CITATION:	*The Queen v Ryan*; *Miller v The Queen* [2019] NTCCA 20
PARTIES:	THE QUEEN
	v
	RYAN, Aaron
AND BETWEEN:	MILLER, Dillon
	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 NOs:	CA (AS) 2 of 2018 (21803523) and CA (AS) 3 of 2018 (21803520)
DELIVERED:	17 September 2019
HEARING DATE:	12 December 2018
JUDGMENT OF:	Grant CJ, Barr and Hiley JJ

CATCHWORDS:

CRIME — Appeals — Appeal against sentence — By Crown against inadequacy

Crown appeal – whether total effective sentence of main offender manifestly inadequate – robbery and assault causing serious harm to shopkeeper – sentencing where two offences contain common elements – overall sentence

needs to ensure that the offender is not punished twice for the same conduct – appeal allowed – respondent resentenced.

CRIME — Appeals — Appeal against sentence — Manifest excess

Appeal by co-offender – whether total effective sentence of co-offender manifestly excessive – robbery and assault causing serious harm to shopkeeper – co-offender's involvement less serious than that of the other offender – appeal allowed – appellant resentenced.

Criminal Code 1983 (NT) s 211
Sentencing Act 1995 (NT) s 40(6), s 52

Bara v The Queen [2016] NTCCA 5; *Bugmy v Queen* (2013) 249 CLR 571; *Carroll v The Queen* (2011) 29 NTLR 106; *Edmond & Moreen v The Queen* [2017] NTCCA 9; *Mill v The Queen* (1988) 166 CLR 59; *Pearce v R* (1998) 194 CLR 610; *R v Bendelle* (SCC 20106693; 2 May 2003); *R v Chambers* (SCC 20015052; 9 March 2001); *The Queen v Evans* [2013] NTCCA 9; *The Queen v Mossman* [2017] NTCCA 6; *Wright v The Queen* [2007] NTCCA 5 referred to.

REPRESENTATION:

Counsel:

The Queen:	S A Robson
Ryan:	I Read SC
Miller:	M Aust with J R Murphy

Solicitors:

The Queen:	Office of the Director of Public Prosecutions
Ryan:	Northern Territory Legal Aid Commission
Miller:	North Australian Aboriginal Justice Association

Judgment category classification:	B
Number of pages:	34

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

The Queen v Ryan; Miller v The Queen [2019] NTCCA 20
No. CA AS 2 of 2018 (21803523) and
No. CA AS 3 of 2018 (21803520)

BETWEEN:

THE QUEEN
Appellant

AND:

AARON RYAN
Respondent

BETWEEN:

DILLON MILLER
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, BARR and HILEY JJ

REASONS FOR JUDGMENT

(Delivered 17 September 2019)

THE COURT:

Introduction

[1] On 14 August 2018 Aaron Ryan, the respondent in CA(AS) 2 of 2018 (**Ryan**), and Dillon Miller, the appellant in CA(AS) 3 of 2018 (**Miller**), were convicted and sentenced in relation to offending on 20 January 2018.

[2] Both of them had pleaded guilty to three offences which they committed in company with each other, namely aggravated robbery and unlawfully causing serious harm to LV at the United Service Station, Heavitree Gap, and aggravated unlawful assault on MK. Ryan also pleaded guilty to aggravated unlawful assault on DK. Miller also pleaded guilty to aggravated assault on his father, CM. Both offenders were 22 years old at the time of the offending.

[3] Ryan was sentenced to a total of five years' imprisonment to be suspended after two years. The individual sentences imposed prior to adjustment for concurrency were for the aggravated robbery three years and nine months, for unlawfully causing serious harm to LV three years and nine months, for the assault on MK six months and for the assault on DK nine months.

[4] Miller was sentenced to a total of eight years' imprisonment and a non-parole period of five years. The individual sentences imposed prior to adjustment for concurrency were for the aggravated robbery five years and three months, for unlawfully causing serious harm to LV three years and nine months (the same as Ryan's sentence), for the assault on MK 13 months and for the assault on CM 18 months.

[5] The Crown has appealed against Ryan's sentences, in particular the total sentence of five years, on grounds including manifest inadequacy. Miller has appealed against his sentences, in particular the total

sentence of eight years with a non-parole period of five years, on grounds including parity and manifest excess.

[6] Counsel for the Crown has conceded that if the Crown's appeal against the inadequacy of the Ryan sentences is unsuccessful, Miller's appeal should be allowed.

Relevant facts

The robbery and assault at the United Service Station - both

[7] Most of these events were recorded on CCTV footage which was shown to this court. To some extent that footage amplified the facts that had been agreed.[1]

[8] Some time prior to 5.30 pm on Saturday, 20 January 2018 the offenders travelled to the United Service Station in Miller's car. Miller was driving. Both of them were heavily intoxicated and affected by alcohol and methamphetamine. They formed a common intention to steal alcohol from the liquor outlet at the store at the United Service Station. The liquor outlet was a caged area situated inside the store and had its own cash register inside the store.

[9] The principal victim, LV, aged 30, and his wife, SA, worked at the United Service Station as console operator and store manager respectively. The two of them were the only people working there at the time of the robbery and assault, having commenced duty at 10 am.

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1 Ex P1 "Crown Facts".

[10] At about 5.30 pm, Ryan entered the store and walked quickly to the liquor outlet. He was not wearing a shirt and appeared well-built and taller than LV. He picked up two 10 pack cartons of Jim Beam and Cola cans from the refrigerator and walked over to the spirit area where he picked up seven small bottles of Bundaberg Rum. While he was doing that, Miller entered the store. He too was taller than LV and was stockier than Ryan. Miller walked inside the shop, appeared to briefly look at what Ryan was doing, then quickly returned to the front door and held it open in order for Ryan to make a swift exit. When Ryan walked past the register, someone signalled to LV to indicate something was wrong. LV confronted Ryan and asked him what he was doing. He tried to take hold of Ryan's shorts to prevent him from leaving without paying and followed Ryan as he was heading for the door.

[11] Ryan dropped some of the bottles on the ground, quickly moved towards LV who was retreating, and punched LV to the face with his right fist. At the same time Miller moved forward from the doorway and then punched LV twice to the face with a left right combination. LV was shielding his face and body and trying to move out of the way. However he was unable to retreat as a counter was immediately behind him. Ryan then picked up one of the bottles of rum, approached LV again and threw the bottle at LV with full force from about a metre away. The bottle struck LV in the head. Ryan then punched LV to the

face again, twice, with right hand punches. Those punches were so hard that LV fell almost two metres to his right and onto the floor. Ryan's punches appeared to be deliberate and forceful, not the kind of wild punches one would expect of a person heavily intoxicated.

[12] Ryan moved straight to where LV was lying on his side trying to protect himself and stood over LV. He then stomped on LV's head with full force three times with his right foot. Miller picked up several bottles of rum from the floor and went over to where LV was cowering and stomped twice on his head. Both of the offenders were barefooted.

[13] Ryan and Miller picked up various items that were on the ground and moved towards the door as if to leave. However Ryan then moved back to LV, who was still on the floor but trying to get up and holding his hand to the left side of his head. Ryan stomped downwards on LV's head to force him back onto the ground. He then leant down and tried to rip LV's gold chain from LV's neck with sufficient force to lift LV's head in the process. Ryan then kicked LV in the face with full force. He then successfully ripped the gold chain from LV's neck. By this stage Miller appeared to have walked away and was standing just outside the door, and eventually appeared to be beckoning Ryan to leave.

[14] Although there had been a number of other people coming into and leaving the shop before and after the robbery and assault it does not

appear that anyone was inside when the robbery and assault were taking place, apart from the offenders, LV and his wife SA. However a number of people came inside the shop shortly after the offenders left. SA, LV's wife, was attempting to use a telephone to call for help. Some of the people who came into the shop approached LV to render him assistance and another man took the telephone from SA, presumably to assist with the call for help.

Impact on victims

[15] As a result of the assaults LV suffered fractured cheekbones on both sides of his face; fractured eye sockets to both eyes; a fractured nose and a fractured skull with air on the brain. He was initially unable to provide a statement of complaint due to the seriousness of his injuries.

[16] LV required maxillofacial surgery and still had not returned to work by time of the sentencing hearing, some seven months after sustaining his injuries. In his victim impact statement he speaks of the significant effect upon the lives of him and his wife, and in particular upon her mental health. From being a happy confident young couple they have lost all confidence and feel very unsafe. He experienced flashbacks, trouble sleeping and headaches. He feels guilty that he cannot give his wife the support that he feels she needs.

[17] LV's wife provided a detailed victim impact statement some five months after the offences. She and LV had been the only two people

working at the United Service Station that day. She speaks about how she felt as LV was being bashed and about trying to dial 000 but being unable to speak because her "voice and throat and mouth sucked without words". She thought her husband was going to be killed and she too was screaming for help. She said the trauma led to her having depression and severe post-traumatic stress disorder, suicidal thoughts and thoughts of self-harm. She was on medication and was attending various forms of counselling and doctors. She too speaks of the significant change that these events have caused to her and her husband. She also speaks of various expenses and other difficulties experienced, including paying for LV's mother to travel from Sri Lanka to assist LV.

Sentencing

[18] The learned sentencing judge said:

> So it is clear, when I come to sentence you for the first count of robbery, the circumstance of aggravation causing harm is based on the actual robbery and physical violence putting the victim to the floor.
>
> The second count is based upon the violence which caused the serious injuries. In other words, on the first count, I put aside the serious injuries. They come into play on the second count. In this way, we avoid doubling up in terms of the consequences of your actions.[2]

2 AB 103.2.

[19] In other words, his Honour regarded the facts and circumstances summarised in [11] above as relevant to count 1, and those summarised to in [12] and [13] above as relevant to count 2.

[20] In relation to count 1, the aggravated robbery, his Honour sentenced:

(a) Ryan to three years and nine months' imprisonment, reduced from a starting point of five years before discount;

(b) Miller to five years and three months' imprisonment, reduced from a starting point of seven years before discount.

[21] In relation to count 2, unlawfully causing serious harm to LV, his Honour sentenced each offender to three years and nine months' imprisonment, reduced from a starting point of five years before discount. His Honour directed that:

(a) one year of Ryan's sentence for count 2 be served cumulatively upon his sentence of three years and nine months for count 1, thus amounting to a total of four years and nine months for his offending at the United Service Station;

(b) one year and nine months of Miller's sentence for count 2 be served cumulatively upon his sentence of five years and three months for count 1, thus amounting to a total of seven years imprisonment for his offending at the United Service Station.

Aggravated unlawful assault on DK – Ryan only

[22] At about 6 pm, not long after leaving the United Service Station, Ryan and Miller were travelling in Miller's car on Basso Road, Alice Springs. Miller was driving. He stopped his car near another vehicle, a Mitsubishi Lancer, in which DK was sitting in the passenger seat. Ryan asked DK for a cigarette. DK replied that he did not have any cigarettes. Ryan then alighted from Miller's car and approached the rear passenger door of the Lancer while holding a bottle of rum. Ryan attempted to open the car door but it was held closed by a female friend of DK who was sitting in the back.

[23] Ryan became angry and shouted at DK and his friends that he was going to rob them because they would not let him in their vehicle. Ryan pointed to blood on his hands and knees, telling the occupants of the Lancer that it was not his blood but someone else's blood. Ryan approached DK who was still seated in the front passenger seat and punched DK with a clenched fist to the left side of his head. DK felt immediate pain to his left jaw. His jaw became swollen. DK was unable to attend for his work the next day.

[24] DK and his friends drove away in the Lancer and were followed by Miller and Ryan in Miller's car for a short time. During this time, Ryan was throwing bottles at the Lancer. As the Lancer approached the Alice Springs police station, Miller and Ryan continued travelling to Eastside.

[25] Although Ryan and Miller were both charged for this offending the Crown did not proceed with the charge against Miller. Ryan was sentenced to six months' imprisonment, reduced from a starting point of nine months before discount.[3] The sentencing judge directed that the whole of that sentence be served concurrently with the sentence of four years and nine months for his offending at the United Service Station.

Aggravated unlawful assault on MK - both

[26] At about 6.15 pm, Miller, still with Ryan as his passenger, drove onto a footpath running parallel to Undoolya Road and followed MK who was walking along the footpath. Ryan got out of Miller's vehicle and followed MK foot. He caught up with MK and asked him for cigarettes. MK told Ryan that he did not have any cigarettes and began to walk faster in order to get away from Ryan. Ryan then said to MK: "Just give me everything you've got".

[27] Ryan grabbed hold of MK's shirt from behind and pulled him in close. Ryan then punched MK to the right side of his face. MK felt immediate pain to his right jaw and he fell to the ground. MK rolled away from Ryan and got up and ran away. Ryan got back into Miller's car and they followed MK to Lindsay Avenue, where MK ran into a shop to seek help. Ryan and Miller remained outside the shop for

3 AB 110.5.

approximately five minutes, yelling to MK to come out. Eventually Ryan and Miller left. After he saw them depart MK left the shop.

[28] MK did not suffer any serious physical injuries. However he said that the whole incident caused him a lot of stress, anxiety, grief and heartache. He had previously been the victim of another assault in Alice Springs which resulted in his jaw being fractured and having to be repaired in Darwin. In light of this previous experience he was particularly frightened when he was being chased along the footpath and struck to the ground. He said: "The incident has scarred me for life. It was so violent and terrifying. I was in fear for my life."[4]

[29] His Honour sentenced:

(a) Ryan to nine months' imprisonment, reduced from a starting point of 12 months before discount, and directed that three months of that sentence be cumulative upon the sentence of four years and nine months for his offending at the United Service Station;

(b) Miller to 13 months' imprisonment, reduced from a starting point of 18 months before discount, and directed that three months of that sentence be cumulative upon the sentence of seven years for his offending at the United Service Station.

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4 AB 89-90.

Aggravated unlawful assault on CM - Miller

[30] Later that night, at about 9 pm, Miller went to a house at Indarpa Camp where his father CM was visiting family. CM was a 48-year-old resident of Alice Springs. Miller was intoxicated and Miller and CM ended up argued with each other. Miller kicked CM in the face and CM fell to the ground. Miller then proceeded to kick and punch CM several times to his face. Family members intervened to stop the assault and Miller ran away. As a result of the assault, CM suffered immediate pain, a fractured nose, a bloodshot eye and minor grazes on his face. An ambulance was called and CM was taken to Alice Springs Hospital for treatment.

[31] His Honour sentenced Miller to 18 months' imprisonment, reduced from a starting point of two years' imprisonment. He directed that nine months of that sentence be cumulative upon the previous sentences. This resulted in a total sentence of eight years.

Objective seriousness

[32] All of the offending was objectively serious. It involved unprovoked violence inflicted upon innocent, and in the case of LV, vulnerable, people going about their normal affairs.

[33] In particular, the offending at the United Service Station was protracted and of a high level of seriousness. The robbery involved punches to LV's face by both offenders and Ryan's forceful throwing

of the bottle at LV's head followed by the heavy punches that caused him to fall on the ground. This was a level of actual violence that was excessive and unnecessary to achieve the objective of stealing the alcohol. Although Ryan claims that he was intoxicated at the time of his offending the CCTV footage showed him to be very agile and skilled when he attacked LV, a man of much smaller build.

[34] What occurred after LV was punched to the ground was particularly serious. LV was extremely vulnerable and still lying on the floor following the previous assaults. Both Ryan and Miller moved in and stomped on the head of their defenceless victim several times. After it appeared that Ryan and Miller were about to leave with the stolen alcohol it seems that Ryan decided that he would go back and attack LV again. After picking up some bottles from the floor, Ryan walked over to LV again, stomped on his head, unsuccessfully attempted to grab the gold chain, kicked him to his face with his right foot and then roughly ripped the gold chain from LV's neck. This subsequent attack understandably caused additional distress to LV and his wife who were not to know whether, when and how the violence would end. The objective seriousness of this offending was high, at least in relation to Ryan's conduct.

[35] The objective seriousness of Ryan's attack upon DK was at the middle level of seriousness for that kind of offence. It was unprovoked and unwarranted and DK was vulnerable as he was sitting in the passenger

seat of his vehicle. Although only one blow was inflicted, Ryan and Miller continued to chase DK and his friends and Ryan threw bottles at their car. The chase only ended when the driver of DK's car approached the Alice Springs police station.

[36] The objective seriousness of the attack upon MK was also at the middle level of seriousness. It too was unprovoked and unwarranted and MK was vulnerable as he was walking alone along a footpath and found himself being chased first by a slow-moving motor vehicle and then by Ryan who punched him to the ground. That encounter also only ended when MK found the opportunity to run into a shop to seek help.

[37] Clearly, as the sentencing judge acknowledged, Ryan's role in, and thus his responsibility for, the joint offending involving MK was far more serious than that of Miller. Ryan was the primary aggressor, and Miller the follower.

[38] The objective seriousness of Miller's attack upon CM, his father, was also towards the middle level of seriousness. Although no weapon was used, Miller proceeded to kick and punch his father several times to his face after he had fallen to the ground.

Crown appeal re Ryan

Grounds of appeal

[39] Counsel for the Crown asserted three grounds of appeal, namely that:

1. the learned sentencing judge erred in the application of sentencing principle by first determining to impose a total effective sentence of no more than five years' imprisonment upon the respondent and then fixing individual sentences and applying concurrency, accumulation and totality so as to achieve a five year total effective sentence;

2. the learned judge erred by failing to apply the principle of parity;

3. the sentence imposed is manifestly inadequate.

[40] Counsel for the Crown devoted most of his argument to ground 1 and contended that if this Court is satisfied that that ground is made out it could set aside the sentence and resentence Ryan, irrespective of whether this Court was satisfied that the sentence was manifestly inadequate. We have concluded that the sentence was manifestly inadequate. Accordingly it is unnecessary for us to determine grounds 1 and 2. In any event, in relation to ground 2, the principle of parity is not available to the Crown as an independent and freestanding ground of appeal. There must be an attendant and manifest inadequacy to warrant appellate intervention.[5]

Relevant circumstances of Ryan

[41] Ryan was born on 29 June 1995 and so was 22 years old at the time of the offending. He was born in Alice Springs but moved to Western

5 *The Queen v Mossman* [2017] NTCCA 6 at [67]-[74].

Australia with his mother and older brother when he was an infant. His mother brought him up with his brother and two younger sisters in what the sentencing judge described as "a respectful household". He played AFL football in regional Western Australia and attended the Clontarf Academy in Perth for Year 11. After leaving school he engaged in various forms of employment including driving dump trucks for mining companies, fabricating tanks, and station work including fencing. He had a stable relationship from which there were two children and a third expected in September 2018. He started drinking alcohol when he was 17. This extended to binge drinking, particularly on weekends. He said that he had previously consumed methamphetamine on five occasions.

[42] He said that shortly before the offending he came to Alice Springs to visit Miller, who was his cousin, and intended to go to an Aboriginal initiation ceremony. Instead, the two of them drank alcohol all day and consumed methamphetamine. They were both very heavily intoxicated and affected by methamphetamine at the time of the offending. Ryan had virtually no memory of the events the subject of the offences.

[43] Ryan's lawyers provided the sentencing judge with a reference from the owner of a rural fencing company in Western Australia for whom he had worked for about four years. The writer of that letter stated that he was a quiet, hard-working, reliable and loyal employee and that he has a good attitude and has always been motivated and willing to learn

more. The writer was willing to employ Ryan again. Ryan also wrote a letter to the court describing his own behaviour as horrific, expressing his deep remorse for the victims, referring to the strong family values which his mother had instilled in him and to his relationship with his partner and children. He had no criminal history.

[44] His Honour accepted that Ryan was determined to get on with his life in a proper and law-abiding way. He accepted that Ryan's conduct was completely out of character and occurred because of his intake of methamphetamine and alcohol. He assessed Ryan's prospects of rehabilitation as very good, and considered that he will be "a good member of our community in the future."

Manifest inadequacy

[45] This Court has recently stressed the importance of the services provided by taxi drivers and their vulnerability to criminal conduct including stealing, assault, robbery and sometimes more serious crimes. They are particularly vulnerable when they are required to work alone and in circumstances where there might not be help at hand.[6] Similar concerns apply in other cases where, for example, shopkeepers, garage attendants and workers at fast food outlets are required to work alone, or in the present case with a vulnerable family member, and to handle the demands of antisocial, dishonest and sometimes violent customers. In many cases the victim will not be

6 See *Moreen v The Queen* [2017] NTCCA 9 at [8]-[12].

able to defend himself or herself, or to seek or get help, when threatened with or subjected to violence. People may not be willing to perform this kind of work for fear of being attacked. Denunciation, specific and general deterrence, and community protection are significant sentencing factors in these kind of cases where the victim or victims fall into that category.

[46] The offence of robbery potentially covers a broad range of conduct and has a wide range of levels of seriousness. This may be largely affected by the length of time during which the victim has been in fear of a threat or has been subjected to physical violence and, if so, of what kind and for how long.[7] In many cases where the stealing is only accompanied by a threat of violence the level of seriousness will be lower than if the stealing is accompanied by actual violence. Even in cases of the former kind the level of seriousness may depend upon when the threat was made, the nature of the threat and whether the offender had a weapon and or threatened to use the weapon.[8]

[47] Towards the lower level of seriousness are cases in which the offender steals a minor item and verbally threatens a shopkeeper who asks the offender to pay for the item as he or she is walking out the door with the item. More serious would be a case where the offender threatens the shopkeeper earlier than then, for example before the actual stealing

7 See for example *BB v The Queen* [2014] NTCCA 13 at [20] – [21]

8 See for example *MK v The Queen* [2018] NTCCA 18 at [17] – [20] and [33].

takes place, and the shopkeeper is or feels unable to seek help or escape. In cases where violence is actually used, again the level of seriousness will depend upon the nature and extent of the violence, and, again, the ability or otherwise of the victim to escape or seek help. And, of course, the impact upon the victim may be expected to be greater where the offender is not alone and appears to be in a position to inflict further violence unless the victim surrenders. Irrespective of the injuries and ongoing physical impacts of the violence one would normally expect ongoing, perhaps permanent, emotional impacts upon the victim and his or her loved ones.

[48] Where, as here, the robbery is committed in company and/or the offender is armed with a dangerous or offensive weapon and/or he causes harm to a person, he is liable to imprisonment for life.[9] Counsel referred the Court to a number of decisions at appellate level, and sentencing remarks of various judges of the Supreme Court, concerning the sentencing of offenders for robbery.

[49] In *Wright v The Queen*[10] the Court of Criminal Appeal reduced a sentence of 6 years and 6 months, after reduction for a plea of guilty, to 4 years' imprisonment. That matter concerned a robbery of drugs in a pharmacy. The offending in that matter was not as serious as that in the present case. The offending in *Wright* did not involve the

9 *Criminal Code 1983* (NT), s 211(2).

10 [2007] NTCCA 5.

application of physical violence and was not committed in company. Although the offender in that case had threatened the female victim with a syringe which contained a clear liquid, there was no real danger of him stabbing her with the syringe. When the victim took hold of the offender's wrist he did not struggle and the victim was able to restrain him from doing anything with the syringe. After making a similar threat to another person nearby a pharmacist gave him the drugs that he was attempting to steal and he left.

[50] Chief Justice Martin (BR) (Angel and Mildren JJ agreeing), said:[11]

> Every crime of armed robbery is a serious crime. People employed in pharmacies are vulnerable victims. Both general and personal deterrence were important factors in the exercise of the sentencing discretion. But as the facts outlined demonstrate, the crime committed by the appellant was not at the upper end of the scale of seriousness for crimes of this type and there were a number of mitigating circumstances accompanying the commission of the crime.

[51] Chief Justice Martin (BR) proceeded to refer to other sentences imposed by judges for armed robbery and in particular to those imposed by Mildren J in *R v Chambers* (SCC 20015052; 9 March 2001) and *R v Bendelle* (SCC 20106693; 2 May 2003). The offending in *R v Chambers* involved the robbery of a pharmacy of morphine by an offender who threatened a staff member with an unopened knife which was not shown to the victim. Chief Justice Martin (BR) quoted Mildren J's observation that the "sentencing range for this type of

11 *Wright v The Queen* [2007] NTCCA 5 at [20].

offences is between five to six years' imprisonment, less an appropriate discount for a plea of guilty and remorse."

[52] Chief Justice Martin (BR) then quoted the following observations of Mildren J in *R v Bendelle*, which he said was a similar offence of armed robbery, but involved a syringe filled with blood:

> The range of sentences in this jurisdiction for armed robbery of soft targets like chemists where the defendant has pleaded guilty, where the property taken was only worth a few hundred dollars, where there is limited planning involved, and where there is little or no actual violence caused is between four to five years for the head sentence. And this may be more or less depending on whether there are aggravating or mitigating circumstances. That range assumes also that the defendant has little or no relevant prior convictions.

[53] The Court in *Wright* applied that range in determining the appeal before them. Consistently with those approaches, we consider that the starting point for lower level offending of that kind should be between four and five years' imprisonment. This range is consistent with more recent sentences imposed by the Supreme Court and sentences accepted by this Court.[12]

[54] The sentencing range for the offence of unlawfully causing serious harm is very broad. This is because the circumstances of the offender and the offending vary widely between cases. That variance is seen in matters such as the facts of the offending in question, whether a

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12 See for example *The Queen v Evans* [2013] NTCCA 9 and *Edmond & Moreen v The Queen* [2017] NTCCA 9.

weapon was used, whether the offending took place in company, the nature and duration of the assault, the nature and timing of the guilty plea and what it indicated, the age of the offender, the extent to which the offender assisted law enforcement authorities, the nature and extent of the prior criminal history, the seriousness of the resulting injuries and the impact of the offending on the victim.

[55] The sentencing exercise is more difficult in cases where, as here, the unlawful infliction of serious harm is committed at the same time as the robbery. Unlike robbery cases such as those noted above involving threatened but no actual violence, the present matter involved considerable violence some of which caused LV serious harm and formed the basis of count 2. The fact that two offences of which an offender has been convicted contain common elements is not uncommon. A similar situation was considered by the Court of Criminal Appeal in *Bara v The Queen*.[13] Care must be taken in those circumstances to ensure that the offender is not punished twice for the same conduct. The principle to be applied and the approach properly taken in cases of that nature were discussed by the High Court in *Pearce v R.*[14]

13 [2016] NTCCA 5 at [51] – [56] in relation to offences of the unlawful entry with an offensive weapon and robbery whilst armed.

14 (1998) 194 CLR 610.

[56] In that case the appellant was charged in the one indictment with the two separate offences of maliciously inflicting grievous bodily harm with intent to do so and with breaking and entering a dwelling house and while therein inflicting grievous bodily harm on an occupant. In considering the matter the plurality recognised that the elements of the two offences overlapped but were not identical.[15] The former offence required a specific intent to do grievous bodily harm whereas the latter did not; and in the latter offence the grievous bodily harm was an incident of breaking and entering whereas in the former it was not. Those distinctions notwithstanding, the plurality made the following observations (footnotes omitted):[16]

> To the extent to which two offences of which an offender stands convicted contain common elements, it would be wrong to punish that offender twice for the commission of the elements that are common. No doubt that general principle must yield to any contrary legislative intention, but the punishment to be exacted should reflect what an offender has done; it should not be affected by the way in which the boundaries of particular offences are drawn. Often those boundaries will be drawn in a way that means that offences overlap. To punish an offender twice if conduct falls in that area of overlap would be to punish offenders according to the accidents of legislative history, rather than according to their just deserts.
>
> In the present case we need not decide whether this result is properly to be characterised as good sentencing practice or as a positive rule of law. There is nothing in ss 33 or 110 or the *Crimes Act 1987* more generally which suggests that Parliament intended that an offender such as the appellant should be twice punished for his inflicting grievous bodily harm on his victim ….

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15 (1998) 194 CLR 610 at [7] per McHugh, Hayne and Callinan JJ.

16 (1998) 194 CLR 610 at [40]-[42] per McHugh, Hayne and Callinan JJ.

> It is clear in this case that a single act (the appellant's inflicting grievous bodily harm on his victim) was an element of each of the offences under ss 33 and 110. The identification of a single act as common to two offences may not always be as straightforward. It should, however, be emphasised that the enquiry is not to be attended by "excessive subtleties and refinements". It should be approached as a matter of common sense, not as a matter of semantics.

[57] As already extracted and described above, the sentencing judge approached the sentencing exercise by treating the element of harm which constituted an aggravating circumstance of the robbery offence to be the harm inflicted by Ryan and Miller when they punched LV in the face and struck him in the head with the bottle of rum prior to him falling to the ground. In fixing penalty for the serious harm offence, the sentencing judge approached the matter on the basis that the charge comprehended the offenders' conduct after LV had fallen to the ground, which involved both offenders stomping repeatedly on LV's head, and Ryan kicking LV in the face and ripping the gold chain from his neck.[17]

[58] To some extent this approach involved a degree of artificiality but in our view was permissible.[18] Like the sentencing judge, we find it difficult to conclude which harm relates to each of the offences

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17 A more straightforward way of approaching the sentencing task would be simply to fix an aggregate sentence for the total offending. However this was not permissible in the circumstances. Section 52 of the *Sentencing Act* required the sentencing judge to fix a separate sentence for each offence.

18 An alternative approach would have been to characterise count 1 as charging a robbery aggravated by the fact that it was committed in company, with a weapon and in which the victim suffered harm, and count 2 as charging the causing of serious harm additional to the simple harm comprised within the robbery charge, irrespective of precisely when that additional serious harm was caused.

committed at the United Service Station, namely the aggravated robbery and unlawfully causing serious harm. This is mainly because of the impossibility of knowing exactly how, when and by whom the injuries constituting serious harm were inflicted. Moreover, the robbery extended beyond the initial theft of the alcohol accompanied by the first act of physical violence. It included further assaults that could be said to have been committed in order to prevent LV from taking any further action to prevent the offenders from taking the alcohol away with them. It also included the further act of removing the gold chain from LV's neck.

[59] Although there is necessarily some degree of artificiality involved in attempting to ascertain and identify the conduct involved in each particular offence, there is no such difficulty in reaching a conclusion as to the appropriate total sentence for counts 1 and 2. Ultimately, it is the total sentence for those two offences that requires consideration, irrespective of which particular facts relate to which or both of those two offences. We see no particular reason to disturb the individual sentences fixed by the sentencing judge, notwithstanding his Honour's approach to that exercise.

[60] However, when one looks at the totality of the conduct involved in counts 1 and 2 and the total sentence imposed on Ryan for that offending, namely a total of four years and nine months' imprisonment, we consider that that total amount was manifestly inadequate.

Effectively, the sentencing judge erred in ordering such a large degree of concurrency between the two individual sentences. In *Carroll v The Queen* this Court made the following broad statement of principle in relation to cumulation and concurrency in sentencing (footnotes omitted):[19]

> The following principles are well established. First, s 50 of the *Sentencing Act* creates a prima facie rule that terms of imprisonment are to be served concurrently unless the court "otherwise orders". There is no fetter on the discretion exercised by the Court and the prima facie rule can be displaced by a positive decision. Secondly, it is both impractical and undesirable to attempt to lay down comprehensive principles according to which a sentencing judge may determine, in every case, whether the sentences should be ordered to be served concurrently or consecutively. The assessment is always a matter of fact and degree. Reasonable minds might differ as to the need for cumulation. Often there will be no clearly correct answer. Thirdly, an offender should not be sentenced simply and indiscriminately for each crime he is convicted of but for what can be characterised as his criminal conduct. The sentences for the individual offences and the total sentence imposed must be proportionate to the criminality in each case.
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> ....
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> However, the overriding concern is that the sentences for the individual offences and the total sentence imposed be proportionate to the criminality of each case. Concurrency may be appropriate because the crimes which gave rise to the offender's convictions are so closely related and interdependent. What is necessarily required in every case is a sound discretionary judgment as to whether there should be cumulation or concurrency.

[61] The following principles govern the assessment of nexus and interdependency for these purposes. Where the offences are part of a

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19 *Carroll v The Queen* [2011] NTCCA 6; 29 NTLR 106 at [42] and [44].

single episode of criminality with common factors it is more likely that the sentence imposed for one of the offences will reflect the criminality of both, particularly where the circumstances in which each offence was committed were "highly interdependent".[20] However, the mere fact that the offences form part of what might be described as a single episode does not of itself warrant concurrency. The operative question is whether the sentence imposed for one offence encompasses in whole or in part the criminality of the other offence or offences.[21]

[62] In this particular case, there were two quite distinct species of criminal conduct (robbery and the infliction of serious harm), which constituted "separate invasions of the community's right to peace and order".[22] Given the manner in which the sentencing judge approached the sentencing exercise, the sentence imposed for the robbery offence did not encompass the criminality of the serious harm offence, the *actus reus* of which was constituted by Ryan stomping repeatedly on LV's head and kicking him in the face after he had fallen to the ground. Accordingly, considerations of nexus and interdependency did not call for any significant degree of concurrency.

[63] That conclusion is then subject to the application of the principle of totality. Totality is concerned with the overall appropriateness of the

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20 *Cahyadi v R* [2007] NSWCCA 1; 168 A Crim R 41 at [27]; *Nguyen v R* [2007] NSWCCA 14 at [12]; *Carroll v The Queen* [2011] NTCCA 6; 29 NTLR 106 at [40].

21 *Nguyen v R* [2007] NSWCCA 14 at [12].

22 *Attorney-General (SA) v Tichy* (1982) 30 SASR 84 at 92-93; *Johnson v The Queen* [2004] HCA 15; 205 ALR 346 at [4].

sentence imposed across a number of different criminal offences, regardless whether there is any nexus or interdependency between them. The overriding consideration is that the total sentence must not be disproportionate the total criminality involved in the conduct.[23] The effect of the concurrency ordered by the sentencing judge was that the component of Ryan's sentence referable to the robbery and serious harm charges was imprisonment for four years and nine months.

[64] In our respectful assessment, that penalty was manifestly inadequate having regard to the gravity and totality of the offending. We have reached that conclusion having regard to the maximum statutory penalties for each offence, the sentencing ranges discussed above, the method by which those offences were committed, the degree of harm caused and Ryan's culpability. During the course of the robbery Ryan not only punched the victim but also armed himself with and actually deployed an offensive weapon (the rum bottle which he brandished and threw at the victim). The infliction of the serious harm was constituted by a callous, pitiless and extremely violent attack on a helpless victim. The injuries suffered by the victim LV were grievous. Mitigating subjective factors could not be permitted to lead to a sentence which was manifestly inadequate. Ryan's personal circumstances, prior good work record, and his being a first offender with good prospects for

23 *Mill v The Queen* (1988) 166 CLR 59 at 63.

rehabilitation may be recognised and given effect in fixing the non-parole period at the minimum.

[65] Although that component of Ryan's sentence referable to the robbery and serious harm charges formed only part of the overall sentence of five years' imprisonment, the fact that it was manifestly inadequate also means that the overall sentence of five years' imprisonment was manifestly inadequate.

[66] Accordingly, we allow the Crown appeal in relation to Ryan.

Resentence

[67] We take into account the matters we have already mentioned, in particular his previous good character and prospects of rehabilitation. However, his offending, particularly at the United Service Station, was very serious and was responsible for the significant ongoing emotional issues for the two victims. As the sentencing judge pointed out Ryan's role in the infliction of violence on LV was more significant than Miller's. Ryan was the first to punch LV, he threw the bottle of rum at LV's head with full force from about a metre away, then punched him again twice causing him to fall onto the floor. While the victim was on the floor Ryan moved in and stomped on the victim's head with full force three times. Then, after he and Miller appeared to leave the store, Ryan moved back to LV who was still on the floor and stomped on him again and kicked him and ripped the gold chain from his neck.

[68] We resentence Ryan as follows:

(a) Count 1 - three years and nine months' imprisonment;

(b) Count 2 - three years and nine months' imprisonment, cumulative as to two years and three months on count 1;

(c) Count 3 - nine months' imprisonment, cumulative as to three months on count 2;

(d) Count 4 - nine months' imprisonment, cumulative as to three months on count 3.

[69] The total effective period of imprisonment is six years and six months, backdated to 20 January 2018. We fix a non-parole period of three years and three months imprisonment, also backdated to 20 January 2018.

Miller appeal

Grounds of appeal

[70] Miller has appealed on two grounds: disparity and manifest excess. For reasons that follow we consider that the total sentence of seven years' imprisonment that was imposed for Miller's involvement in counts 1 and 2 was manifestly excessive. Accordingly, there is no need to consider the parity arguments, particularly given the increase to Ryan's overall sentence for that offending. It suffices to say that, as is apparent from the description of the offending set out above, Ryan's

moral culpability for the robbery and the infliction of serious harm was significantly greater than Miller's.

Relevant circumstances of Miller

[71] Miller, born 12 January 1996, was also, but only just, 22 years of age at the time of the offending. He was born in Alice Springs and attended school in Alice Springs completing year 11 at Yirrara College. He was the sixth child of a family containing nine children. From an early age he grew up in an extremely dysfunctional household due to his father's alcoholism and violence. He, his mother and some of the other children spent a lot of time in women's shelters and out bush in order to escape the violence of his father. When he was about 14 he began drinking alcohol and smoking marijuana and getting into bad company in Alice Springs. He moved to his mother's community at Amata when he was 17 and obtained employment doing construction work. He obtained a number of qualifications including his white card and on-the-job training. When he was about 20 he left his employment in Amata and moved back to Alice Springs to live with his partner, with whom he now has a young child. He began drinking heavily and using methamphetamine.

[72] He has a criminal history which commenced in December 2009 when he would have been almost 14 years old. It includes three findings of the Youth Justice Court of aggravated assaults on a female with a weapon: two in January 2013 and the third in December 2013. He also

has a number of convictions for contravening domestic violence orders in 2013. His criminal history also includes a conviction for an aggravated assault in March 2016 which resulted in him being sentenced to three months' imprisonment, nearly all of which was suspended. That was his most serious offending since the aggravated assaults in 2013 when he was 17 years old. He has also breached bail on several occasions and breached conditions of court orders.

[73] The sentencing judge concluded that as a consequence of his alcohol and other substance abuse he has a propensity for violence. Defence counsel informed the sentencing judge that he had developed insight into his problems and wanted to get help. While in prison he had undertaken a course called "Taking Charge". He had reached the category of medium security and he had become a block cook. He was keen to attend DASA and get help for his problems with substance abuse. When he is released he hopes to improve his education, re-establish his relationship with his child and build on his prior work experiences. The sentencing judge accepted that there are "some prospects" of his rehabilitation because he has proved in the past that he is capable of working. However, much will depend upon his ability to overcome his problems with alcohol and methamphetamine.

Manifestly excessive

[74] As we have already observed, the offending, particularly at the United Service Station, was very serious. As we have also noted, however,

Ryan's offending was more serious than Miller's and his culpability of a higher level. Although Miller did punch LV twice after Ryan threw the initial punch, and stomped twice on LV's head when LV was lying on the ground, Miller played no further active role by way of inflicting further physical violence. Indeed it appears that Miller was ready to leave the store before Ryan returned to inflict further violence on LV.

[75] The main differences between Ryan and Miller for sentencing purposes were Ryan's lack of any criminal history and his prospects of rehabilitation, which the sentencing judge assessed to be very good. On the other hand Miller's unfortunate childhood would warrant special consideration in accordance with *Bugmy*.[24] Ryan's moral culpability was significantly greater than Miller's, and the weight properly accorded to his prior good character would not subsume the much more significant role he played in the offending. We consider that the total sentence for Miller in relation to counts 1 and 2 should have been lower than that for Ryan. Accordingly, in our respectful assessment the total sentence of imprisonment for seven years for that component of Miller's offending was manifestly excessive. It follows that his overall sentence of eight years' imprisonment for his offending that day was manifestly excessive.

[76] Accordingly, we allow Miller's appeal.

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24 *Bugmy v Queen* [2013] HCA 37, 249 CLR 571.

Resentence

[77] We resentence Miller as follows:

(a) Count 1 - three years' imprisonment;

(b) Count 2 - three years' imprisonment, cumulative as to 18 months on count 1;

(c) Count 4 - nine months' imprisonment, cumulative as to three months on count 2;

(d) Count 5 - 18 months' imprisonment, cumulative as to six months on count 4.

[78] The total effective period of imprisonment is five years and three months, backdated to 20 January 2018. We fix a non-parole period of two years and eight months' imprisonment, also backdated to 20 January 2018.
