Davey v Burgoyne [2004] NTSC 36

PARTIES:	DUDLEY DAVEY
	v
	ROBERT ROLAND BURGOYNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 49/03 (20015633, 20018620, 20016160 & 20315725)
DELIVERED:	4 August 2004
HEARING DATES:	11 June 2004
JUDGMENT OF:	THOMAS J

CATCHWORDS:

APPEAL AGAINST SENTENCE
Manifestly excessive – imprisonment served in one state and subsequently returned to the Territory to be deal with for offences committed in the Territory at a prior time – totality principle s 52 *Sentencing Act* and aggregation of "like offences" only.

Sentencing Act (NT), s 52

Mill v R (1998) 166 CLR 59, approved and applied

REPRESENTATION:

Counsel:

Appellant:	S O'Connell
Respondent:	R Noble

Solicitors:

Appellant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	tho200406
Number of pages:	13

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

Davey v Burgoyne [2004] NTSC 36
No. JA 49/03 (20015633, 20018620, 20016160 & 20315725)

BETWEEN:

DUDLEY DAVEY
Appellant

AND:

ROBERT ROLAND BURGOYNE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 4 August 2004)

[1] This is an appeal against sentence imposed by the Deputy Chief Magistrate in the Court of Summary Jurisdiction in Alice Springs on 19 September 2003.

[2] The appellant was sentenced to a total of two years and six months imprisonment with a non parole period of 16 months backdated to 13 August 2003.

[3] The convictions and sentences arose from a series of offences which occurred in Alice Springs between 22 September 2000 and 25 November 2000.

[4] On file 20015633 (22 September 2000 offences) the appellant was sentenced to an aggregate of six months imprisonment on two offences of attempt to steal and one offence of aggravated assault.

[5] The facts as found by the learned Deputy Chief Magistrate are as follows:

[6] On 22 September 2000, the appellant approached a woman who was crossing the pedestrian causeway across the Todd River. He approached her from behind. He grabbed her by the right shoulder and tried to steal her purse. He tugged hard at it on several attempts, but the victim managed to hang onto the purse and the appellant ultimately ran away.

[7] Not long after when he was in South Terrace, he approached a 12 year old school girl from behind. She was going home from school. He grabbed at her school bag which was hanging by a strap on her shoulder. He tried to take it from her. She was pulled to the ground and the appellant dragged her for a distance along the ground until he secured the bag. He then ran away, pursued by bystanders. The girl suffered bruises and lacerations to her wrist and ankle and general bruising and soreness, as well as psychological consequences which have diminished with the passage of time.

[8] It is conceded by Mr Noble, counsel for the respondent, that the appeal must be allowed with respect to the sentence for these offences. Pursuant to the provisions of s 52 of the Sentencing Act the offence of unlawful assault cannot be aggregated with the two offences of attempt to steal.

[9] Section 52 of the Sentencing Act provides as follows:

> "(1) Where an offender is found guilty of 2 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 shall not exceed the maximum term of imprisonment that could be imposed if a separate term were imposed in respect of each offence.
>
> (2) A court shall not impose one term of imprisonment under subsection (1) where one of the offences in respect of which the term of imprisonment would be imposed is an offence against section 192(3) of the Criminal Code.
>
> (3) Subsection (1) does not apply if one of the offences in the information, complaint or indictment is a violent offence or a sexual offence."

[10] With respect to the offences on file 20018620, which occurred on 30 September 2000, the learned Deputy Chief Magistrate made the following findings:

[11] At 2.45pm the appellant was at the Alice Springs Hospital. He took off a flyscreen and entered the pathology section of the hospital. He went into the locker room and stole a handbag containing $100.

[12] The appellant pleaded guilty to unlawful entry and stealing. He was sentenced to one month imprisonment cumulative upon the sentence of six months imprisonment for the offences committed on 22 September 2000.

[13] The third set off offences occurred at 10.00pm on 30 September 2000. His Worship made the following findings of fact in respect to the third set of offending, being file 20016160.

[14] At 10.00 pm on 30 September 2000, the appellant broke and entered the premises of Bar Doppio, kicking in a glass door as he did so. He activated the buttons on the cash register and succeeded in opening it. He stole $3000 in cash. He gave it away to friends and relatives and spent some of it for himself on food. He pleaded guilty to unlawful entry and stealing accordingly. He was sentenced to three months aggregate sentence cumulative upon counts 1 and 2 on file 20015633 and concurrent with counts 1 and 2 on file 20018620.

[15] The fourth set of offending as found by the learned Deputy Chief Magistrate occurred on 2 October 2000, file 20018620. The appellant entered an unoccupied dwelling at 24 Bloomfield Street. He walked around looking for things to steal, but before he could do so, the occupier returned and the appellant fled. He entered a plea of guilty to unlawful entry.

[16] For the offence which occurred on 2 October 2000, the appellant was convicted and sentenced to one months' imprisonment cumulative upon counts 1 and 2 on file 20016160.

[17] The fifth in the series of offending occurred the day after that, that is on 3 October 2000, file 20016160. The appellant entered the premises at Novita Gifts in the Alice Springs mall through an unlocked door. He opened the cash register and helped himself to $40. He entered pleas of guilty to unlawful entry and stealing. He was sentenced to two months imprisonment cumulative upon count 3 on file 20018620.

[18] With respect to the offences that occurred on 25 November 2000, file 29315725, the appellant entered a plea of guilty to a charge of aggravated unlawful assault. The facts as found by the learned Deputy Chief Magistrate are as follows:

[19] The appellant went to the Alice Springs Hospital carpark and jumped on a woman from behind. He placed both arms around her torso. She struggled. She fell face first to the ground. He fell on top of her. He placed her in a headlock. He placed both hands over her mouth to prevent her screams. She eventually managed to break free and alert passers by. The victim suffered abrasions to her shoulder and a sore neck and lasting psychological consequences. She naturally enough believed that she was the victim of a sexual assault as opposed to a mugging.

[20] For this offence the appellant was sentenced to 18 months imprisonment. The total sentence is two years and six months.

[21] His Worship then fixed a non parole period of 16 months. The sentences were backdated to 13 August 2003.

[22] The appellant filed a Notice of Appeal. The grounds of appeal are:

> "1. That in all of the circumstances the learned Magistrate imposed a sentence that is manifestly excessive.
>
> 2. That the learned Magistrate erred in failing to place sufficient weight on the youthfulness of the offender and his prospects for rehabilitation.
>
> 3. That the learned Magistrate erred in failing to properly apply the principles of totality in failing to take sufficient account of

a sentence imposed on, and served by, the offender in another State."

[23] I shall deal with these grounds of appeal in the order they were argued by Mr O'Connell, counsel for the appellant.

Ground 3: That the learned Magistrate erred in failing to properly apply the principles of totality in failing to take sufficient account of a sentence imposed on, and served by, the offender in another State.

[24] The essence of the appeal under this ground is that the learned Deputy Chief Magistrate failed to apply the principle of totality as it is explained in *Mill v R* (1988) 166 CLR 59.

[25] On 4 December 2002, the appellant was found guilty in the District Court of South Australia of one count of assault with intent to rape. This followed a plea of guilty to the charge. The sentencing remarks of his Honour Judge David of the District Court in Adelaide were tendered on this appeal. It does not contain the facts on which the offence was proved. His Honour did refer to three previous offences in the Children's Court which were dealt with without proceeding to conviction. His Honour described those as being of a serious sexual nature. His Honour mentioned a number of reports that had been provided to him. He stated that an appropriate head sentence was three years. He reduced this to two years and six months taking into account the plea of guilty. He set a non parole period of 22 months. The sentence was backdated to 16 February 2001. The appellant was not released on parole but rather served his full sentence of two years and six months.

[26] There was no reason put to the Court of Summary Jurisdiction in Alice Springs or to this Court, as to why the appellant had served the full term of imprisonment.

[27] In the authority referred to of *Mill v R* (supra), the High Court considered the situation where an accused is sentenced to a term of imprisonment in one state and subsequently returned to another state to be dealt with for offences committed in that state at a prior time. The Court said at p 66:

> "… The long deferment of the trial or punishment of an offender, with the consequent uncertainty as to what will happen to him, raise considerations of fairness to an offender which must be taken into consideration when the second court is determining an appropriate head sentence. The intervention of a State boundary denies to an offender the opportunity of having the series of offences dealt with together by a sentencing court which can avail itself of the flexibility in sentencing provided by concurrent sentences."

and further on p 66:

> "In our opinion, the proper approach which his Honour should have taken was 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. …"

[28] Mr O'Connell for the appellant submits that the practical effect of the sentence imposed on the appellant in the Court of Summary Jurisdiction in Alice Springs is to sentence the appellant to a total head sentence of five years imprisonment from 16 February 2001.

[29] Counsel who appeared for the appellant at the hearing before the Court of Summary Jurisdiction, addressed the learned Deputy Chief Magistrate as to

the details of the appellant's prison sentence in South Australia, the term of that imprisonment and the rehabilitation that had been undertaken whilst he was serving that sentence. Counsel further submitted "that the principles of totality apply". His Worship accepted this because he stated (at tp 19): "It's one of those cases where, you're right, I have to check at the end of the day to make sure it's not too much."

[30] Mr Banbury who appeared for the appellant in the Court of Summary Jurisdiction drew his Worship's attention to s 5(2)(m) of the Sentencing Act. Section 5(2)(m) provides as follows:

> "(2) In sentencing an offender, a court shall have regard to –
>
> ....
>
> (m) sentences imposed on, and served by, the offender in a State or another Territory of the Commonwealth for an offence committed at, or about the same time, as the offence with which the court is dealing;"

[31] Following the references to s 5(2)(m) the learned Deputy Chief Magistrate said (tp 20.2): "Yes. I think that's meant for me to adjust it in an upwards direction, Mr Banbury, not downwards, but." It is Mr O'Connell's submission that this is indicative the learned Deputy Chief Magistrate contravened the principle in *Mill v R* (supra).

[32] I note that this remark was not repeated by his Worship when he delivered his reasons for sentence a few days later. In those reasons for sentence, his Worship did not make a specific reference to the totality principle as

expressed in *Mill v R* (supra). He did however, take into account the fact that the appellant had served (tp 5) "30 months, in the Port Augusta gaol."

[33] In his reasons for sentence delivered on 19 September 2003, his Worship states (tp 6):

> "In coming to the head sentences, I have applied discounts for the pleas and have had regard to the principles of totality and taken into account the defendant's age."

and in the final paragraph on p 6:

> "All in all, the defendant's offending, looked at individually and then in it's totality, calls for a head sentence of two and a half years."

[34] It is clear that the learned Deputy Chief Magistrate applied the principle of totality to the offences committed in the Northern Territory. However, no submission was made to him concerning the principle of totality as expressed in the High Court authority of *Mill v R* (supra). This decision was not drawn to his Worship's attention. This aspect of the principle of totality does not appear to have been addressed. It was a very important aspect in the sentencing of this particular offender.

Ground 2: That the learned magistrate erred in failing to place sufficient weight on the youthfulness of the offender and his prospects for rehabilitation.

[35] Mr O'Connell, counsel for the appellant, submits that the learned Deputy Chief Magistrate did not give any or significant weight to the progress of the appellant's rehabilitation during his time in prison in South Australia.

[36] In *Mill v The Queen* (supra) the Court refers to the comments of Street CJ in the matter of *Todd* [1982] 2 NSWLR 517, where he said inter alia (p 64):

> "… 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 process of his rehabilitation during the term of his earlier sentence, …"

[37] From a reading of the proceedings before the learned Deputy Chief Magistrate, Mr Banbury who appeared in the Court of Summary Jurisdiction made quite extensive submissions concerning the educational programs the appellant had undertaken whilst in gaol, the skills he had acquired and the work programs with which he had been involved. Submissions were also made to the effect that the appellant had given up petrol sniffing and become a devout Christian.

[38] In his reasons for sentence, the learned Deputy Chief Magistrate makes reference to the appellant's youth, the fact that he had given up petrol sniffing and become a Christian.

[39] The appellant had matured considerably since the commission of the offences in the Northern Territory in 2000. He had spent a substantial time in gaol and it appears made considerable efforts to obtain an education and acquire skills which would be relevant to the aspect of his rehabilitation upon release from gaol.

Ground 1: That in all of the circumstances the learned magistrate imposed a sentence that is manifestly excessive.

[40] The particular sentence which has been identified as manifestly excessive by counsel for the appellant is the sentence of 18 months imprisonment for the offence of aggravated assault which occurred on 25 November 2000. In particular, counsel for the appellant objects to the reference made by his Worship to it being a sexual assault. At tp 4 in his reasons for sentence, his Worship makes reference to prior offences in the juvenile court in South Australia of robbery, assault and attempted rape. He then goes onto say:

> "The offences are similar in nature to those now before the court. That is to say, those committed on 22 September 2000 being similar to attempted robbery with violence, and offence number 6 having elements of attempted sexual assault."

[41] I agree that statement was not correct as the offence of aggravated assault did not have elements of attempted sexual assault. However, this comment was made in the context of a statement in the Victim Impact Statement dated 6 September 2003, to the effect that the victim had feared this would be a sexual assault:

> "During the attack I believed the offender was trying to kill or paralyse me by breaking my neck, as he could not keep me still and completely restrained. I believed throughout the attack that his intention was to sexually assault me."

[42] The learned Deputy Chief Magistrate was well aware that it was not a sexual assault and had commented (tp 9-10) that he would read the reference in the Victim Impact Statement to sexual assault as "aggravated assault to which

the defendant has pleaded guilty". The learned Deputy Chief Magistrate then went on to say "I mean, it's understandable, isn't it? That the victim would perceive it as to be an attempted sexual assault, yes."

[43] The offence of aggravated assault to which the appellant had pleaded guilty was a serious offence. The learned Deputy Chief Magistrate had indicated he thought the offence itself warranted a sentence of two years imprisonment. He had reduced it to 18 months having regard to the principles he had identified.

[44] I do not consider the sentences in themselves are manifestly excessive. I do agree that having regard to the period of time the appellant spent in gaol in South Australia immediately prior to being sentenced in the Northern Territory for prior offences, that insufficient weight was given to the principle of totality as expressed in *Mill v R* (supra) and for that reason the total sentence was manifestly excessive.

[45] The appeal is allowed to the extent that the sentences imposed on file 20015633 being offences which occurred on 22 September 2000, cannot be aggregated.

[46] The appeal being allowed with respect to the error made in aggregating sentences the matter is now open for this Court to re-sentence the appellant. Accordingly, I set aside the six month aggregate sentence and proceed to impose separate sentences for these offences. I consider that a total of six

months imprisonment for these three offences is an appropriate disposition. I make the following order:

[47] Count 1: attempt to steal, convicted and sentenced to two months imprisonment.

Count 2: attempt to steal, convicted and sentenced to three months imprisonment cumulative upon sentence on Count 1.

Count 3: aggravated unlawful assault, convicted and sentenced to six months imprisonment concurrent with sentences on Counts 1 and 2.

[48] I confirm the remaining sentences imposed by the learned Deputy Chief Magistrate with the exception of the sentence of 18 months imprisonment for the offence of aggravated unlawful assault which occurred on 25 November 2000, file 29315725.

[49] With respect to that matter, I quash the sentence of 18 months imprisonment. I vary the sentence to 12 months imprisonment to take account of the principle of totality as expressed in *Mill v R* (supra).

[50] This is a total sentence of two years imprisonment. I fix a non parole period of 12 months. The sentence is backdated to 13 August 2003 to take account of time spent in custody.

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