CITATION:	*Ferguson v The Queen* [2019] NTCCA 11
PARTIES:	FERGUSON, Danny 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 26 of 2018 (21343913)
DELIVERED:	7 June 2019
HEARING DATE:	4 June 2019
JUDGMENT OF:	Grant CJ, Blokland and Hiley JJ

CATCHWORDS:

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT

Northern Territory sentence fixed first in time but to be served second in time – appellant subsequently sentenced to imprisonment in South Australia – no account taken of South Australian sentence at time Northern Territory sentence imposed – whether Northern Territory sentence manifestly excessive – sentence set aside and appellant resentenced.

Criminal Code Act 1983 (NT) s 411

Betts v The Queen (2016) 258 CLR 420 at [10], *Forrest v The Queen* [2017] NTCCA 5, *Gallagher v The Queen* (1986) 160 CLR 392, *Mill v The Queen* (1988) 166 CLR 59, *R v Vachalec* [1981] 1 NSWLR 351 at 353, referred to.

REPRESENTATION:

Counsel:

Appellant:	I Read SC
Respondent:	SA Robson

Solicitors:

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

Judgment category classification:	B
Number of pages:	10

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

Ferguson v The Queen [2019] NTCCA 11
No. CA 26 of 2018 (21343913)

BETWEEN:

DANNY FERGUSON
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, BLOKLAND and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 7 June 2019)

THE COURT:

[1] This is an appeal against sentence which arises in unique circumstances. The parties are in agreement that the appeal should be allowed and the appellant resentenced.

Background

[2] The appellant was charged in the Northern Territory with two counts of sexual intercourse without consent and one count of unlawful assault. He pleaded guilty to the count of unlawful assault and the trial of the other two charges commenced on 1 June 2015.

[3] On 3 June 2015, the appellant absconded from the Northern Territory. The trial continued in his absence and on the following day the appellant was found guilty of the two counts of sexual intercourse without consent.

[4] On 3 July 2015, the appellant was arrested in South Australia and charged with the murder of his then partner in that jurisdiction. He has remained in prison in South Australia since that time.

[5] On 22 April 2016, the appellant was sentenced by the Supreme Court of the Northern Territory for the two counts of sexual intercourse without consent and the count of unlawful assault. He was sentenced to a total effective sentence of 16 years and 155 days with a minimum non-parole period of 11 years and six months. The sentencing proceedings were conducted by audio-visual link to a prison in South Australia. The Court was unable to fix a commencement date for that sentence due to the appellant's absence from the jurisdiction and his custodial situation in South Australia.

[6] On 13 October 2016, the appellant was sentenced by the Supreme Court of South Australia for the alternative charge of manslaughter of his partner. He was sentenced to imprisonment for 15 years with the minimum non-parole period of 12 years.[1] That sentence was backdated to 7 July 2015. The consequence of that sentence in South Australia is that the Northern Territory sentence cannot commence until 7 July 2027 at the earliest, which

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1 Under s 20B of the *Criminal Law (Sentencing) Act 1988* (SA) the appellant was taken to be a "serious repeat offender" for the purpose of that legislation. Under s 20BA of the legislation, the sentencing court was not bound to ensure that the sentence was proportional to the offence, and any non-parole period fixed in relation to the sentence had to be at least four-fifths of the length of the sentence.

is the earliest time at which the appellant might be released on parole in South Australia. The further consequence is that the appellant is liable under the two sentences as presently fixed to serve a minimum period of 23 years and six months under both sentences, with the possibility of having to serve in excess of 31 years. That raises questions concerning the application of the principle of totality.

[7] The appellant sought and was granted leave to appeal against the Northern Territory sentence on the ground that it was manifestly excessive in the circumstances.

Consideration

[8] In the ordinary course, any adjustment made to take into account the principle of totality in these circumstances will be made to the sentence to be served second in time. That is because the sentence to be served second in time is usually also the sentence fixed second in time. That adjustment will ordinarily take into account the time already served and to be served under the first sentence. For reasons to do with the appellant's flight during the course of the trial in the Northern Territory, and the subsequent commission of the offence in South Australia and his arrest there, it was the Northern Territory sentence which was fixed first in time but which stands to be served second in time.

[9] The principle of totality could not be applied at the time the Northern Territory sentence was fixed because the South Australian sentence had not

then been passed. On the other hand, the principle of totality could not be applied in the orthodox way at the time the South Australian sentence was fixed because the appellant had not served the sentence in respect of the Northern Territory offences. However, the South Australian sentencing judge was aware of the Northern Territory convictions and sentence and sentenced him "on the basis that those convictions and sentence stand". Her Honour also stated that she "[took] into account in a general way that you are liable to serve that long period of imprisonment in Alice Springs in the future, and that the combination of the sentence I impose and that sentence, will appear to you to be crushing".

[10] The approach pressed by counsel for the appellant is that the sentence imposed in the Northern Territory was manifestly excessive, and on that finding the sentencing discretion would be exercised afresh permitting the principle of totality to be given effect in the resentencing exercise.

[11] The respondent does not formally concede that there was any error in the sentence imposed at first instance. Despite that, the respondent contends that this Court has a broad power to correct or prevent a miscarriage of justice and has the flexibility to take into account matters transpiring since the sentence was passed in order to prevent such a miscarriage.[2] While that

2 *Betts v The Queen* (2016) 258 CLR 420 at [10]; .*R v Vachalec* [1981] 1 NSWLR 351 at 353; *Gallagher v The Queen* (1986) 160 CLR 392 at 395.

might be accepted as a general proposition,[3] there are difficulties with its application in the present case. When the sentence was fixed in South Australia the court there did so taking into account that the appellant was also liable to serve the Northern Territory sentence on completion of the South Australian sentence, and in recognition of the totality considerations to which that gave rise. It would be inappropriate and contrary to the principles of judicial comity to proceed, in effect, on the basis that the sentence fixed in South Australia gave rise to a miscarriage of justice requiring correction by this Court.

[12] Any correction to or adjustment of the total sentence imposed is contingent on the appellant establishing error in the term of imprisonment imposed by the Northern Territory court. For the reasons that follow, we consider that the term of imprisonment imposed for the Northern Territory offending was manifestly excessive.

[13] The circumstances of the offending are set out in some detail in the transcript of the sentencing proceedings on 22 April 2016. Count 1 on the indictment was particularised as anal intercourse using a torch. That act was preceded by the appellant dragging the victim from a bed by her hair, throwing her on the floor, jumping onto her head as she lay prone on the ground, and punching her in the buttocks and legs. The appellant then bent her over a couch and inserted a torch into her anus. The violence attending

3 It may be noted in this respect that s 411(4) of the *Criminal Code 1983* (NT) provides that on an appeal against sentence, this Court may impose another sentence if it is of the opinion that another sentence is warranted and should have been passed.

that act of sexual intercourse without consent was also comprehended by the charge brought in Count 3. Count 2 on the indictment was particularised as forced fellatio. That took place immediately following the anal rape. While the victim was performing fellatio on the appellant in accordance with his demand he was punching her to the right side of the face. Again, that violence was also comprehended by the charge brought in Count 3. The conduct charged in Count 3 on the indictment also comprehended conduct which followed the two acts of sexual intercourse without consent. The appellant dragged the victim by her ankles to a couch, tied her ankles together using a belt, lifted the victim by the belt so she was hanging upside down, dropped her so that her face came in contact with the floor, and kicked her in the chest. The appellant then dragged the victim to the bed and struck her to the back, buttocks, legs and face using the buckle end of that belt.

[14] The sentencing standards for sexual intercourse without consent have been reviewed by this Court relatively recently in *Forrest v The Queen*.[4] The violence, savagery and ferocity of those assaults on the victim notwithstanding, the sentences of imprisonment for 12 years, 15 years and four years and six months respectively, together with the order for cumulation, resulted in a total effective period of imprisonment which was excessive having regard to the principle of totality and the fact that these

4 *Forrest v The Queen* [2017] NTCCA 5.

offences were all committed as part of what might be described as a single course of conduct.

[15] The respondent concedes that in any re-sentencing exercise there may also be some moderation of the individual sentences and/or the total effective sentence as the only practical means by which the principle of totality may be given effect in the circumstances. Any such moderation must properly take into account the requirements of judicial comity already identified. Although the circumstances which present are different, the same principles expressed in *Mill v The Queen*[5] may guide the resentencing process. First, there is no statutory provision enabling the new sentence to be fixed to commence while the appellant is in custody serving the sentence in South Australia.[6] Secondly, this Court must take into account what would be the appropriate head sentence if the offender had been sentenced for all the offences he committed both in the Northern Territory and South Australia at the one time, in recognition of the fact that the intervention of the State/Territory boundary has denied the appellant the flexibility in sentencing provided by concurrent sentences. Thirdly, there may be cases in which the only course open to give effect to the principle of totality is to adopt a lower head sentence which might fail to reflect adequately the

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5 *Mill v The Queen* (1988) 166 CLR 59.

6 Section 62(1) of the *Sentencing Act 1995* (NT) provides that a sentence of imprisonment commences on the day it is imposed unless the offender is not then in custody in which case it commences on the day he or she is apprehended under a warrant of commitment issued in respect of the sentence. What that means in this case is that the sentence of imprisonment imposed in the Northern Territory cannot commence until such time as the appellant is released from imprisonment in South Australia and taken into custody under a warrant of commitment issued in respect of the Northern Territory sentence.

seriousness of the crime in respect of which is imposed. This is not such a case.

[16] The application of the principle of totality requires some consideration of the nature and circumstances of the offending for which the appellant was convicted and sentenced in South Australia. The appellant was found guilty following a trial by jury of the manslaughter of his partner of eight months on or about 3 July 2015. Approximately a week before the death the appellant and the victim left Oodnadatta in South Australia to stay at a remote campsite. On 3 July 2015, the appellant returned with the body of the deceased which bore multiple injuries. He was responsible for those injuries. The victim died from blood loss caused by blunt force trauma. The autopsy concluded that those injuries were inflicted over a period involving three separate episodes and the use of a weapon. On his return, the appellant told people that the victim had been raped and bashed by another man and had then taken an overdose of pills. That other man was living with his family in a different community at the time the injuries were inflicted. The statements made by the appellant were lies told in an attempt to cast the blame for the victim's death elsewhere.

Re-sentence

[17] The appellant was 35 years old at the time of the sentencing proceedings. He was raised in the Finke community and attended primary school there. He was initiated through ceremony at age 13. He did not return to school after that time. After leaving school he worked intermittently before

travelling to Port Augusta at the age of 17. There he committed a rape while still a juvenile for which he was sentenced to detention for three years. He also had a subsequent conviction in South Australia for the use or threatened use of unlawful violence, and two convictions in the Northern Territory for aggravated assault on his partner at the time. All three offences attracted sentences to imprisonment. The offending the subject of this appeal was committed while he was still under supervision in relation to the last of those aggravated assault offences.

[18] For each of the counts of unlawful sexual intercourse without consent, we would sentence the appellant to imprisonment for 10 years. For the offence of aggravated assault, to which a plea of guilty was entered, we would sentence the appellant to imprisonment for three years and four months. Those sentences are to be served concurrently. We would fix a non-parole period of seven years.

Orders

[19] Accordingly, we make the following orders:

1. The sentence imposed on 22 April 2016 is quashed.
2. On Count 1 the appellant is sentenced to imprisonment for 10 years.
3. On Count 2 the appellant is sentenced to imprisonment for 10 years, to be served concurrently with the first sentence.
4. On Count 3 the appellant is sentenced to imprisonment for three years and four months, to be served concurrently with the first sentence.

5. A non-parole period of seven years is fixed.

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