylamphetamine, some of which was supplied to her by Philip Kaye. In March 2013 police commenced an operation which targeted Mr Kaye and some of his associates. The operation involved the utilisation of covert surveillance devices, including telephone interceptions and surveillance cameras. This investigation obtained evidence of the respondent's involvement in the offences the subject of the charges.

Count 1

[4] On 25 March 2013 the respondent made a telephone call to a fellow prison officer, Dwayne Reicheldt, and asked him to access the prison database for information about Mr Kaye and another known drug user to determine if they were in custody. She wished to contact them to obtain drugs. They were not in custody. The respondent pleaded guilty to the offence of having procured Mr Reicheldt to unlawfully communicate confidential information. The maximum penalty for this offence is imprisonment for three years.

Count 2

[5] On 16 April 2013 the respondent contacted James Hau on behalf of a remand prisoner, Jarrod Davis, and asked him to contact Mr Kaye to organise the supply of cannabis for Mr Davis at the Darwin Correctional Centre. Mr Davis was known to be a member of the Rebels outlaw motorcycle gang.

The respondent pleaded guilty to the offence of unlawfully supplying cannabis contrary to the terms of the *Misuse of Drugs Act 1990* (NT). The maximum penalty for this offence is imprisonment for five years.

Count 3

[6] On 16 April 2013 the respondent again contacted Mr Hau on behalf of Mr Davis. She outlined the evidence that Mr Hau should give at any hearing of the charges pending against Mr Hau for receiving firearms from Matthew Evans. Mr Evans had stolen firearms from a navy vessel and was supplying those firearms to Mr Hau, who was to give them to Mr Davis in exchange for dangerous drugs. On 24 April 2013 the respondent passed a message to Mr Hau on behalf of Mr Davis thanking him for the information he provided to the court. The respondent pleaded guilty to a charge of attempting to induce a person to give false testimony. The maximum penalty for this offence is imprisonment for seven years.

Count 4

[7] On or about 22 April 2013 the respondent procured a work colleague to access the prison database and obtain the personal mobile telephone number of Richard Carter, who was the President of the Rebels outlaw motorcycle gang. The respondent obtained the number. She pleaded guilty to having procured another to unlawfully communicate confidential information. The maximum penalty for the offence is imprisonment for three years.

Count 5

[8] On 24 April 2013 the respondent told Mr Kaye that investigating police officers had visited the Darwin Correctional Centre and spoke with a female inmate about an assault charge pending against him, made by his ex-partner, Sharna Bromham. On 15 May 2013 the respondent told Mr Kaye that a drug dealing associate of his was on remand at the Darwin Correctional Centre and had been visited by detectives. She said the prisoner had been moved within the prison and that she had "personally offered her services" to him. On 20 May 2013 the respondent received information from a prisoner to the effect that a named "Southern drug dealer" was dealing large quantities of methamphetamine in the Darwin area, and she conveyed that information to Mr Kaye. She pleaded guilty to having unlawfully communicated the confidential information to Mr Kaye. The maximum penalty for this offence is imprisonment for three years.

Count 6

[9] On 23 April and 24 April 2013 the respondent participated in several telephone conversations with Mr Kaye in which she negotiated the purchase of the drug MDMA for her flatmate and work colleague, Page Watteau. She pleaded guilty to unlawfully supplying a dangerous drug. The maximum penalty for this offence is imprisonment for five years.

Count 7

[10] On 30 May and 31 May 2013 Mr Kaye was before the Court of Summary Jurisdiction for a bail application for a charge of aggravated assault upon

Ms Bromham. The respondent performed escort duties on those occasions. At the request of Mr Kaye she contacted his business partner, Anthony Heta, and asked him to make contact with Ms Bromham to tell her to withdraw the charge. The respondent pleaded guilty to having attempted to induce a person being called as a witness in a judicial proceeding, to withhold true testimony. The maximum penalty for this offence is imprisonment for seven years.

Count 8

[11] On 31 May 2013 the respondent made contact with Zailey Ainslie, who was Mr Kaye's partner at the time. Mr Kaye was in the Darwin Correctional Centre on remand. She instructed Ms Ainslie that Mr Kaye wanted to be supplied with cannabis and she described a method by which cannabis could be smuggled into the prison. The following day Ms Ainslie attempted to smuggle a small amount of cannabis into the prison whilst visiting Mr Kaye. The respondent pleaded guilty to the offence of unlawful supply of cannabis. The maximum penalty for the offence is imprisonment for five years.

Count 9

[12] On 11 May 2013 the respondent returned from a trip to Thailand with her partner. Her partner purchased steroids in Thailand and gave them to her to smuggle through customs. The drugs were subsequently found at her premises. She pleaded guilty to unlawful possession of testosterone and stanazol. The maximum penalty for the offence is a fine.

Count 10

[13] On 12 June 2013, whilst off duty, the respondent called Ms Watteau who was working at the prison and had her look at the database to see if Mr Kaye was in custody. She pleaded guilty to having counselled or procured Ms Watteau to unlawfully communicate confidential information. The maximum penalty for the offence is imprisonment for three years.

Counts 11 and 12

[14] On 14 June 2013 the respondent attended at a car park in Winnellie to collect drugs from a motor vehicle that had been parked there. The vehicle belonged to Mr Kaye. She was arrested at the scene and denied any knowledge of drugs. She eventually produced the drugs from within her vagina. A drug analysis revealed that there were 12 tablets containing 3.15 g of MDMA and a powder containing 1.46 g of methylamphetamine. Count 11 related to the unlawful possession of the methylamphetamine and the maximum penalty for this offence is two years imprisonment or a fine. Count 12 related to the unlawful possession of the MDMA and the maximum penalty for this offence is imprisonment for five years.

The sentence

[15] The respondent pleaded guilty to each of the charges and was sentenced on 13 November 2014. The sentencing Judge dealt with the offences in groups which she described as “broadly like charges”. In relation to counts 1, 4, 5 and 10, offences relating to unlawful communication of confidential information, her Honour imposed an aggregate term of imprisonment for 6

months. In relation to counts 2, 6 and 8, offences relating to drug matters, her Honour imposed an aggregate sentence of imprisonment for 12 months. In relation to counts 3 and 7, offences of attempting to induce a person to withhold true testimony, her Honour imposed an aggregate sentence of imprisonment for 12 months. In relation to count 9, the offence of possessing steroids, the respondent was fined $500. In relation to counts 11 and 12, the offences of possessing methamphetamine and MDMA, she was fined $1000. It was directed that the individual sentences of imprisonment be served cumulatively, giving a total period of imprisonment for two years and six months.

[16] Her Honour went on to observe:

> I have also had significant regard to the previous two and a half months in custody in relation to whether or not to order home detention, hence I have not specifically taken it into account when setting the overall terms.
>
> The sentence of two and a half years is suspended upon her entering a home detention order for one year which commences today.

Grounds of appeal

[17] The Crown originally relied on the following grounds of appeal.

> 1. The learned sentencing Judge erred in imposing a sentence which was contrary to law in that neither s 44 nor any other section of the *Sentencing Act* authorised the partial suspension of the sentence of imprisonment for two years and six months upon condition that the respondent enter into a home detention order.
>
> 2. The learned sentencing Judge imposed sentences on counts 1, 2, 3, 4, 5, 6, 7, 8 and 10 which were manifestly inadequate and that the

resultant head sentence of two and a half years imprisonment is in all the circumstances manifestly inadequate.The suspension of the term of imprisonment upon entering into a home detention order is manifestly inadequate.

3. The learned sentencing Judge erred in not finding that misrepresentations made by the respondent to authors of reports provided for the court for sentencing purposes were attributable to the respondent being an unreliable historian and gave insufficient weight to the consequences of such misrepresentations.

4. The learned sentencing Judge erred in concluding that imprisonment to be served by way of home detention was of similar consequence to actual imprisonment.

Ground 1

[18] Ground 1 of the appeal as originally pleaded was clearly unsustainable. The sentencing Judge did not partially suspend the sentence of imprisonment. Her Honour wholly suspended the sentence.

[19] The appellant was granted leave to amend ground 1 so that the appellant could argue that, under the *Sentencing Act*, home detention orders are: (1) restricted to offenders who are sentenced to 12 months imprisonment or less; and (2) must be of the same duration as the sentence of imprisonment that is imposed on the offender. Counsel for the appellant argued that these propositions were implicit in the text of s 44 of the *Sentencing Act* read in the context of s 40, s 53 and s 54 of the Act. Section 40 stipulates that a sentence of more than five years imprisonment cannot be suspended either wholly or partly by the Court. Section 53 specifies when the Court must fix a non-parole period and s 54 specifies minimum non-parole periods. A non-

parole period must be fixed in all sentences of imprisonment which are greater than 12 months, unless the court either suspends the sentence or determines that a non-parole period should not be fixed.

[20] The difficulty with the appellant's submission is that it is contrary to the text of s 44 of the *Sentencing Act* and the decision of the Supreme Court in *Jongmin v McMaster*[1] which has been followed and applied by the Supreme Court for more than a decade.

[21] Counsel for the appellant was unable to present any argument which showed any error in the reasoning of Bailey J in *Jongmin v McMaster*. His reliance on s 40, s 53 and s 54 of the *Sentencing Act* was misconceived. Section 53 of the *Sentencing Act* has no application in circumstances where a home detention order is made, because the sentence is wholly suspended. There is nothing in the *Sentencing Act* to suggest that s 44 of the Act must be read subject to the sections relied on by the appellant. Section 44 provides a discrete sentencing disposition.

[22] In *Jongmin v Mc Master* Bailey J rejected an argument which was virtually identical to the argument pressed by the appellant. His Honour said:[2]

> Section 44(1) and (2) provides that a court which sentences an offender to a term of imprisonment may make an order suspending the sentence on the offender entering into a home detention order for a period not exceeding 12 months. There is nothing express or implied in s 44 or the Act read as a whole to require that an offender's sentence of imprisonment and the period of his home

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1 (2004) 145 A Crim R 260

2 *Jongmin v McMaster* (2004) 145 A Crim R 260 at [28].

> detention order be the same duration, nor is there anything in s 44 which restricts the availability of home detention orders to offenders sentenced to 12 months imprisonment or less.

His Honour then dealt with s 48 and concluded that it provided no support to the appellant's argument: [3]

> Nothing in the *Sentencing Act* requires that the period a home detention order is in force to equate to the period of the sentence held in suspense. The *Sentencing Act* leaves the period in the discretion of the court. Accordingly, the appellant's sentence is not contrary to law.

[23] We see no reason to depart from what Bailey J said in *Jongmin v McMaster*, and respectfully agree with his Honour.

Section 52 of the Sentencing Act

[24] In the course of the appeal, the Court queried whether the sentencing Judge had erred in formulating sentencing dispositions that were contrary to s 52 of the *Sentencing Act* and contrary to this Court's decision in *Tomlins v The Queen.*[4] The error arose because the sentencing dispositions did not involve either an aggregate sentence for all counts on the indictment or individual sentences for each count on the indictment. The sentencing Judge imposed a number of aggregate sentences for different groups of counts. At [38] of *Tomlins v The Queen* the Court held that s 52 of the *Sentencing Act* "does not enable a court to pass a number of aggregate sentences for different groups of counts on an indictment."

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3 *Jongmin v McMaster* (2004) 145 A Crim R 260 at [30].
4 [2013] NTCCA 18 at [34] – [44].

[25] The respondent conceded that the sentencing Judge had erred by imposing sentences that were contrary to s 52 of the *Sentencing Act* and the decision of this Court in *Tomlins v The Queen,* and further that the respondent should be resentenced.

[26] Accordingly it is unnecessary to consider the pleaded grounds of appeal. We now proceed to resentence her.

Objective seriousness of the offending

[27] As the sentencing Judge pointed out the offending was "serious offending, particularly the offences that broadly may be categorised as offences against justice and the supply of drugs in the setting of a prison." The offending occurred over a period of approximately 3 months whilst the respondent was employed as a prison officer within the Northern Territory Department of Corrections. It involved a gross breach of trust, not only to her employer, but also to the community at large.

[28] In *R v Bunning*[5] the Court of Appeal of the Supreme Court of Victoria dealt with a number of offences committed by a police officer who accessed confidential databases for the purposes of providing information to a police informer and drug trafficker, with whom he had entered into a corrupt relationship. The Court said:

> The accessing of confidential data bases held by Victoria Police for the purposes of providing information to L must be regarded as most

[5] *R v Bunning* [2007] VSCA 205 at [50]

> serious. The public is entitled to have confidence that such material will remain confidential. The breach of that confidentiality, such as took place in this case, is liable to have a serious impact on public confidence in the maintenance of such databases by law enforcement agencies. The public is entitled to rely upon the integrity of police officers in investigating and prosecuting offenders. It is entitled to expect that police officers will not abuse intentionally the trust reposed in them in relation to confidential information.

[29] The same applies to prison officers such as the respondent, who have access to confidential information, and unlawfully pass it on or otherwise use it to benefit themselves or others, particularly prisoners and people who have been charged with offences.

[30] The offences the subject of counts 1, 4 and 10 were more serious, because they also involved the procuring of other prison officers to unlawfully access and communicate confidential information.

[31] The offences the subject of counts 3 and 7 strike at the heart of the justice system. Both counts involved the respondent putting pressure on proposed witnesses in criminal proceedings at the direction of other people who were involved in those proceedings. It is of fundamental importance to the justice system that witnesses are able to give honest testimony without fear or favour.

[32] The offence the subject of count 8 is particularly serious because it involved the respondent using her knowledge as a prison officer to advise Mr Kaye's partner how to smuggle cannabis into the prison for him. This constituted a gross breach of trust.

[33] The other offences concerning the unlawful supply of drugs namely those that were the subject of counts 2 and 6, were serious because they involved her negotiating the supply of drugs at the request of others.

[34] Moreover, the respondent was the person who initiated the unlawful conduct involved in counts 1 to 5, 8 and 10, and she was an essential participant in the unlawful activities involved in the other offences.

[35] Most of the offences involved a serious breach of trust and are the sorts of crimes which undermine the public's faith and trust in the criminal justice system. This is particularly so where, as here, the crimes were committed over a period of time when the respondent's employment as a prison officer enabled her to carry out those activities.

[36] We agree with the sentencing Judge's observations that the seriousness of the respondent's offending is magnified by the fact that the offences were committed within the context of a prison and by a prison officer. As her Honour said, "while certain harms may not have eventuated, this offender harmed the integrity of the prison system." It is the potential for harm coupled with the corruption of the correctional system, that is the gravamen of this type of offending.

Appropriate sentences

[37] The sentencing Judge made a number of observations about the respondent's background and personal circumstances. She was 24 years old at the time of the offending, having completed year 12 at a school in Adelaide in 2006. She moved to Darwin in 2009 and, following a period of training, was employed as a prison officer at the Berrimah Correctional Centre until she was arrested for these offences.

[38] The respondent told the officer who prepared a pre-sentence report that her offending occurred during a challenging period in her life beginning about September 2012, which resulted in her taking drugs. However the sentencing Judge concluded that she had been taking drugs for a longer period.

[39] At the time of being sentenced the respondent had a six month old son who was being breastfed. The sentencing Judge also considered the possibility that the respondent's previous employment as a prison officer would place her at some risk. Her Honour was satisfied that appropriate arrangements were in place in the prison to deal with these factors. We are similarly satisfied.

[40] We agree with her Honour's conclusions that the respondent knew what she was doing and that she was dealing with serious criminals. She broke the trust of the community and bears a high level of moral culpability.

[41] At the time of sentencing, the respondent had already served approximately two and a half months in prison. After she was released on bail, a number of conditions were imposed on her, including conditions concerning her place of residence, use of illicit substances, obligation to submit to urine or other analysis, and reporting to police three times each week. The sentencing Judge noted that the respondent has a good work record and could gain further employment in the future notwithstanding her criminal history. Her Honour concluded that the respondent had changed her lifestyle for the better and that her prospects of rehabilitation were good. This, coupled with the fact that the respondent had the care of her son, and had no prior convictions, along with her pleas of guilty, were factors that her Honour took into account in imposing a home detention order.

[42] Counsel for the respondent stressed the matters above and submitted that we should sentence her in such a way as to permit her to continue with home detention, even if we consider that a higher head sentence should be imposed.

[43] Counsel identified a significant number of cases where this court has imposed a head sentence which exceeds 12 months imprisonment and also given an offender the opportunity of a home detention order. Examples include situations where other people, normally cared for by the offender, might suffer badly if the offender could not be there to properly care for them.

[44] Whilst home detention might appear easier and less restrictive than imprisonment, strict conditions of the kind contemplated in s 44(3) of the *Sentencing Act* are invariably imposed. Moreover s 48(1) stipulates a wide range of acts, not confined to mere failures to comply with a term or condition of the order, as breaches. Subject to the discretions conferred under s 48(9), the consequence of a breach is that the home detention order is revoked and that the offender be imprisoned for the whole of the term suspended, irrespective of any period that the offender may have already served under the home detention order.[6] Consequently, a home detention order will usually involve more serious consequences, if breached, thana suspended sentence. A home detention order cannot be made unless the offender consents to the making of the order.[7]

[45] It is well established that for offences involving a significant breach of trust, and offences that undermine the system of criminal justice, general deterrence and denunciation are pre-eminent sentencing considerations. That is so in the present matter, notwithstanding the absence of prior convictions and good prospects of rehabilitation.[8]

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6 S 48(6) *Sentencing Act*.
7 S 45(1)(b) *Sentencing Act*.
8 *R v Bunning* [2007] VSCA 205 at [47] & [53]; Cf *The Queen v James Dean*, SC 21218991, 23 November 2012; *R v Bird* [2004] QCA 196; *Ranford v Western Australia (No 2)* (2006) 166 A Crim R 451.

[46] Some offending is so serious as to require the offender to be imprisoned notwithstanding compelling personal circumstances that might otherwise warrant the making of a home detention order.[9]

[47] We consider that is the case here. However we do propose to partially suspend the respondent's sentence on conditions similar to those imposed by the sentencing Judge in relation to the home detention order.

[48] We re-sentence the respondent as follows:

> Count 1 (procuring a person to unlawfully communicate confidential information) - 12 months imprisonment;
>
> Count 2 (unlawfully supplying a dangerous drug to another person by arranging for such supply through a third party) – 9 months imprisonment;
>
> Count 3 (attempting to induce a person to give false testimony) – two years imprisonment;
>
> Count 4 (procuring a person to unlawfully communicate confidential information) - 12 months imprisonment;
>
> Count 5 (unlawfully communicating confidential information on three occasions) - 18 months imprisonment;

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[9] See for example the observations of Mildren J in *R v Williams* (1992) 109 FLR 1 at 10.

Count 6 (unlawfully supplying a dangerous drug to another person by arranging for such supply by a third party) – nine months imprisonment;

Count 7 (attempting to induce a person to be called as a witness in a judicial proceeding to withhold true testimony by withdrawing a charge of aggravated assault) – three years imprisonment;

Count 8 (unlawfully supplying cannabis by telling a person how to smuggle drugs into prison) – two years imprisonment;

Count 9 (unlawful possession of testosterone and stanazol) - $500 fine;

Count 10 (procuring a person to unlawfully communicate confidential information) - 12 months imprisonment;

Count 11 (unlawful possession of methylamphetamine) - $1000 fine;

Count 11 (unlawful possession of MDMA) - $1000 fine.

[49] Having regard to the need for some concurrency and the totality principle we consider that the appropriate head sentence is five years imprisonment, backdated by 75 days to take into account the time the respondent has already spent in custody.

[50] To achieve a total head sentence of five years imprisonment we direct that:

(a) the sentences imposed in relation to counts 1, 2, 4, 5, 6 & 10 be served concurrently with the two year sentence imposed for count 8;

(b) the sentence imposed in relation to count 3 be served concurrently with the three year sentence imposed for count 7, and such sentence be cumulative upon the two year sentence for count 8.

[51] In light of the particular circumstances of the respondent, including the fact she has previously spent some time in custody followed by restrictive bail conditions and a further three months or so in home detention, the age of her child, and her good prospects of rehabilitation we order that her head sentence be suspended after she has served nine months imprisonment, also backdated by 75 days. The suspended sentence is on condition that for a period of 12 months, the respondent will be under the ongoing supervision of a probation and parole officer and must obey all reasonable directions from a probation and parole officer. The following conditions apply:

(a) The respondent must report to a probation and parole officer within 48 hours of her release from prison.

(b) The respondent must tell a probation and parole officer of any change of address or employment within two clear working days after the change.

(c) The respondent must not leave the Northern Territory except with the permission of a probation and parole officer.

(d) If a probation and parole officer so directs the respondent must wear or have attached an approved monitoring device in accordance with such directions and allow the placing or installation in and retrieval from the

premises or place specified in such directions of such machine equipment or device necessary for the operation of monitoring device.

(e) The respondent must not consume a dangerous drug and will submit to testing as directed by a probation and parole officer or a police officer for the purpose of detecting the presence of dangerous drugs.

[52] For the purposes of the *Sentencing Act* we set an operational period of four years and three months deemed to have commenced when she is released from prison.

Orders

[53] The appeal is allowed. The respondent is sentenced to a total of five years imprisonment backdated by 75 days from the day she enters custody. The sentence will be partially suspended after the respondent has served a total of nine months imprisonment, on the conditions set out in paragraph 51 above.