CITATION:	*TM v The Queen* [2017] NTCCA 3
PARTIES:	TM
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA 7 of 2016 (21436343)
DELIVERED:	26 May 2017
HEARING DATES:	9 February 2017
JUDGMENT OF:	GRANT CJ, SOUTHWOOD and RILEY JJ
APPEALED FROM:	KELLY J

CATCHWORDS:

CRIMINAL LAW – OFFENCES AGAINST THE PERSON – JUDGMENT AND PUNISHMENT

Whether sentence was manifestly excessive having regard to the circumstances of the offending and the appellant – whether wrongly characterised as adult offending – whether failure to treat rehabilitation of a youthful offender as the paramount consideration – whether primacy erroneously given to deterrence, denunciation and punishment – whether purpose of rehabilitation and other subjective circumstances considered only in relation to when the sentence was to be suspended and not in fixing the head sentence – whether difference between the head sentence of four years and the requirement that the offender only serve three months produced a risk of unintended consequence and indicated sentencing error – appeal dismissed.

Youth Justice Act (NT) s 4(a), s 81(3)

Bukulaptji v The Queen (2009) 24 NTLR 210, *Dinsdale v The Queen* (2000) 202 CLR 321, *DPP v Lawrence* (2004) 10 VR 125, *Emitja v The Queen* [2016] NTCCA 4, *Markarian v The Queen* (2005) 228 CLR 357, *Nancarrow v The Queen* [2010] VSCA 300, *R v Bloomfield* [1999] NTCCA 137, *R v Goodwin* [2003] NTCCA 9, *R v Mills* [1998] 4 VR 235, *R v Nichols* (1991) 57 A Crim R 391, *Yovanovic v Pryce* (1985) 33 NTR 24, referred to.

Fox & Freiberg's sentencing: state and federal law in Victoria (Third Edition), Law Book Company, 2014.

REPRESENTATION:

Counsel:

Appellant:	P Bellach
Respondent	D Dalrymple

Solicitors:

Appellant:	North Australian Aboriginal Justice Agency
Respondent	Director of Public Prosecutions

Judgment category classification:	A
Number of pages:	18

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

TM v The Queen [2017] NTCCA 3
No. CA 7 of 2016 (21436343)

BETWEEN:

TM
Appellant

AND:

THE QUEEN
Respondent

CORAM: GRANT CJ, SOUTHWOOD and RILEY JJ

REASONS FOR JUDGMENT

(Delivered 26 May 2017)

THE COURT:

[1] Following a trial the appellant was found guilty by the jury of the offence of robbery with circumstances of aggravation that: the offence was committed in company; the victim suffered harm; and the victim was a female. The maximum penalty for the offence is imprisonment for life. The appellant was subsequently convicted of the offence and sentenced to imprisonment for four years suspended after he had served three months on various conditions of supervision. An operational period of four years was set.

[2] The appellant appealed against the sentence on the basis that it was manifestly excessive and crushing in all the circumstances.

[3] At the conclusion of the hearing the Court announced that the appeal was dismissed and advised that reasons for decision would be published. These are the reasons for decision.

The offending

[4] At the time of the offending the appellant was aged 14 years. He was in the remote Aboriginal community of Borroloola in the company of four other young males, his co-offenders, who were aged 17 years, 16 years, 15 years and 13 years. Two of the co-offenders suffered cognitive deficits which gave them a mental age of around 10 years. The appellant had no such intellectual disability. The victim was a young woman who was in Borroloola staying with her grandmother. The appellant was her nephew and known to her.

[5] On 11 August 2014 the victim had spoken with the appellant as she was making her way to a card game. She went to the card game and left around midnight to go home. At the time of leaving she had a tobacco pouch inside her bra which contained some tobacco, papers, $200 in cash and a satchel of cannabis.

[6] On her journey home the victim walked past the appellant, who was sitting outside a house with his co-offenders. The victim asked the appellant if he wished to buy cannabis and he responded that he did not. The victim walked

on following a road where there was lighting. The appellant informed his co-offenders that the victim had money and together they reached an understanding that they would follow her and, at a minimum, assault her. The sentencing judge said:

> Maybe you were all thinking about taking her money or her cannabis. Maybe one or more of you were thinking about trying to have sex with her, but you all planned to assault her at the very least.

[7] The five offenders took a short cut along a bush track and caught up with the victim. One of the offenders punched the victim to the head and she fell to the ground. All of the offenders then took part in punching her and kicking her. The offenders dragged the victim through the yard of a house to an unlit service road running along the back of the housing yards in that street. The group then continued to kick and punch the victim. While she was being kicked and punched one of the offenders felt in her pockets looking for something to steal but did not find anything. Another undid the button of her jeans and tried to pull her jeans down. This made the victim fearful she was going to be raped and she "redoubled her efforts and started kicking out". She was calling out for help but no one responded.

[8] At this time one of the offenders, SC, thought things were going too far and called on the others to stop. He was joined by another who stepped away and also called on his co-offenders to stop. SC then reached into the victim's bra and found the pouch containing cannabis. He showed it to his co-offenders and suggested that they "go and smoke it". At this point the

attack ceased and the offenders left the area of the assault and shared in the cannabis.

[9] The victim was abandoned. She made her way to a phone box where she called for assistance. She was treated at the local clinic for her injuries and was subsequently interviewed by police. In a victim impact statement made some two years after the offending she detailed some of her injuries. They included bruising, swelling, black eyes, gravel rash on her face, a sore back and generalised pain. She said that at the time of making the victim impact statement she continued to suffer pain at the back of her eyes, severe headaches and nightmares. The incident remained ever present in her thinking and she was anxious and scared in her own community. The sentencing judge noted that the victim had been terrified and thought she was going to be raped and killed. She suffered long-term psychological and emotional harm as a result of the offending.

[10] In her evidence in the trial the victim identified the appellant as "the main one" and gave evidence that he kicked and punched her in the face.

The appellant

[11] At the time of the offending the appellant was aged 14 years. He was 16 at the time of sentence. Through no fault of the appellant there were significant delays in the matter coming on for trial and, in the intervening period, he had been on strict bail conditions.

[12] The appellant was born in Borroloola and was mainly raised by his grandparents. He lived for a time in Darwin while he attended boarding school. Through his grandfather, who was a long-term employee of the Sea Ranger Unit in Borroloola, he had been involved in intensive turtle camps on West Island where children from the community were exposed to cultural studies, scientific research methods and kinship lessons. References were received from people involved in those camps who spoke highly of the appellant. However, as the sentencing judge observed, the descriptions provided by the referees were "very hard to reconcile with the brutal and selfish conduct" of the appellant in relation to the "young woman who is family" to him.

[13] Her Honour accepted that the appellant had been anxious about his case and concerned about the effects of his actions upon his family. However, and importantly, it was noted that he had not shown any genuine remorse for his actions. He had expressed no concern for his victim between the time of the offending and the time of sentence, a period of some two years. He did not at any time accept responsibility for his conduct.

[14] Regrettably, the appellant had a significant criminal history for a person of his age. Although he had no convictions he had a record count of 33 appearances before the Youth Justice Court where offences were found proved. The offences involved crimes of dishonesty, unlawful entry, stealing and property damage. He had one offence of aggravated assault upon a female causing her harm. In addition, he had what the sentencing

judge described as “an unfortunate history of breaching court orders”. All of the offending had taken place since 2012.

[15] Unfortunately, the appellant committed further offences after the date of this offence. His history included an offence of trespass which occurred on 7 June 2015, and offences of aggravated unlawful entry to a building with intent to commit a crime, damaging property and stealing which occurred on 23 June 2015. Each of these offences was committed while the appellant was on bail for the offence the subject of these proceedings. He was dealt with for those offences without proceeding to conviction.

[16] Notwithstanding the matters referred to above, given that the appellant was still very young, the sentencing judge correctly advised the appellant he had “good prospects if you are prepared to work hard and stick at your schooling”.

The sentence

[17] At the time the sentencing submissions were made the sentencing judge was provided with a table of comparable sentences. Her Honour had general regard to those matters and made specific reference to some that were said to involve particular similarities to the offending in question. No challenge was made to the suitability of the table of comparative sentences, either at the time of sentencing or on the appeal.

[18] The sentencing judge dealt with the three offenders who had pleaded not guilty to the offences together, and also made reference to the sentences

imposed upon the remaining two co-offenders. Her Honour undertook a detailed consideration of the involvement of each offender and fashioned separate sentences based upon the relevant circumstances of each offender.

[19] The appellant initially proposed a ground of appeal claiming that the principle of parity as between the offenders had not been properly applied, but subsequently (and correctly in our view) withdrew this ground when it became apparent that it was not sustainable. The principles of parity and equal justice in sentencing only require identity of outcome in cases that are relevantly identical, and permit different outcomes in cases that are different in relevant respects.[1]

[20] The sentencing judge observed that the appellant had "come to the end of the road when it comes to not recording convictions" and recorded a conviction. A term of imprisonment of four years was imposed. Her Honour indicated that, but for the significant delays in the matter, the sentence would have been suspended after a period of six months. However, in light of the delays and the strict bail conditions, the sentence was suspended after a period of three months upon a range of conditions directed towards enhancing the prospects for rehabilitation of the appellant. An operational period of four years was set.

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1 *Wong v The Queen* (2001) 207 CLR 584 at 608 per Gaudron, Gummow and Hayne JJ; *Green v The Queen; Quinn v The Queen* (2011) 244 CLR 462 at [28] per French CJ, Crennan and Kiefel JJ.

Manifest excess

[21] The principles applicable to an appeal based upon the ground that a sentence was manifestly excessive are well known and need not be repeated here.[2]

[22] In support of the claim that the sentence was manifestly excessive the appellant asserted that the sentencing judge wrongly characterised the offending by the appellant as adult offending leading, it was argued, her Honour to sentence on the basis the offenders, including the appellant, were to be punished like adults. It was submitted the effect was to remove rehabilitation as the paramount sentencing consideration and to give primacy to deterrence, denunciation and punishment.

[23] Further, it was submitted that rehabilitation and other subjective circumstances were considered only in relation to determining when the sentence was to be suspended, rather than also being given consideration in fixing the head sentence.

[24] Finally, it was asserted that the difference between the head sentence of four years and the requirement that the offender only serve three months, considered along with the four-year operational period, produced a risk of the type of unintended consequence described in *Dinsdale v The Queen*.[3]

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2 *Emitja v The Queen* [2016] NTCCA 4 at [39].

3 (2000) 202 CLR 321 at [14].

Rehabilitative purpose

[25] It is necessary first to give some consideration to the proper place of rehabilitative purpose when sentencing youth offenders. It is no doubt correct to say, as was observed in *R v Mills*[4], that in the case of youthful offenders, and particularly first offenders, rehabilitation is usually far more important than general deterrence. This recognises both that youthful offending is often the product of immaturity and that imprisonment has significant limitations as a rehabilitative tool. However, it is not correct to say that rehabilitation will necessarily be the "paramount" sentencing consideration in all cases, or that rehabilitation will necessarily be more important than other sentencing purposes.

[26] The focus on rehabilitation over deterrence in the case of youthful offenders is directed to the offender's capacity to alter his or her behaviour so as not to reoffend, and to ensure the youth is dealt with in a way that acknowledges his or her needs and will provide him or her with the opportunity to develop in socially responsible ways. Rehabilitation may carry far less weight in respect of a repeat offender who has previously been afforded a number of opportunities to modify his or her behaviours through the imposition of non-custodial dispositions, but has failed to do so and has committed a very serious criminal offence.[5] In such cases the prospects of rehabilitation may

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4 [1998] 4 VR 235.

5 As the seriousness of the criminality increases there will be "a corresponding reduction in the mitigating effects of the offender's youth": see *Fox & Freiberg's sentencing: state and federal law in Victoria* (Third Edition), Law Book Company, 2014, p 355. See also *R v Bloomfield* [1999] NTCCA 137 at [21], [34]; *R v Goodwin* [2003] NTCCA 9 at [10]-[11].

be considered as diminished, and the weight properly attributed to rehabilitative purpose in the sentencing process lessened as a result.[6] The youth must be held accountable and made aware of his or her obligations under the law and the consequences of contravening the law. The court must maintain a proper balance between the needs of the youth, the rights of the victim and the interests of the community.

[27] This is not to say that the prospects of rehabilitation will necessarily be considered as extinguished in cases of serious offending. It is only to say that the manner in which the balance is to be struck between rehabilitation and the other sentencing purposes will be guided by a consideration of both the seriousness of behaviour and the prior criminal history. That balance will be reflected in such matters as whether the sentence is custodial or non-custodial; and, if custodial, the length of the head sentence, whether a non-parole period or an order suspending sentence is imposed, and the minimum time to be served. By way of example, the purposes of punishment, denunciation and deterrence may be primarily served by the imposition of a stern head sentence, while at the same time the purpose of rehabilitation may be primarily served by an order suspending sentence after a period of incarceration of lesser duration than would otherwise have been required but for the offender's youth.

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6 *DPP v Lawrence* [2004] VSCA 154; 10 VR 125, cited in *Fox & Freiberg's sentencing: state and federal law in Victoria* (Third Edition), Law Book Company, 2014, p 354. See also *Yovanovic v Pryce* (1985) 33 NTR 24 at 27-28; *Nancarrow v The Queen* [2010] VSCA 300; *R v Nichols* (1991) 57 A Crim R 391 at 396.

[28] Against that background, the appellant submitted that the offending was not of such "considerable gravity" as to displace rehabilitation as the paramount sentencing consideration. The expression "considerable gravity" is taken from the observations of the Court of Criminal Appeal in *R v Goodwin*[7], where it was said:

> It is well established that if a young offender commits a criminal offence like an adult then that justifies sentencing him or her in a fashion more akin to an adult. Where crimes of considerable gravity are committed the protective function of the criminal Court would cease to operate unless denunciation, general deterrence and retribution are significant sentencing considerations even in respect of juveniles.

[29] The offending in the present case was, in fact, very serious. It involved an attack upon a defenceless woman late at night in an isolated location by five assailants. The attack was premeditated and calculated in the sense that the appellant and his co-offenders agreed to assault her, decided upon a route which would intercept her path of travel and, upon meeting her, immediately launched a physically violent attack upon her. She was then dragged from the street through a yard and into a dark service lane where her screams for assistance were less likely to be heard and detection was less likely.

[30] The attack was very violent, including both punching and kicking to her face and other parts of her body. It was a prolonged attack and the seriousness of the offending escalated with the undoing of the button on her jeans and the attempt to pull her jeans down. The victim was vulnerable and justifiably

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7 [2003] NTCCA 9 at [11].

feared she may be raped and/or killed. The offending came to an end when two of the offenders called on the others to stop and then took the cannabis from the victim suggesting the group "go and smoke it". The appellant took no action to bring the offending to an end. The impact of the offending upon the victim has been described above. The appellant did not show or experience genuine remorse for his part in the offending. He has not accepted responsibility.[8]

[31] The Court is required by the *Youth Justice Act* (NT) to "dispose of the matter in a way that is in proportion to the seriousness of the offence".[9] It was also necessary for the Court to ensure the appellant was "held accountable and encouraged to accept responsibility for (his) behaviour".[10]

[32] In sentencing the appellant the judge referred to the seriousness of the offending, but did not expressly characterise it as "adult-like". However, in sentencing one of the co-offenders her Honour observed that "when young people commit crimes like this, they can expect to be punished like an adult".[11] It may be accepted that the sentencing judge considered that the offending in this case had "adult-like" features, but to describe offending as "adult-like" in this context is simply another way of saying that the

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8 The finding by the sentencing judge that the appellant had not expressed genuine remorse for the offending and had not accepted responsibility for his conduct was in no way gainsaid by the submission that the appellant had matured over the intervening period between the commission of the offence and the time of sentence. It may be noted in that respect that he committed further offences and breaches of bail during that period.

9 *Youth Justice Act*, s 81(3).

10 *Youth Justice Act*, s 4(a).

11 Her Honour went on to say that was not so in the circumstances of the particular offender with whom she was dealing, who suffered from an intellectual disability.

offending behaviour is serious in nature. That determination is not limited to a consideration of the extent of the premeditation or whether weapons were used. It requires a consideration of all the circumstances of the offending.

[33] Having regard to the features of this offending it may properly be characterised as of "considerable gravity", with the consequence described by the Court in *R v Goodwin*.[12] Considerations of denunciation, general deterrence and protection of society had a significant part to play in determining an appropriate sentence. Such considerations had to be balanced with a consideration of the age of the appellant and his prospects for rehabilitation. It is apparent that her Honour took into account and applied the criteria relating to the sentencing of youths as required by the *Youth Justice Act*. In particular, her Honour dealt with the age of the appellant and the issue of his prospects for rehabilitation which, subject to qualification, were described as relatively positive. The sentence imposed upon the appellant and the sentencing remarks which accompanied that sentence do not disclose error on the part of the sentencing judge concerning the significance properly attached to the purpose of rehabilitation.

The attribution of weight at different stages of the sentencing process

[34] The submission that the sentencing judge did not take into account the appellant's prospects for rehabilitation and his subjective circumstances when determining the head sentence, and that her Honour only did so in

12 [2003] NTCCA 9.

determining when the sentence should be suspended, cannot be sustained. The sentencing remarks included a reference to the relevant subjective and mitigatory material before the head sentence was pronounced. The sentencing judge then went on to refer to a submission suggesting that the sentence be suspended forthwith and gave reasons for not accepting that submission. A fair reading of the sentencing remarks makes it plain that the relevant subjective and mitigatory material was taken into account in determining both the head sentence and the period to be served before it was suspended.

[35] Although the sentencing court takes into account the same considerations which inform fixing the head sentence, it may be expected to apply different weightings to those considerations for the purpose of determining whether an order suspending sentence should be made and, if so, after what period of imprisonment. It is both legitimate and appropriate where warranted by the circumstances of the case for a sentencing court to give greater weight to the purposes of punishment, denunciation and deterrence when fixing the head sentence, and to give greater weight to the purpose of rehabilitation in making an order suspending sentence.

[36] To do so does not constitute the adoption of a two-tiered approach criticised in *Markarian v The Queen*[13], wherein the objective circumstances of the offending determined the first tier followed by individual additions or

13 (2005) 228 CLR 357 at [37]-[39] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

subtractions having regard to the appellant's subjective circumstances. The sentencing judge's approach was entirely instinctual in the sense that it took into account the totality of the objective and subjective factors relevant to the exercise of the sentencing discretion in the imposition of both the head sentence and the order suspending sentence.

Disparity between the head sentence and the order for suspension, and the risk of unintended consequence

[37] Finally, it was submitted on behalf of the appellant that the significant difference between the head sentence of imprisonment for four years and the requirement that the offender serve only three months suggested that the subjective circumstances of the appellant were not given appropriate weight when the head sentence was determined. The appellant further submitted that this difference demonstrated that the sentencing judge had imposed a head sentence that would be inappropriate if unsuspended. That is, the head sentence was a disproportionate sentence in all of the circumstances of the case.

[38] In that context, counsel for the appellant drew attention to the fact that the head sentence and the operational period will not be completed until the appellant is 20 years of age. The argument followed that the commission of a further offence during the period of suspension would produce the sort of

unintended consequence referred to by Gleeson CJ and Hayne J in *Dinsdale v The Queen*.[14]

[39] That consequence would be the appellant's exposure to the restoration of some or all of the substantial period of imprisonment held in suspense, to be served in an adult facility. That possible consequence was said to be exacerbated by the disparity between the head sentence and the period to be served under the order suspending sentence. While it must be acknowledged that there is a significant difference between the head sentence and the time the appellant was ordered to serve in actual imprisonment, a number of observations may be made in relation to that contention.

[40] First, the reason for the difference appears to be that her Honour intended to require the appellant to serve a period of imprisonment of six months before suspending the sentence but determined that the period to be served should be reduced to three months. This reduction was to take account of the delay between the commission of the offence and the imposition of sentence, and the fact that the appellant had been under stringent bail conditions for 20 months. This was to err on the side of leniency in favour of the appellant and cannot of itself be a cause for complaint on his behalf.

[41] Secondly, in order to make good the proposition it is necessary to establish that the head sentence of four years was inappropriate. For the reasons already given, and in the absence of some relevant error on the part of the

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14 (2000) 202 CLR 321 at [14].

sentencing judge, it cannot be said that the head sentence was plainly and obviously excessive, and nor can it be said that the imposition of a head sentence of that duration was inappropriate. It would also seem highly unlikely that the sentencing judge did not contemplate that the appellant would be subject to the possibility of the restoration of the period of imprisonment in whole or in part in the event that he reoffended during the operational period. That possible consequence could not be said to be "unintended" in any relevant sense.

[42] Thirdly, as counsel for the respondent submitted, even if the appellant does breach a condition of the order suspending sentence or commit some further serious offence after attaining the age of majority and prior to the completion of the head sentence, it would not be inappropriate to bring him to account for that conduct. Whether any part of the sentence held in suspense would be restored in those circumstances would depend entirely on the nature of the breach or further offence in question. Given the approach required when considering the restoration of the whole or some part of a sentence held in suspense[15], it is unlikely that a breach of condition would lead to a restoration of the sentence held in suspense unless serious. It would also be open to the appellant to seek some variation or reconsideration of sentence in the event the circumstances warranted such an application.

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15 *Bukulaptji v The Queen* [2009] NTCCA 7; 24 NTLR 210 at [35], [39].

Disposition

[43] Whilst the head sentence imposed upon the appellant was stern, and the operational period was lengthy, in our opinion neither could be said to be manifestly excessive. The operational period, while unusually long in relative terms, did not exceed the bounds of a proper discretionary sentence.

[44] The appeal is dismissed.
