PARTIES:	PENHALL, Casper v PRYCE, Leonard David
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	1 of 1997
DELIVERED:	Alice Springs, 2 May 1997
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JUDGMENT OF:	MARTIN CJ

CATCHWORDS:

Criminal Law - Appeal and new trial and inquiry after conviction - Appeal and new trial - Appeal against sentence - Appeal by convicted persons - Application to reduce sentence - Appeal against exercise of discretion - Whether failure by lower court to give any or sufficient weight to mitigating factors - Rules applicable to appeal against exercise of discretion relevant - Prior record a relevant consideration - Magistrate did not offend against principles applicable to offenders with prior history - Other sentencing options not deserving of close attention in this case.

Sentencing Act (NT) 1995, ss52, 57(1) and 59.

Gronow v Gronow (1979) 144 CLR 513 at 519, applied.
Veen v R (No. 2) (1988) 164 CLR 465, referred to.

Criminal Law - Appeal and new trial and inquiry after conviction - Appeal and new trial - Appeal against sentence - Appeal by convicted persons - Application to reduce sentence - Greater emphasis on rehabilitation when fixing a non parole period than in fixing head sentence - Interests of community and appellant considered - Non parole period imposed by lower court excessive.

Bugmy v R (1990) 92 ALR 532 per Mason CJ. and McHugh J. at 536, applied.

REPRESENTATION:

Counsel:

Appellant: Mr D Bamber
Respondent: Mr M Fox

Solicitors:

Appellant: CAALAS
Respondent: Office of the Director of Public Prosecutions

Judgment category classification: B
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IN THE SUPREME COURT
OF THE NORTHERN
TERRITORY OF AUSTRALIA
AT ALICE SPRINGS

No. 1 of 1997

BETWEEN:

CASPER PENHALL
Appellant

AND:

LEONARD DAVID PRYCE
Respondent

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 2 May 1997)

The appellant was convicted upon his plea of guilty before the Court of Summary Jurisdiction at Alice Springs on 16 January 1997, firstly, for that on 19 May 1996 he unlawfully assaulted Kurt Collins, and secondly, that at that time he stole a can of beer from him. He was sentenced to an aggregate term of imprisonment of twelve months to be served cumulatively upon a sentence of three months imprisonment then being served (being the unsuspended portion of a sentence of six months). The period during which he was not to be eligible for parole was fixed at ten months. The non parole period was expressed to have commenced on 5 December 1996, upon which date the

original sentence had commenced. For reasons given later, I consider that to have been beyond the Court's power.

The grounds of appeal are:

(a) The learned Stipendiary Magistrate failed to take into account, or failed to properly take into account, the Appellant's frank admissions to the Police and his early plea of guilty.

(b) That the learned Stipendiary Magistrate failed to take into account, and failed to adequately take into account, the youth of the Appellant and his prospects of rehabilitation

(c) That the learned Stipendiary Magistrate failed to give any, or any mature consideration to other sentencing options, particularly Community Service work.

(d) That the sentence of 12 months imprisonment was manifestly excessive.

(e) That, alternatively, the learned Stipendiary Magistrate erred in failing to suspend the sentence, in whole or in part.

(f) That the learned Stipendiary Magistrate failed to consider, or gave insufficient weight to, the totality of the sentences imposed.

(g) That the learned Stipendiary Magistrate erred in finding the Appellant played a significantly greater role in the offence than the co-offenders.

(h) That the disparity between the sentences imposed on the Appellant and his co-offenders is such as to leave the Appellant with a justifiable sentence of grievance.

The appellant and Manuel Tilmouth were dealt with together by that Court on 15 January this year. A co-offender, David Woods, did not then appear, but was later arrested and was also dealt with on his plea of guilty by the same Magistrate. Another alleged co-offender has not been apprehended.

It is convenient to provide an overall summary of the facts admitted, and then provide details of the particular involvement of each of the co-offenders dealt with thus far and their personal circumstances so far as they are known.

Summary of the Offences

The appellant and co-offenders were intoxicated, and at about 8.35pm were in the vicinity of the Todd Tavern Bottle Shop. Three other men were walking south along Todd Mall carrying a carton of beer. One was named Roderick Wasson and another Kurt Collins. The third man was not identified.

One of the co-offenders, Woods, asked Wasson for a cigarette and was told he had none. Another of the co-offenders, not identified, suggested that they all follow the other three and steal the beer. They followed the group with the beer some distance along the mall to near the Reg Harris Lane, about two blocks from the Todd Tavern. Another unsuccessful request was made for a cigarette, and an altercation then took place involving the two groups of men as the co-offenders tried to steal the carton of beer. The offence was committed because the appellant and the others were intoxicated, had run out of money and wanted more to drink. The fighting arose because the other three men defended the carton. It seems to be accepted that the offenders had not originally intended to use violence. The proceedings were to be by way of committal involving as well a charge of robbery, but the plea was accepted and the robbery charge withdrawn at a time when the prosecutor had already arranged for a witness from interstate to be in Alice Springs to give evidence upon the committal. How those circumstances came to arise is not disclosed.

The Appellant admitted as well that it was he who made the second approach for a cigarette, and then Manuel Tilmouth approached Kurt Collins, who was carrying the carton. The appellant also approached Collins and struck him with a clenched right fist to the left side of his face causing bruising to his left eye. Penhall then pushed Collins who fell to the ground and dropped the carton which broke open. Penhall began to pick up the cans of beer. He took one with him when he decamped upon the arrival of the

police. He was apprehended nearby and held because of his intoxication. The next day he was interviewed and admitted that he was thinking about the carton as he walked down the mall with the others, and that he and Manuel Tilmouth were fighting (Collins).

The appellant was born on 14 January 1976, and was thus a little over twenty at the time of the offence, twenty one when dealt with. An Aboriginal who normally lived at Yuendumu, he had been in employment fixing tyres and earning about $600 per week (?per fortnight). He had a significant record of prior convictions commencing in 1994, including for unlawful use of motor vehicles, stealing, assaulting police (two counts dealt with at the one time, presumably involving two separate policemen on an occasion when he was being arrested), being armed with an offensive weapon (particulars unknown) resisting police, and for sundry motor vehicle offences, including four for exceed .08 and two for driving whilst disqualified. At the time he was before the Court on this occasion he was serving a sentence of imprisonment following conviction on 9 December 1996 for driving whilst disqualified and exceeding .08. The record as to the length of the term of that sentence is not clear, but it was put to the Court, and not disputed, that he had two months of that sentence to serve when sentenced on 16 January. He has successfully complied with an order for community service for a substantial number of hours upon convictions in April 1996 (a month before committing this offence).

Manuel Tilmouth was the person who first approached Collins and attempted to pull the carton from him, after which Penhall punched Collins. Tilmouth began to pick up the cans spilled from the carton and threw one at Collins, causing Collins to duck to avoid being struck. When apprehended by police shortly after the event he gave a false name and address, but shortly thereafter, being identified by others, confirmed his real name. He was arrested and detained whilst police made further enquiries. The following day he was interviewed and made no admissions. He pleaded guilty on this occasion. On the same day upon which he was dealt with for these matters he had also pleaded guilty to assault upon a female by punching and kicking her at an earlier time. For that he was sentenced to three months imprisonment which was wholly suspended. At the time of sentencing for his involvement in this assault and stealing he was an eighteen year old Aboriginal who had no prior convictions (apart from the assault on the female). He was also employed at Yuendumu. It was put on his behalf that he was: "young and silly". He was sentenced to six months imprisonment which was also wholly suspended.

David Woods was the first to approach the other group for cigarettes. He took no part in the direct violence towards Collins, but was keeping a look out for police. He decamped with two cans. He was seventeen at the time of the offence, and spent a fortnight in custody (for failing to attend at Court when

first required in connection with these matters), had a minor prior record for dishonesty, but none for violence. He was also sentenced to six months imprisonment, wholly suspended.

Sentencing Remarks

The learned Magistrate recited the admitted facts and noted the appellant's age and other personal details. The violence was categorised as not severe, but inflicted on people going lawfully about their business, that is, not offering any reason to attract an assault. That made it a serious offence. The Magistrate assessed the appellant as having played a larger part than some of the others, noting in particular, the physical assault on Collins. In the Magistrate's view the circumstances called for a period of imprisonment, and given that less than a month before the commission of these offences the appellant had been before the Court on charges of stealing and unlawful entry, (for which the penalty was community service), it would not be appropriate to suspend the proposed term of imprisonment. It was also noted that the appellant had previously had a sentence of imprisonment suspended for violence, the assault on the police in February 1995, and that that had not deterred him (from further violence). That was given as a further reason for not suspending the proposed sentence. Reference was made to his successfully completing the period of community service.

The appellant was then sentenced to the aggregate period of twelve months (*Sentencing Act* (NT) 1995, s52) and that term was ordered to be served cumulatively on the period of the sentence then being served. (The Magistrate seems to have taken that period to be six months: However, there was no order that the part of the sentence suspended be restored, and thus the term to be taken into account for these purposes was three months). That sentence of six months imprisonment had not attracted the fixing of a non parole period (s53). In those circumstances the Court could not fix a new single non parole period in respect of both sentences which the appellant was then to serve (s57(1)). The non parole period of ten months fixed must be taken to apply to the sentence of twelve months imposed on 16 January 1997. Pursuant to s59 of the *Sentencing Act*, the appellant is to serve the term in respect of which a non parole period was not fixed, three months, and thereafter the non parole period of ten months, a total of thirteen months from 9 December 1996.

The Appeal

I have carefully considered all grounds of the appeal. The maximum penalty for these offences was for the assault, one year, and for stealing the beer, seven years.

What the appellant seeks to show is that the Magistrate failed to give any or sufficient weight to mitigating factors, such as cooperation with the police,

the plea of guilty and his age. Certainly, they are all matters which would tell in favour of the appellant. I am not satisfied that the Magistrate failed to take them into account or to give sufficient weight to them. They have to be seen against the gravity of the offending, the appellant's culpability by reference to his participation in the assault and stealing, and taking into account his prior record, including offences of a similar nature. I am again reminded of what was said by Stephen J. in *Gronow v Gronow* (1979) 144 CLR 513 at 519:

> "While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that the appellate court, left to itself, would have arrived at a different conclusion".

The appeal is against the exercise of a discretion, and all of the rules applicable to such an appeal must be borne in mind.

It cannot be held that the Magistrate failed to give consideration to other sentencing options in the sense that they were options that deserved careful attention in this case. They did not. The appellant's record showed that a range of non custodial sentences over a lengthy period prior to these events had failed to act as a personal deterrent to further offending. The immediacy of the community service orders prior to this offending is sufficient demonstration of that. His frequent convictions for driving whilst disqualified shows he holds the law in contempt. The well known principles applicable to offenders with a prior criminal history, as laid down by the High Court in *Veen*

v R (No. 2) (1988) 164 CLR 465, do not need repeating. It is not shown that the Magistrate offended those principles. Surely the time must come when an offender, knowing the benefit to be usually derived from mitigatory circumstances such as here, must be made to realise that they lose weight as offending continues in comparison with aggravating features such as continual disobedience to the law. The scales start to tip against the offender, even one who cooperates, pleads guilty and might be thought to benefit from better opportunities for rehabilitation because of youth or other factors.

The suggestion that the Magistrate erred in failing to suspend the sentence in whole or in part also fails. The Magistrate clearly considered whether the whole term should be served and decided to fix a non parole period. That may have been a favour to the appellant since supervision would cease at the end of the period of the head sentence (assuming release from prison on the expiry of the non-parole period), whereas suspending the sentence may have led to his being subject to direction and control for a longer period. No argument was directed to the relative merits of release on a suspended sentence or on parole.

As to the totality principle, it does not seem to me that it has any application when an aggregate sentence is imposed. It comes into play when a series of sentences have been imposed, and it is necessary to consider the result in the light of what is just and appropriate in relation to all the offences.

It is more appropriate to look at whether an aggregate sentence is manifestly excessive than seek to apply the totality principle, although, theoretically, either should return the same result.

It is not the case that the Magistrate erred in finding the appellant played a significantly greater role than the co offenders. He did, as the admitted facts show. In particular, he was the one who initiated violence against Collins by punching him in the face and causing him to fall.

Given the participation of the others in the offending and their personal circumstances, there is ample room for significant difference in the sentences imposed on each of them when compared with that imposed upon the appellant. His record can not be lightly dismissed in this context either. If he has a sense of grievance it can only be because he mistakenly thought that continuing disobedience to the law would be met with continuing leniency.

There remains the question of the non-parole period. For the reasons mentioned, it could apply only to the sentence of twelve months here under consideration. Had it applied to the combined periods of sentence of imprisonment of fifteen months and operated from the commencement of the suspended sentence (as the learned Magistrate indicated), it may have been unexceptional. But I do not think that that was open under the statute. The non-parole period could only apply to the sentence of 12 months here under

consideration, and I consider it was excessive. The minimum which could be ordered was six months (s54(1)). The factors taken into account in fixing the head sentence are also taken into account in fixing the non-parole period, but in that exercise greater attention may be given to the issue of rehabilitation. "The weight to be attached to the various factors and the way in which they are relevant will differ due to the different purposes behind each function", *Bugmy v R* (1990) 92 ALR 532 per Mason CJ., and McHugh J. at p536. The interests of the community and the appellant will best be served in this case, given his age and other factors relevant to his prospects of rehabilitation, if he does not remain in prison for so long. A period of reintegration into the community under supervision and direction as formulated by the Parole Board, at the appropriate time, is called for. That period needs to be longer than two months.

The appeal is allowed in relation to the non-parole period fixed at ten months. That order is quashed and in lieu thereof the non-parole period is fixed at six months from the commencement of the term of 12 months imprisonment imposed on 16 January 1997.

In all other respects the sentence and orders made by the Magistrate are affirmed.
