Bond v Burgoyne [2005] NTSC 51

PARTIES:	SEAN HENRY BOND v ROBERT ROLAND BURGOYNE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM COURT OF SUMMARY JURISDICTION EXERCISING TERRITORY JURISDICTION
FILE NO:	JA 15/ of 2005, 20212924, 20322974
DELIVERED:	14 September 2005
HEARING DATES:	31 August 2005
DECISION OF:	OLSSON AJ

CATCHWORDS:

APPEAL

Justices - appeals against sentences - multiple offences under Misuse of Drugs Act and the Firearms Act - offender extradited from another State when released on parole in relation to sentence served there - restoration of previous Territory sentence - pleas of guilty to eleven Territory offences committed prior to going interstate - failure to answer to Territory bail when taken into custody interstate - whether various sentences ought to be served cumulatively or concurrently - whether proper plea discount allowed - whether reasons ought to have been given for departure from minimum non parole period - application of totality principle to multiple offences especially where custodial sentences imposed end on to sentence served in another State - delay in Territory sentencing due to service of interstate sentence - whether allowance made for more onerous conditions whilst on remand awaiting sentence - relevance of evidence of rehabilitation whilst serving interstate sentence - whether sentences imposed manifestly excessive.

REPRESENTATION:

Counsel:

Appellant:	R. Goldflam
Respondent:	R. Noble

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	22
Judgment ID Number	Ols05004

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Bond v Burgoyne [2005] NTSC 51
No JA 15 of 2005, 20212924, 20322974

BETWEEN:

Sean Henry Bond
Appellant

AND:

Robert Roland Burgoyne
Respondent

CORAM: OLSSON AJ

REASONS FOR DECISION

(Delivered 14 September 2005)

Introduction

[1] In this matter the appellant appeals against sentences imposed on him on 25 February 2005 by the then Deputy Chief Magistrate in respect of a variety of offences under the Misuse of Drugs Act and the Firearms Act, to be served cumulatively upon the restoration of a prior suspended sentence. It is asserted that the ultimate effective sentence was manifestly excessive in the circumstances.

[2] It is particularly complained that, in adopting the relevant sentencing strategy, the learned Deputy Chief Magistrate:

2.1 Failed to have regard to and make due allowance for the appellant's pleas of guilty;

2.2 Did not justify the fixation of a non-parole period of 14 months.;

2.3 Failed to have proper regard to the totality principle;

2.4 Did not give sufficient weight to the more onerous nature of a substantial period served in custody on remand; and

2.5 Failed to recognise and make due allowance for the rehabilitative steps taken by the appellant whilst in custody in New South Wales.

[3] In order to place the submissions on behalf of the appellant in a proper perspective it is first necessary to address his relevant background history.

Background Chronology

[4] The appellant is a man 32 years of age. He was born and grew up in New South Wales. He was educated up to year nine level. He had fairly consistent employment thereafter, in a variety of areas. However, his predominant forms of employment were in mechanic shops and, importantly, as a truck driver.

[5] It was put to the learned Deputy Chief Magistrate that, as a truck driver, he had to work long hours and began to use and became addicted to amphetamine.

[6] On 28 May 1999 the appellant was convicted in New South Wales of an offence of being armed with intent. The sentencing court also took into account other offences of using an offensive weapon to prevent lawful detention and common assault. The appellant was sentenced to five years and nine months imprisonment, to commence from 8 August 1998, when he was first taken into custody.

[7] By reason of the time already spent in custody he was released on parole on 24 June 1999. However, he was charged on 2 December 1999 with breaching its conditions by reason of contravening an apprehended domestic violence order, following a break-up with his partner.

[8] Having been taken into custody for about four months, he was, on 6 April 2000, ordered to remain in custody until the rising of the court in respect of the breach. He was again released on parole on 18 May 2000.

[9] He moved to the Northern Territory in June of that year. He first worked on a cattle station for about 18 months and then moved to Alice Springs and commenced a tow truck business there.

[10] His parole was revoked in New South Wales on 29 March 2001 by reason of his failure to report on moving to the Territory.

[11] He remained in Alice Springs until he returned to Sydney in December 2003. Whilst there he was taken into custody in relation to the revocation of his parole and served a further 8 months and 26 days. This occurred when he took his de facto partner to hospital for urgent treatment and, by chance, the police became aware of his presence in New South Wales and his identity.

[12] The material placed before me confirms a submission made to the learned Deputy Chief Magistrate to the effect that, during the last mentioned period in custody in New South Wales, the appellant embarked upon a very substantial programme of education and rehabilitation activity. In all this amounted to 599 hours of activity and spanned studies in automotive technologies, transport and distribution warehouse and storage certificate studies, general education studies and information and technology studies. He also completed a relapse prevention course aimed at addressing alcohol and drug dependency problems, as well as anger management and stress management courses.

[13] He was again released on parole in New South Wales on 28 October 2004.

[14] However, whilst in the Territory, he had been charged with a variety of offences. On 30 October 2003 he was granted bail in Alice Springs in respect of certain charges against him. He defaulted in his reporting obligations relating to that bail when he was taken into custody in Sydney. Furthermore, by reason of that custody, he ultimately failed to answer to

his bail in Alice Springs on 18 December 2003. A Territory warrant was therefore issued for his arrest.

[15] So it was that, when he was released on parole in Sydney, the appellant was at once arrested and extradited to the Territory on the last mentioned warrant.

[16] This led to his appearance before the learned Deputy Chief Magistrate on 25 February 2005, having continuously been in custody since December 2003.

The charges and their disposal

[17] On File No 20322974 the appellant pleaded guilty to 11 separate charges. A number of other charges were not proceeded with, following discussions between the prosecution and counsel for the appellant.

[18] The offences admitted were:

18.1 One count of possession of a trafficable quantity of amphetamine;

18.2 One count of possession of a prohibited firearm;

18.3 Two counts of possession of an unlicensed firearm;

18.4 Three counts of possession of an unregistered firearm;

18.5 Three counts of failing to meet firearms storage requirements; and

18.6 One count of supplying amphetamine.

[19] These offences had been committed on 29 October 2003.

[20] In practical terms the firearms offences only reflected three separate criminal acts, as they were multiple counts in respect of the appellant's possession of three separate firearms, or portions of firearms.

[21] It is to be noted that the offences on this File were committed against the background of some earlier offences of which the appellant had been convicted whilst in Alice Springs.

[22] On 24 July 2003 he had been convicted of possession of cannabis and a trafficable quantity of methamphetamine on 28 August 2002 and, on the basis of his assertion that the drugs had solely been for his own use, the learned Deputy Chief Magistrate had sentenced him to six months imprisonment suspended forthwith, for an operative period of two years. That period was therefore still operative at the time of commission of the offences the subject of this appeal.

[23] He then appeared before a Court of Summary Jurisdiction on 11 September 2003 and was fined in respect of possession of a small quantity of drugs and a firearm.

[24] On 2 December 2003 the appellant once more appeared before a Court of Summary Jurisdiction at Alice Springs when found in possession of stolen property to the value of $15,000. He was later sentenced to one month and seven days imprisonment in respect of that offence on 1 February 2005. That sentence ran from 28 December 2004.

[25] In disposing of the pleas on File No 20322974 the learned Deputy Chief Magistrate sentenced the appellant to 18 months imprisonment in respect

of the drug offences and 6 months imprisonment in respect of the firearms offences, both sentences to be served concurrently.

[26] On the application of the prosecution in that regard, he also restored the 6-month suspended sentence in relation to the 2002 offences. He ordered that the other sentences be served cumulatively upon the restored sentence.

[27] In the result the appellant was sentenced to an effective period of two years imprisonment -- in relation to which the learned Deputy Chief Magistrate fixed a non-parole period of 14 months.

The basis of sentencing

[28] In dealing with matters before him the learned Deputy Chief Magistrate summarised the foregoing history and expressed the view that it was difficult to see any commitment to change on the part of the defendant who, seemingly, was minded to continue his drug offences and to "*thumb his nose at the leniency*" that had previously been extended to him. He also said that the appellant had compounded his guilt by failing to answer to his bail when he went to Sydney, thereby putting the Territory to the expense of extradition.

[29] He also noted that consumption of amphetamines had been a problem in Alice Springs for some considerable time and that the weapons offences could also not be overlooked, even given that the weapons in question were found to be inoperable.

[30] He went on to say that he was sick and tired of dealing with people in breach of the Firearms Act and that it appeared that the appellant had intended to "*do up*" the weapons in question that were admittedly in poor condition and then to exhibit them only months after having previously been dealt with for possession of illegal firearms.

[31] He thereupon imposed the sentences to which I have earlier referred. In dealing with the topic of totality he commented:

> "…… it does seem to me to be a strange approach to pay too much attention to what happened to him in New South Wales. Presumably he got there no more nor no less than he deserved by his actions. I think that the most that can be done here is to back date the defendant's sentence to commence on a date agreed by both prosecution and defence as the appropriate starting date and to order the sentences for the illegal firearms to be served at the same time as the sentence for the drugs".

[32] As I understand the position the reference to backdating related to the fixation of a commencement date of 5 December 2004, to allow for the fact that the appellant had to serve the sentence of one month and seven days in respect of the unrelated offence of possession of stolen property.

Appeal issues

[33] I now turn to the specific matters debated on the appeal, considered against the foregoing background.

Plea discount

[34] Counsel for the appellant drew attention to the fact that, despite submissions of counsel touching on the topic and a concession made by the prosecutor in that regard, the learned Deputy Chief Magistrate made no mention whatsoever, in the course of his sentencing remarks, of allowing any reduction in sentence in recognition of the appellant's pleas.

[35] In this regard counsel drew attention to the well-known authority of *Kelly v The Queen (2000) 10 NTLR 39 at par 27.* The Court of Criminal Appeal there made the point that it is desirable that a sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor. As the Court there pointed out, it is not possible to lay down any precise tariff. Suffice to say that, commonly, a discount between 20% and 30% is given, dependent upon the particular circumstances. It has long been recognised that a significant discount will be allowed where guilty pleas indicate contrition and remorse and an acceptance of responsibility and willingness to facilitate the course of justice or is indicative of rehabilitation.

[36] However, even where there is little or no evidence of contrition, remorse and the other factors referred to, a more modest discount will also be attracted, if only for the bare utilitarian value of the plea (*R v Thompson and Houlton (2000) 48 NSWLR 383).* It is to be noted that this judgment was a guideline judgment in which the Court made the point that failure to

explicitly state that a plea of guilty has been taken into account will generally be taken to indicate that the plea was not in fact given weight. Whilst that guideline is not directly applicable in the Territory it really reflects an obvious natural inference.

[37] Counsel conceded that, having regard to the appellant's failure to answer to his bail, he was not entitled to the *maximum* possible discount. On the other hand, the pleas were entered at the first opportunity that the appellant had to formally enter them, because the charges, that had been the subject of negotiation, were amended on the days on which the pleas were actually entered. At least a moderate discount was indicated. I did not take counsel for the respondent to argue against that proposition.

[38] It seems to me that, upon reading the relevant sentencing remarks, there is a strong inference that the learned Deputy Chief Magistrate became preoccupied with the background of the appellant and what he saw as being aggravating circumstances related to the offences, to the exclusion of directing his mind to the need, ultimately, to give an appropriate discount in relation to the pleas. It is strange that he made no reference to this aspect when it had earlier been canvassed before him. There is nothing to indicate that he did, in fact, make an appropriate reduction in the sentences imposed.

[39] In my opinion this ground of appeal has been made good.

Length of non-parole period

[40] Once again, it was stressed that, in the course of his sentencing remarks, the learned Deputy Chief Magistrate simply fixed a non-parole period and said nothing concerning how this had been arrived at, or what factors had influenced his selection of a period that was in excess of 50% of the head sentence.

[41] In drawing attention to that situation counsel for the appellant emphasised that there were a number of matters before the court that had an important bearing on the length of any non-parole period. These included evidence of the appellant's rehabilitation, the fact that the supply and possession of the amphetamine was in relation to the appellant's addiction to that drug, that the firearm offences were clearly at the less serious end of the spectrum because the items in question were unserviceable and it had been the intention of the appellant to renovate the weapons for exhibition and possible sale. Reference was also made to the need to allow for the relatively harsh environment on remand over a period of some four months and the fact that the appellant had cooperated with the administration of justice by entering his pleas.

[42] Counsel were unable to draw my attention to any specific authority of this Court to the effect that there was an expectation that a sentencing judicial officer would express reasons for departing from the statutory minimum non-parole period (Sentencing Act, s54). On the other hand there seemed to be a measure of agreement between them that, generally speaking,

sentencers did normally indicate a basis of reasoning when it was intended to depart from the statutory minimum.

[43] It seems to me that this is a most desirable practice, in absence of which it becomes difficult for an appellate court to review the propriety of any reasoning that may have led to the sentencing strategy adopted.

[44] Having said that, the compelling inference arising from the sentencing remarks in this case is that the learned Deputy Chief Magistrate was heavily influenced by the antecedent record of the appellant and, in particular, his pattern of almost continuous offending and apparent failure to profit from earlier leniency granted by the Court. I am not persuaded that, in this particular case, a failure to express reasons for the figure arrived at is indicative of error.

The totality principle

[45] It is trite to say that, where a sentencer is faced with the task of imposing sentence in respect of multiple offences, proper regard must be had to the end result, in terms of the effective total head sentence achieved. The authorities indicate that the proper approach is to review any aggregate sentence resulting from tentative individual sentences arrived at for the relevant separate offences and then consider whether, having regard to the totality of the relevant criminal behaviour, the resultant quantum is an appropriate sentence for the total criminality involved. A failure to do so

and the adoption of a mere arithmetic approach may well result in an unjustifiably crushing sentence (*Mill v The Queen (1988) 166 CLR 59, Griffiths v The Queen (1989) 167 CLR 372).* A proper end result may be achieved by the imposition of consecutive sentences of reduced length with or without other sentences to be served concurrently, or through the imposition of an aggregate head sentence pursuant to s52 of the Sentencing Act that is appropriate to the total criminality.

[46] In undertaking such an exercise s5 of the Sentencing Act specifically mandates that, in sentencing an offender, a court must (*inter alia)* have regard to sentences imposed on, and served by, the offender in a State or another Territory of the Commonwealth for offences committed at, or about the same time, as the offences which the Court is dealing.

[47] In the instant case there may be some question as to whether, literally, that provision is applicable to a situation in which an existing period of parole is cancelled by virtue of a breach of its terms, by way of contrast with the *ab initio* service of a sentence in respect of the substantive offence to which it relates.

[48] However, I agree with counsel for the appellant that there is a parallel of reasoning applicable to this case with that adopted in *Mill v The Queen (supra).* At page 66 of the report the members of the High Court referred to considerations of fairness that ought to be taken into account when the punishment of an offender is deferred by reason of the fact that he is being dealt with, successively, in two places. The High Court commented that:

"The intervention of a State boundary denies to an offender the opportunity of having the series of offences dealt with together by the sentencing court which can avail of the flexibility in sentencing provided by concurrent sentences."

[49] To paraphrase what was said by the High Court, the question that needed to be posed in the instant case, bearing in mind the fact that the appellant had been serving an interstate sentence up to the time of his extradition, was what would be likely to have been the effective head sentence imposed had the sentencing court dealt with all outstanding matters at the time when he was taken into custody in the first instance.

[50] Such an approach accords with that adopted by Martin C J in his judgment in *Regina v The Queen [2004] NTCAA 9 at pars 27 et seq.* He there pointed out that, in recent times, there had been some extension of the original totality principle so that, 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 sentence so that the total period ultimately 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.

[51] It will be remembered that the learned Deputy Chief Magistrate said that he was disinclined to pay *any* significant attention to what had occurred to the appellant in New South Wales. Furthermore, as counsel pointed out, it appears unlikely that he had a clear appreciation of the precise sequence of events bearing on the New South Wales situation. The actual taking of the

appellant back into custody from 2 February 2004 was in relation to a failure to report and not, as the learned Deputy Chief Magistrate stated, by reason of a breach of a domestic violence order. The failure to report arose from the appellant's relocation to the Northern Territory, where other offences were committed at the relevant times.

[52] Counsel for the appellant submitted that the practical result of the strategy adopted was a compounding of the time spent in custody in New South Wales, the sentence imposed in respect of the separate unlawful possession charge and the sentences now sought to be impugned. It was argued that, manifestly, there was no ultimate review by the learned Deputy Chief Magistrate of the totality of the sentences in their practical effect, in a manner required by the totality principle. Indeed, it is said that the statement made by him underlines that very situation.

[53] With all due respect to the learned Deputy Chief Magistrate I think that there is considerable force in the criticism advanced. In my opinion this ground of appeal has been made out.

Time spent on remand

[54] It is well established that time spent on remand in the Alice Springs prison is significantly more onerous than other circumstances of imprisonment. It is a harsher environment, there being little or no access to programs and only limited work availability. The offender is kept in a high security area (*R v Sebastian Walker (unreported, sentencing remarks of Angel J. 2*

August 2001). Having, myself, visited the prison in the relatively recent past, I am in wholehearted agreement with the view expressed by Angel J.

[55] In a situation in which the time spent on remand ultimately forms a not insubstantial portion of the time to be spent in custody, this is a significant factor for which proper allowance needs to be made.

[56] I see no indication that this aspect was recognised by the learned Deputy Chief Magistrate. As earlier recited, the appellant had spent no less than four months on remand i.e. almost 30% of the non-parole period that was made applicable to his effective sentence.

[57] I consider that this ground of appeal has also been established.

Evidence of rehabilitation

[58] There is not the slightest doubt that the learned Deputy Chief Magistrate took a very jaundiced view of the appellant and what appeared to be his continuing history of repeat offending. On a fair appraisal of the appellant's record he was well justified in so doing.

[59] Nevertheless, his attention was specifically directed to the somewhat remarkable achievements of the appellant during his last period of incarceration in New South Wales. Seemingly for the first time, the appellant had applied himself to a quite impressive array of rehabilitative activities, with a substantial apparent degree of success. Bearing in mind

his past history, this information was of significance, particularly in relation to any non-parole period that might be fixed.

[60] As Street CJ said in *R v Todd (1982) 2 NSWLR 517*, where an interstate sentence has postponed the sentencing hearing, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of the earlier sentence.

[61] The learned Deputy Chief Magistrate made no reference at all to this aspect in the course of his sentencing remarks. The only reasonable conclusion to be drawn is that he did not take it into consideration, despite the fact that the issue was raised with him.

[62] This ground of appeal has also been made out.

Conclusion

[63] It follows that the appellant has succeeded in demonstrating error on the part of the learned Deputy Chief Magistrate of the type adverted to in *House v The King (1936) 55 CLR 499 at 505*.

[64] The appeal must accordingly be allowed and the impugned sentences set aside. It falls to this court to re-exercise the sentencing discretion, there being adequate material before it with which to do so.

[65] There is no question but that the earlier suspended sentence must, in the circumstances, be restored. That will result in an order that the appellant serve six months imprisonment to commence on 5 December 2004. Having

regard to the sequence of events in this case I consider it not inappropriate that such sentence be served cumulatively upon the sentence in respect of the unlawful possession sentence.

[66] As to counts 1 and 17 on File No 20322974 I consider that a proper reduction for the appellant's pleas of guilty and a need to give adequate recognition to the totality principle and the time spent on remand ought to give rise to the imposition of a sentence of 12 months imprisonment, in lieu of the sentence previously imposed.

[67] Particularly bearing in mind the inoperable and disassembled nature of the firearms involved and the purpose for which they were possessed it seems to me that a similar approach to counts 4, 6, 7, 8, 10, 11, 12, 13 and 14 ought to give rise to a sentence of four months imprisonment.

[68] As portion of the exercise of correctly applying the totality principle it is, in my view, appropriate that both of the last mentioned two sentences be served cumulatively upon one another, but also concurrently with the restored sentence.

[69] It follows that the effective head sentence should be one of 16 months imprisonment, to commence on 5 December 2004.

[70] The fixation of a non-parole period presents some difficulty in this case. *Prima facie*, the bad continuing record of offending does, on the face of it, suggest that the appellant has not profited from prior leniency in sentencing and that the prospects for his rehabilitation may not be promising. As against that, due regard must be had to what appears to be

some positive change in attitude, as evidenced by the rehabilitative measures embarked upon by him whilst in New South Wales.

[71] On balance, it seems to me that the proper course will be to adopt the 50% statutory minimum on this occasion. I therefore propose to fix a non-parole period of eight months, to run from 5 December 2004.

[72] There will, accordingly, be orders in conformity with the foregoing reasons.
