Hill v The Queen [2012] NTCCA 7

PARTIES:	**HILL, Daryl**
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 27 of 2010
DELIVERED:	5 APRIL 2012
HEARING DATES:	5 APRIL 2012
JUDGMENT OF:	RILEY CJ, KELLY & BARR JJ
APPEALED FROM:	OLSSON AJ

CATCHWORDS:

CRIMINAL LAW - application for extension of time to appeal against sentence - fixing of a non-parole period - manifest excess - principle of totality - application refused

Sentencing Act s 53

Barr v R (2003) NTCCA 2; *Green v The Queen* (1998-1989) 95 FLR 301; *R v Haydon* [2006] SASC 238, followed
Albert v The Queen [2009] NTCCA 1; *Bugmy v R* (1989-1990) 169 CLR 525, referred to

REPRESENTATION:

Counsel:

Applicant:	M Johnson
Respondent:	W J Karczewski QC

So*licitors:*

Applicant:	
Respondent:	Office of the Director of Public Prosecutions

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Hill v The Queen [2012] NTCCA 7
No. CA 27 of 2010

BETWEEN:

DARYL HILL
Applicant

AND:

THE QUEEN
Respondent

CORAM: RILEY CJ, KELLY & BARR JJ

EX TEMPORE
REASONS FOR JUDGMENT

(Delivered 5 April 2012)

Riley CJ:

[1] The applicant seeks an extension of time to make an application for leave to appeal against a sentence which was imposed on 28 August 2009.

[2] Following a trial by jury occupying some 11 days the applicant was convicted of driving a motor vehicle causing death. The applicant was sentenced to a term of imprisonment of seven years and the sentencing Judge refused to fix a non-parole period. At the time of the application the sole proposed ground of appeal was that his Honour erred in law by failing to fix a non-parole period. At the hearing before this Court the appellant

identified two further proposed grounds of appeal in relation to which an extension of time to file an application for leave was required, namely:

(a) the sentence imposed by the learned sentencing Judge was manifestly excessive;

(b) the learned sentencing Judge erred in law by failing to take into account the principle of totality in the sentencing.

[3] The time within which to apply for leave to appeal expired on 25 September 2009. The application for leave to appeal was not filed until 17 December 2010, almost 15 months out of time. The delay is explained in an affidavit by Mr Baker of the Northern Territory Legal Aid Commission. The initial instructions of the applicant to the Legal Aid Commission were that he wished to appeal against the verdict. There was no suggestion of an appeal against sentence. The merits of an appeal against the verdict were assessed by the Legal Aid Commission and, on 12 March 2010, the applicant was informed that aid would not be granted for that purpose. The applicant sought a review and, upon completion of the review, the decision to refuse the grant of aid was confirmed. However the reviewing officer indicated that aid would be granted to appeal against sentence. On 5 May 2010 the applicant accepted the decision to refuse the grant of aid for an appeal against the verdict and instructed the Legal Aid Commission to seek leave to appeal against sentence.

[4] Mr Baker emphasised in his affidavit that in his opinion the applicant was not at fault for the delay.

[5] The principles applicable to such an application are well established. Where there has been a lengthy delay the court will require the identification of exceptional circumstances before granting an extension of time unless there has been a manifest miscarriage of justice or unless the court is satisfied that there are such merits in the proposed appeal that it would probably succeed. The greater the delay, the more difficult becomes the task for the applicant.[1] In the circumstances of this matter, where there has been considerable delay, the application for an extension of time should be refused unless to do so would leave a miscarriage of justice without remedy.[2] An extension of time will not be granted if leave to appeal is required and would not be granted.[3]

The circumstances of the offending

[6] The offending occurred on 3 July 2008 near Adelaide River when the motor vehicle which was then being driven by the applicant left the Stuart Highway, hit an embankment and rolled over causing the death of the front seat passenger. The evidence established that the applicant, the deceased and two others had driven from Darwin to Mataranka on that day. During the course of the journey from Pine Creek to Mataranka the applicant and others had consumed alcohol. On the return journey further alcohol was consumed both in the vehicle and at a hotel in Katherine. As the party left Katherine a

[1] *Green v The Queen* (1988-1989) 95 FLR 301 at 312.
[2] *Green v The Queen* (1988-1989) 95 FLR 301 at 303.
[3] *Barr v R* (2003) NTCCA 2 at [3].

security guard observed the applicant, who was then "substantially intoxicated", get into the driver's seat of the vehicle. The guard was so concerned that he immediately reported the event to police. The vehicle was seen by other witnesses to be driven in a "most erratic manner" to the point where the applicant lost control of the vehicle. Immediately after the crash the applicant was seen to crawl from the wreck. He advised people at the scene that he did not wish the police to be called and then, notwithstanding the fact that he had a fractured right ankle, disappeared into the surrounding bush. The applicant was tracked and eventually located in the bushland on the following morning. At all times he denied being the driver of the vehicle and at the trial the Crown was put to proof in this regard.

The merits of the proposed grounds of appeal

[7] In determining an appropriate sentence the very experienced sentencing Judge drew attention to the criminal history of the applicant which he observed to be "arguably the worst record of its type that I have encountered in the course of my judicial career". His Honour noted that the criminal history extended to the Northern Territory and five States. In the Northern Territory the applicant had 86 convictions between 1995 and 2008 for offences of dishonesty, property damage, unlawful use of a motor vehicle, possession of cannabis, assault and also a sex offence. However, as his Honour observed, "the bulk of (the offences) portray a lengthy and persistent history of repeated motor vehicle offences, mostly of a serious nature". The Judge went on to say:

> Of those on my count, there are seven convictions for driving with significant blood alcohol concentrations; three convictions for driving dangerously; 20 convictions for driving an unregistered or uninsured vehicle; and 17 convictions for driving unlicensed or whilst disqualified. Additionally, you have been found to have breached bail, parole or sentence suspension conditions on no less than six occasions. There is a variety also of less serious vehicle related convictions.
>
> Within the Territory you have received a wide range of custodial sentences, ranging from as little as 14 days to as much as three years and six months. You have been disqualified from holding a driver's licence on numerous occasions.
>
> A somewhat similar pattern is to be seen in antecedent records from Victoria, New South Wales, Queensland, South Australia and Western Australia, save that the number of convictions in the specific jurisdiction is in most instances considerably less than in the Territory.
>
> However, that may be, on my count the total number of convictions in those other jurisdictions is of the order of slightly in excess of 100, a substantial number of those being in Victoria. The convictions in question also include some in respect of offences of dangerous driving. They attracted, amongst other penalties, service of a variety of custodial sentences.

[8] The learned Judge described the information provided to the Court as indicating a "consistent total disregard for the law" on the part of the applicant and "a truly breathtaking continuing attitude" that the applicant determined to drive regardless of his state of intoxication or the fact that he was not permitted to drive without a current licence.

The failure to fix a non-parole period

[9] In support of the first proposed ground of appeal it was argued that, notwithstanding the acknowledged "appalling record of convictions" of the

applicant, a non-parole period should have been fixed. Reference was made to the discussion regarding the purpose of parole and the benefits afforded by the determination of a non-parole period in *Bugmy v R.* [4]

[10] Section 53 of the *Sentencing Act* provides that, where an offender is sentenced to imprisonment for a period of 12 months or longer and that sentence is not suspended in whole or in part, a court shall set a non-parole period unless it considers that the nature of the offence, the past history of the offender or the circumstances of the particular case make the fixing of such a period inappropriate. The structure of the provision creates a prima facie obligation on the sentencing court to specify a non-parole period unless the grounds for making such an order inappropriate are present.[5]

[11] In the present case the learned Judge had regard to the relevant provisions of the *Sentencing Act*, the decision in *Albert v The Queen*[6] and the relevant applicable principles. His Honour said:

> I recognize that it is a rare case in which the Court is justified in declining to fix a non-parole period. As Riley J recently re-expressed the concept in the case of *Albert*, the provision of a non-parole period is to provide for the mitigation of the punishment of an offender in favour of his rehabilitation, through conditional freedom.
>
> However, in your case, your appalling record of convictions in relation to serious motor vehicle offences, constituting an ongoing and persistent pattern over many years that has not abated, constitutes an important background to the total absence of any present indication that rehabilitation is a practical possibility in the foreseeable future. Such a situation, coupled with your prior failure

[4] *Bugmy v R* (1989-1990)169 CLR 525 at 531-532.
[5] *Albert v The Queen* [2009] NTCCA 1 at [38].
[6] *Albert v The Queen* [2009] NTCCA 1.

> to obey court orders or observe conditions related to your release, demands that my primary concern must be the protection of the community.
>
> I note that the section 103 report in this matter points to your long history of alcoholism; your failure to complete rehabilitation programs; and your past breaches of parole, sentence suspensions and bail conditions, unsurprisingly, (ends) in the case that you are unsuitable for supervision by Community Corrections. In all the circumstances I conclude that the fixing of a non-parole period is inappropriate.

[12] In so concluding his Honour, having drawn attention to “the appalling” criminal history of the applicant, described him as "a persistent and incorrigible offender in relation to whom various sentencing outcomes and more recently appropriate rehabilitation attempts have proved utterly ineffective". His Honour observed that the applicant had long exhausted any claim to leniency and went on to conclude that the prospects of the applicant re-offending "remain high". The prospects for the applicant’s rehabilitation were "poor in the extreme". There is no challenge to these conclusions. Reference to the applicant's criminal history reveals a sound basis for the conclusions of his Honour. The sentencing Judge was entitled to conclude that the fixing of a non-parole period was inappropriate. Such a conclusion was well within his Honour's discretion.

Manifest excess

[13] The principles applicable to an appeal on the ground of manifest excess are well known. It is fundamental that the exercise of the sentencing discretion is not disturbed on appeal unless error in that exercise is shown. The

presumption is that there is no error and the appellate court does not interfere with the sentence imposed merely because it is of the view that the sentence is insufficient or excessive. It interferes only if it be shown that the sentencing Judge was in error in acting on a wrong principle or in misunderstanding or in wrongly assessing some salient feature of the evidence. The error may appear in what the sentencing Judge said in the proceedings or the sentence itself may be so excessive or inadequate as to manifest such error. In relying upon this ground it is incumbent upon the appellant to show that the sentence was not just excessive but manifestly so. He must show that the sentence was clearly and obviously and not just arguably excessive.

[14] In the present case the applicant submitted that his Honour "placed excessive emphasis on the applicant's prior driving record in consideration of his flouting of the law". In my opinion the remarks of his Honour were quite appropriate. Ultimately it was submitted that the sentence imposed was outside the range which would have been appropriate in all the circumstances. I see no error on the part of the learned Judge and, in my view, the sentence was within the range of sentences available.

The totality principle

[15] The final proposed ground of appeal was that the learned Judge failed to apply the totality principle. It was pointed out that the applicant had been dealt with for other offending and, at the time of being sentenced for the

present offending on 28 August 2009, had been in custody for more than 12 months. He had been arrested on 19 August 2008 on warrants relating to traffic offences which had occurred in 2006 and 2007. He was remanded in custody for those offences. On 12 September 2008 he was sentenced in relation to those matters to a total of seven months imprisonment backdated to 19 August 2008. The details of the 2006 and 2007 offending were placed before his Honour. The offences were both alcohol related driving offences. They occurred some 16 months apart. The 2007 offending occurred some seven months before the matters with which we are concerned in this appeal.

[16] In imposing the sentence for the present offending, his Honour deemed the sentence to have commenced on 18 March 2009 being the date upon which the earlier sentence for the 2006 and 2007 offending was completed. Given the coincidence of the completion of the earlier sentence and the commencement of the sentence imposed by his Honour it is readily apparent that his Honour intended that the latter sentence be served cumulatively upon the former. In so doing his Honour must have had regard to the principle of totality. As a consequence the applicant was required to serve a sentence of seven years and seven months for all of the offending. The fact that his Honour did not specifically refer to the totality principle is not itself an error and does not necessarily lead to the conclusion that the Judge failed to consider the matter of totality.[7] The sentence imposed by his Honour reflected an appropriate measure of the total criminality involved in all of

[7] *R v Haydon* [2006] SASC 238 at [85]-[89].

the offending in all the circumstances. I see no basis to interfere with the sentence imposed.

[17] In my view the applicant has not shown an arguable case. He has not demonstrated sufficient merit to enable this Court to conclude that an appeal would be likely to succeed and for that reason the interests of justice do not require the granting of an extension of time.

[18] I would refuse the application for an extension of time.

Kelly J

[19] I agree the application should be dismissed for the reasons provided by the Chief Justice.

Barr J

[20] I agree the application should be dismissed for the reasons provided by the Chief Justice.
