Kotis v The Queen [2005] NTCCA 13

PARTIES:	KOTIS, Michael
	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:	No 8 of 2005 (20406207 and 20409031)
DELIVERED:	26 August 2005
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JUDGMENT OF:	MARTIN (BR) CJ, MILDREN & THOMAS JJ

CATCHWORDS:

CRIMINAL LAW

Appeal against sentence – discount for plea – mental illness relevant to sentencing discretion – each sentence determined on individual circumstances and matters personal to offender – totality principle – appeal allowed in part – sentence varied.

Miles v R [2001] NTCCA 9 at [35]; *Director of Public Prosecutions v Grabovac* [1998] 1 VR 664 at 68, applied.

REPRESENTATION:

Counsel:

Appellant:	I Read
Respondent:	D Lewis

Solicitors:

Appellant:	NTLAC
Respondent:	ODPP

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

Kotis v The Queen [2005] NTCCA 13
No. CA8 of 2005 (20406207 and 20409031)

BETWEEN:

MICHAEL KOTIS
Appellant

AND:

THE QUEEN
Respondent

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

REASONS FOR JUDGMENT

(Delivered 26 August 2005)

Martin (BR) CJ:

[1] This is an appeal by leave against sentences of imprisonment totalling 5 years and 9 months, in respect of which a non-parole period of 4 years and 1 month was fixed.

[2] On 24 March 2005 the appellant pleaded guilty to three offences contained in two indictments. The first, that between 1 January 1980 and 30 December 1982 at Darwin he indecently assaulted a child contrary to s 66 of the Criminal Law Consolidation Act and Ordinance. The maximum penalty for the offence was 2 years imprisonment. A sentence of 6 months was imposed.

[3] Secondly, that between 1 January and 9 March 2004 the appellant maintained a sexual relationship with a child who was under the age of 16 years and had sexual intercourse with her contrary to s 131A(2) and (4) of the Criminal Code. The maximum penalty for that offence is 14 years. A sentence of 4 years and 6 months was imposed.

[4] Thirdly, that on 9 March 2004 the appellant unlawfully and indecently dealt with a child who was under the age of 16 years contrary to s 132(2)(a) of the Criminal Code. That offence carried a maximum penalty of 5 years imprisonment. A sentence of 9 months was imposed.

[5] The learned sentencing Judge directed that each term of imprisonment be served cumulatively, thereby arriving at a total period of 5 years and 9 months imprisonment in respect of which a non-parole period of 4 years and 1 month was fixed. The grounds of appeal complain that each sentence is manifestly excessive and that the Judge erred in ordering that the sentences be served cumulatively.

[6] The first offence occurred between January 1980 and December 1982 when the appellant was aged between 26 and 27 years. The female victim was born on 8 May 1972 and was approximately 10 years of age at the time of the offence.

[7] The victim visited the Nightcliff pool with members of her family. While in the pool the appellant placed himself next to the victim and pulled her towards him. He stroked her vagina on the outside of her bathers using the

fingers of his left hand. He then took her right hand and placed it on his groin area where he held her by the forearm. The offender placed the victim's hand on his penis on the outside of his shorts causing a rubbing effect. The victim could feel that the penis was erect.

[8] The victim climbed out of the swimming pool and ran to where her mother and grandmother were sitting on the grass. She wrapped a towel around herself and sat staring at the ground until the family left one or two hours later. She did not want to speak to anyone.

[9] It was not until January 2004 that the victim made a complaint. She was visiting her family in Darwin and by coincidence saw the offender walking along a footpath. Several days later the victim returned to her home interstate.

[10] On 21 January 2004 the victim telephoned the Northern Territory Police and made a complaint. The offender was arrested on 19 April 2004 and admitted the commission of the offence. In his words: 'I can tell you. I went to the pool and jumped in the water. I actually touched the little girl on the vagina, touching her on the clothes. I'll tell you the truth, I got a hard on and I put a hand on her bikini. It lasted about ten seconds and that was it.' The appellant also made admissions to using the victim's hand to rub his penis on the outside of his shorts.

[11] The appellant's crime had a severe impact upon the victim. The Judge described the victim impact statement as giving a 'distressing account' of

how badly the victim was traumatised by the crime. It is unnecessary to repeat the details of the severe affects upon the victim.

[12] The second offence of maintaining an unlawful relationship of a sexual nature with a child occurred between 1 January and 9 March 2004. The appellant was 48 years of age and the victim was ten.

[13] The facts are as follows:

> "In relation to Count 1, sometime close to midnight in January 2004 the offender was at home. The victim, 10 year old M, attended at the offender's home with two other young girls. The offender allowed them to stay the night in the end bedroom of the house.
>
> At approximately 2 am the offender entered the bedroom where M and the two girls were lying on a double mattress on the floor. The offender knelt down and then removed her shorts. She was not wearing any underpants. The offender then performed the act of cunnilingus on M for approximately 5 to 10 minutes. At the time of the offence the other girls were asleep in the room. M and the other girls departed the next morning at around 6.30 am.
>
> In February 2004, the offender was in the lounge room of his home at night time. M attended at the offenders' home and he allowed her in. The offender was sitting on the floor in his lounge room and M stood between his outstretched legs. She removed her shorts and he assisted. The offender took hold of M around her waist and began to kiss her on her body. At some point he also began to play with his penis. After the offender stopped playing with his penis M sat next to him.
>
> The offender allowed M to play with his penis for approximately 1 minute. After M stopped playing with the offenders' penis she lay on her back and he proceeded to perform cunnilingus on M. The whole episode had lasted approximately 15 to 20 minutes. After this period of time the offender stopped performing cunnilingus and M put her clothes back on. M left the house a short time later.

> At 10 pm on Tuesday 9 March 2004 the offender was at home. M and the 11 year old victim J came to the house and the offender allowed them inside. Once inside, the offender and M entered the offender's bedroom. The bedroom door was shut and J was left outside. M removed her shorts and underpants. The offender knelt between M legs and performed cunnilingus on M for approximately three to four minutes.
>
> J came to the closed bedroom door and called out to M. M walked to the door of the bedroom and opened the door where she was observed by J not to be wearing any clothing on her lower body. J told M to put her clothes back on. M dressed herself before lying back down on the offender's bed. Shortly after the offender left the bedroom and entered the hallway of the house."

[14] The third offence to which the offender pleaded guilty occurred on 9 March 2004, immediately after the events described above had occurred with M. The appellant approached J in the hallway and placed both hands on her buttocks. He then moved his left hand from the buttocks and placed it on J's pelvic area outside of her clothing. This caused J to move away from him. J was aged 11 years.

[15] At the time of the offending, both M and J were under the care of Family and Children's Services. The Judge was not provided with any information about J, but extensive material was placed before his Honour concerning M.

[16] From the age of five M was the subject of sexual abuse by friends of her father and was physically abused and neglected by her parents. She suffered the trauma of seeing her father's dead body hanging in the backyard. M has been assessed as suffering from Post Traumatic Stress Disorder and

Adjustment Disorder. The psychiatrist who made the assessment reported that he has never seen a child so damaged at such a young age.

[17] M's history and disorders have resulted in her engaging in out of control sexualised behaviour since her father's death. The Judge observed that it appears that the child may well have attended the offender's home of her own compulsion for the purpose of obtaining cigarettes and cannabis and for the purpose of providing the offender with sexual favours.

[18] In the view of the psychiatrist, the child has been at high risk for a number of years because of her limited cognitive understanding of the risks associated with her sexualised behaviour, substance abuse, absconding and habitual thieving.

[19] The Judge accepted that the appellant's offence against M was more opportunistic than predatory. The appellant told a psychiatrist and the police that he was pestered on almost a nightly basis by M and her friends for cigarettes, marijuana and money. They threatened to damage his home if he did not comply. The appellant claimed that M demanded that he have cunnilingus with her.

[20] The Judge was faced with a difficult sentencing task. The offences were serious, but there were matters of significance in the appellant's personal circumstances which required careful attention and co-consideration.

[21] At the time of the appellant's offending he was suffering from schizophrenia. The Judge accepted that it is well recognised that a person suffering from schizophrenia may exhibit socially inappropriate behaviour, including unacceptable sexual behaviour. Notwithstanding the schizophrenia, the Judge observed that the appellant is a man of normal intelligence with no evidence of significant cognitive deficit.

[22] The appellant is a reasonably articulate individual who has been employed in various positions since leaving school. He currently receives the disability support pension on the basis of his mental illness. At the time of sentence he was working part time as a kitchen hand and waiter for which he was remunerated largely in kind.

[23] As to the risk of re-offending, a psychiatrist reported that the appellant is insightful of the fact that he is mentally ill, but that he requires indefinite treatment. In the view of the psychiatrist, the incidences of the appellant behaving in a sexually inappropriate manner have been "reassuringly few" and the appellant has insight that his misconduct is socially unacceptable. The psychiatrist expressed the opinion that the appellant is well motivated not to re-offend.

[24] The judge regarded the appellant's mental illness as relevant to the sentencing discretion, but expressed the view that it was not of such a level that little weight should be given to general deterrence. In my opinion his Honour was correct in arriving at that view. As his Honour observed, the

appellant's behaviour was not of the same compulsive nature as other offenders suffering from mental impairments. In addition, at the time of the offending the appellant was on appropriate medication and his condition was being well managed by his medical practitioners.

[25] Recognising the appellant's pleas of guilty, remorse and co-operation with the authorities, the Judge allowed a reduction on each sentence of 25%. There is no complaint about that reduction. His Honour specifically stated that he had regard to the principal of totality.

[26] As to the indecent assault, the appellant submitted that the objective seriousness of the offence did not warrant a sentence of 6 months imprisonment. Emphasis was placed on the short duration of the offending, about ten seconds, and the fact that the touching occurred on the outside of the complainant's bathers and the appellant's shorts. Counsel also emphasised that the appellant was mentally ill at the time of the offence, that it was over 20 years after the offence and that the appellant made full admissions which were accompanied by the plea of guilty and remorse.

[27] As mentioned, the Judge allowed a reduction of 25% by reason of the plea and genuine remorse. It follows that his Honour's starting point for the offence was a sentence of 8 months imprisonment.

[28] There is no tariff or fixed scale of penalties for offences of this type. Each sentence must be determined according to the individual circumstances of the offending and the matters personal to the offender. The offence under

consideration was committed by a mentally ill person. The offence was of a very brief duration and is properly classified as at the lower end of the scale of seriousness of offences of this type. It must be borne in mind however, that although the objective circumstances of the crime were at the lower end of the scale of seriousness, any indecent assault upon a child in a public place, such as a swimming pool is a serious offence. The offence was predatory in motive and general deterrence is a significant aspect of the sentencing discretion. In addition it must be remembered that even offences at the lower end of the scale of seriousness can, and did in this instance, have very traumatic effects upon the victim.

[29] In all the circumstances applying the sentencing standards that prevailed at the time of the offending, in my view the sentence of six months was within the range of the sentencing discretion.

[30] As to the offence of maintaining an unlawful relationship of a sexual nature, counsel for the appellant submitted that the objective seriousness of the offence did not warrant the sentence of 4 years and 6 months' imprisonment. In particular, counsel contended that the starting point before a reduction for the remorse and plea of guilty of 6 years is obviously excessive.

[31] Again, there is no particular tariff for this type of crime. The objective seriousness of such crimes varies greatly. A review of a number of previous sentences demonstrates a wide range of circumstances and penalties. Unlike a number of cases that have come before this court, the appellant was not in

a position of trust such as a parent or guardian and the relationship he unlawfully maintained did not continue for a number of years. Unlike other cases, only three occasions of sexual activity were involved and there was no penile sexual penetration of the child. Viewed objectively, the appellant's offending in maintaining the unlawful sexual relationship was at the lower end of the scale of seriousness of offences of this type.

[32] In addition, when considering the moral culpability of the appellant, it must be borne in mind that he was suffering from a mental illness. On the other hand, as I have mentioned, at the time of the offending the appellant was on appropriate medication and his condition was being well managed by his medical practitioners.

[33] The appellant was an adult of 48 years who allowed children aged 10 and 11 years to enter his home and to stay the night. While the appellant apparently sees himself, at least to some extent, as a victim, he was not obliged to permit the children into his home or to allow them to stay the night. In substance, the appellant undertook a responsibility for the young children in his home. In addition, on the first occasion of sexual activity the appellant was proactive in entering the bedroom after the children were asleep and in removing M's shorts. His conduct in that regard led to the first of the three acts of cunnilingus.

[34] There is widespread community abhorrence of these types of crimes. It is not an excuse, nor is it a matter of mitigation, that a child aged ten or 11 years is sexually promiscuous.

[35] In all the circumstances, in my view the starting point of 6 years and the ultimate sentence of 4 years and 6 months were within the range of the sentencing discretion. While the sentence was at the upper end of that range, it was not manifestly excessive.

[36] As to third offence in respect of which a sentence of 9 months imprisonment was imposed, the objective circumstances were at the lowest end of the scale of seriousness. It was a spontaneous offence of very short duration.

[37] The starting point adopted by the Judge must have been 12 months imprisonment. Bearing in mind the nature and very short duration of the offending, and in view of the appellant's mental illness, in my opinion the starting point of 12 months was manifestly excessive. In my view before allowance for the plea of guilty coupled with remorse a starting point of 6 months is appropriate.

[38] As to the decision of the Judge to order that the sentences be served cumulatively, s 50 of the Sentencing Act creates a prima facie rule of concurrency unless the court orders otherwise. But there is no fetter upon the sentencing discretion: *Miles v R* [2001] NTCCA 9 [35].

[39] While the Judge did not discuss the issue of accumulation, in my view it was open to his Honour to direct that the sentences be served cumulatively. The first offence was an entirely separate occasion from the subsequent offending. The offence committed against J followed immediately upon the last occasion of sexual activity between the appellant and M and concurrency would have been justified.

[40] However, although concurrency would have been justified, the offence against J was a distinct offence committed against a separate victim who was not involved in any way in the earlier events between M and the appellant. Accumulation was not beyond the range of the sentencing discretion.

[41] The appellant also complained that the sentencing Judge failed to give sufficient weight to the question of totality. If I had not been of the view that one of the sentences was manifestly excessive, I would not have interfered on this ground. The Judge took totality into account and, but for the excessive sentence to which I have referred, the total period would not have been too severe.

[42] As to totality, the Judge stated that he had regard to this principle in determining the appropriate sentences to impose on the offender. His Honour did not say whether he had made any adjustment to individual sentences by reason of totality.

[43] If his Honour made an adjustment to allow for totality, that was a course open to him. In my opinion, however, where a court is sentencing for multiple offences it is preferable to make allowance on the basis of totality by ordering sufficient concurrency to achieve a just result, rather than reducing the individual sentences.

[44] I agree with the following remarks of Ormiston JA, with whom Winneke P, Hedigan JA agreed in *Director of Public Prosecutions v Grabovac* [1998] 1 VR 664 at 680:

> "It remains therefore for me to express my conclusions as to the proper method to be adopted in sentencing on multiple offences. In general a court should avoid imposing artificially inadequate sentences in order to accommodate the rules relating to cumulation. In other words, and the High Court said, where practicable when applying accepted rules of sentencing as to totality, proportionality and the like and in order to fashion an appropriate total effective head term in relation to a series of offences, it is preferable to achieve a satisfactory result by passing appropriate individual sentences and to make those sentences wholly or partially concurrent, rather than by an order or orders for the cumulation of unnecessarily reduced individual sentences. Nevertheless, a rule of this kind can only be a precept or guideline to be applied as and when practicable. In particular, though concurrency is to be preferred, a degree of cumulation ought to be ordered where sentences represent separate episodes or transactions which ought to be recognised, though at all times avoiding the imposition of a 'crushing' sentence."

[45] For these reasons, in my opinion the appeal should be allowed to the extent of setting aside the sentence of 9 months imprisonment imposed for the offence of unlawfully and indecently dealing with a child under the age of 16 years. In respect of that sentence, after making allowance for the plea of

guilty coupled with the remorse, I would impose a sentence of 4 months imprisonment.

[46] Upon allowance of the appeal with respect to the sentence of 9 months imprisonment this Court is free to reconsider the question of accumulation of the sentences. The Court must also address the question of totality.

[47] In my opinion, the sentence of 4 years and 6 months should be served cumulatively upon the first sentence of 6 months, but the sentence of 4 months should be served concurrently with the sentence of 4 years and 6 months. This order of sentences would result in an appropriate total period of 5 years Imprisonment.

[48] Upon allowing the appeal to the extent I have indicated, this Court is free to reconsider the question of whether a non-parole period should be fixed or whether it is appropriate to suspend all or part of the sentence. In all the circumstances I am satisfied that it is desirable to suspend part of the sentence. Whilst suspension of part of the sentence might be unusual for the offence of unlawfully maintaining a sexual relationship with a child, given the appellant's mental condition and remorse it is clear that the appellant is a person who could benefit from the opportunities for rehabilitation provided by partial suspension of the sentence.

[49] I would order that the appellant be released after serving three years of the sentence on condition that for a period of two years from the date of his

release the appellant be under the supervision of the Director of Correctional Services and obey the reasonable directions of the Director or the Director's nominee, including directions as to reporting to his probation officer and as to his place of residence and employment. In addition, it should be a condition that the appellant undertake such medical treatment or counselling as directed by the Director or the Director's nominee.

[50] The formal orders of the court are:

(1) The appeal is allowed to the extent of setting aside the sentence of 9 months imprisonment imposed for the offence of unlawfully and indecently dealing with a child.

(2) In lieu a sentence of 4 months imprisonment is imposed, which sentence is to be served concurrently with the sentence of 4 years and 6 months.

(3) In respect of the total period of 5 years to be served commencing on 16 March 2005, the balance of the sentence is suspended after the appellant has served a period of 3 years commencing 16 March 2005. The suspension of the balance of the sentence is on conditions that:

(i) For a period of 2 years from the date of his release, the appellant be of good behaviour.

(ii) The period of 2 years from the date of his release is the period during which the appellant is not to commit further offences for the purposes of the Sentencing Act.

(iii) For a period of 2 years from the date of his release, the appellant be under the supervision of the Director of Correctional Services and obey the reasonable directions of the Director or the Director's nominee, including directions as to reporting to his probation officer, as to his place of residence and employment.

(iv) The appellant undertake such medical treatment and counselling as directed by the Director or the Director's nominee.

Mildren J:

[51] I agree with the Chief Justice and with the orders that he proposes. I have nothing further to add.

Thomas J:

[52] I also agree with the reasons as expressed by the Chief Justice and with the orders that he has announced.
