PARTIES:	SAY HOUR
	v
	BRYAN MICHAEL GOBLE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising TERRITORY JURISDICTION
FILE NO:	9718440
DELIVERED:	11 November 1997
HEARING DATES:	7 November 1997
JUDGMENT OF:	Thomas J

REPRESENTATION:

Counsel:

Appellant:	Ms F. Careton
Respondent:	Mr M. Fox

Solicitors:

Appellant:	NTLAC
Respondent:	Director of Public Prosecutions

Judgment category classification:	C
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tho97013

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 9718440

BETWEEN:

SAY HOUR
Appellant

AND:

BRYAN MICHAEL GOBLE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 11 November 1997)

This is an appeal against sentence from the decision of a magistrate sitting in the Court of Summary Jurisdiction on 26 August 1997.

Following a plea of guilty the appellant was convicted on that date of the following offences:

> "Between the 18th day of August 1997 and 19th day of August 1997 at Alice Springs in the Northern Territory of Australia.
>
> 2. did steal Holden Commodore sedan NT 506872, valued at $12,500.00, the property of Alan Thorpe:
>
> Contrary to Section 210 of the Criminal Code.

And Further
On the 18th day of August 1997 and 18th day of August 1997
at Tennant Creek in the Northern Territory of Australia.

3. did steal personal property, valued at $1,000.00, the property of T. Kanada:

Contrary to Section 210 of the Criminal Code.

And Further
On the 11th day of August 1997 and 11th day of August 1997
at Alice Springs in the Northern Territory of Australia.

4. did steal Citibank Credit Card, valued at 1.00, the property of Peter C. Low:

Contrary to Section 210 of the Criminal Code.

.....

And Further
On the 18th Day of August 1997
at Alice Springs in the Northern Territory of Australia.

9. by a deception, obtained property, namely $30.00 of petrol, of another, namely Peter C. Low:

And Further
On the 18th day of August 1997
at Renner Springs in the Northern Territory of Australia.

10. by a deception, obtained property, namely $50.00 of petrol, of another, namely Peter C. Low:

Contrary to Section 227 of the Criminal Code."

The maximum penalty for each of these offences is 7 years imprisonment. He was sentenced to 16 months imprisonment with a non parole period of 8 months.

The agreed facts in support of the charges are as follows:

"On about 11 August 1997 the defendant arrived in Alice Springs by bus from Brisbane. At Toddy's Cabins in Gap Road the defendant took a letter from the mailbox there belonging to a Peter C. Lowe. In this letter was a Citibank Visa credit card in the name of Peter C. Lowe.

The defendant took this card into his possession and placed a signature on this new card. On about 13 August the defendant travelled to Ayers Rock where he used the credit card to purchase bus travel from Ayers Rock to Alice Springs valued at about $100. However, he subsequently returned the ticket and the money was recredited.

At about 1pm on Monday, 18 August, the defendant went to Allan Thorpe Car Sales on the North Stuart Highway in Alice Springs. There the defendant spun a tale that he was Peter Lowe Chan, that his family was from Hong Kong presently living in Alice Springs and that he wanted to show his family the intended purchase. From this tale the defendant was allowed a test drive by himself.

He subsequently headed north in the vehicle. The vehicle was a Holden Commodore NT 506-872 valued at $12,500. Before leaving Alice Springs the defendant purchased $30 worth of fuel at an unknown location by using the credit card in the name of Peter Lowe. The defendant then stopped off in Tennant Creek where he went to the Tourist Rest Motel. There he met a Japanese tourist by the name of Ti Konada (?).

From a conversation with Mr Konada the defendant gleaned that Mr Konada was staying in room 10 and whilst Mr Konada was in the kitchen cooking, at about 9pm the defendant went to Reception, stated that his name was Konada and that he had forgotten his key and was allowed a key for room 10. The defendant then removed a bag that contained property such as wallet, credit cards, passport, camera, mobile phone, Walkman, an electronic dictionary and other items having a total value of about $1000.

Shortly afterwards the defendant headed north in the vehicle and on the way he threw out of the vehicle some of Mr Konada's property; namely sunglasses, passport and wallet minus the money and credit card. At about 11pm the defendant stopped at Renner Springs to re-fuel and there the defendant again used the credit card in the name of Peter Lowe and purchased $50 worth of petrol and then continued to head north.

Elliott police were alerted by Renner Springs and apprehended the defendant at Elliott at 12.05am on 19 August. He was placed [under] the provisions of section 137 of the Police Administration Act for the above offences and the following morning was interviewed in a taped record of interview. In this interview the defendant made full admissions in relation to the credit card.

Police had no information to go by and hence how the card came into the defendant's possession and subsequent use of at this stage is based on the defendant's admissions. In relation to the vehicle the defendant stated it was his plan to drive to Darwin and then to Sydney, as he is a student in computer and biology. On the defendant's apprehension there appears to be no damage to the vehicle."

The appellant by an amended grounds of appeal filed 6 November sets out the following grounds of appeal:

"1. The learned Magistrate erred in not giving sufficient weight to the circumstances of mitigation relied on by the appellant.

2. The learned Magistrate erred in not giving sufficient weight to the principle of rehabilitation.

4. The learned Magistrate erred in giving undue weight to the principle of retribution.

5. The sentence imposed was in all the circumstances manifestly excessive.

6. The learned Magistrate erred in attaching excessive weight to the appellant's prior convictions, particularly those in the Children's Court."

The general principles which I apply in dealing with this appeal are set out in two authorities:

Raggett Douglas and Miller v R (1990) 50 A Crim R 41 at 42 Kearney J and *Salmon v Chute & Anor* 94 NTR1 at 24 Kearney J.

A record of his prior convictions was put before the learned stipendiary magistrate as is before this Court (Exhibit P1).

The details of Mr Say Hour's background and other matters in mitigation, were put to the learned stipendiary magistrate by his counsel as follows:

> "He is 23 years old. He was born in Vietnam in 1974. In the late seventies he and his family escaped from Vietnam, travelling to Thailand - or to Cambodia, to Thailand and eventually entered a refugee camp in Hong Kong, and he instructs that during the course of that period, that journey, he has basically learnt that stealing was a way of life, of survival for him and it seems to be that that is a way of life that he has continued in Australia. Indeed, from his early days as a child it was very much the basis on which he and his family survived.
>
> His family remained in a refugee camp in Hong Kong for 2 years and then migrated to Australia and settled in Sydney in 1984. He has completed his primary schooling in Sydney and partially completed his secondary schooling before leaving, and when he left school originally that's when his problems with criminal activity commenced. He recently returned to study, studying computer science and biology at the University of New South Wales.
>
> Prior to coming to Alice Springs nearly 3 weeks ago he was hoping to transfer his studies to Centralian College, whereupon up here he could also obtain employment to supplement his Austudy income. That was his plan before the offences occurred.
>
> This year has been a very difficult year for him. In January this year, 2 days after his birthday, his wife of one year was shot dead and the perpetrators have not been discovered. Together they had a one year old son, who is currently in the care of his parents. His parents are hoping that he will return to Sydney at some stage to assist them and to look after the child and to observe his parental responsibilities.

Obviously the circumstances of his wife's death have caused him a tremendous amount of grief and depressive anxiety. He instructs that whilst in Sydney he was receiving medication to help him deal with the depression that he was suffering, and he was also consulting a psychologist in Sydney. Since being in custody in the last 7 days he's consulted with the prison doctor, who has recommended a referral to a psychologist to assist him deal with the grief.

It's quite apparent that given the absence of criminal activity in the last 3 years, mindful of the fact that there is an extensive history before this, this is the longest period of non-offending since that whole period of criminal activity began. It's certainly my submission that the details concerning his wife's death earlier this year have been a factor in developing a state of mind that has caused some instability in his life and some return to criminal activity.

He has instructed that when his mind is active when involved in his studies, that the grief and depression is not nearly as great. But since being in Alice Springs and basically being quite inactive, that the depression and grief was considerable and that certainly had some impact on his judgment and his actions."

In addition his counsel advised Mr Say Hour had travelled from his permanent home in Sydney to Alice Springs en route to Darwin to visit a friend. He was apprehended by police in Elliott on 19 August 1997. He was fully cooperative with police who only had information relating to the obtaining of petrol from Renner Springs. The other offences to which he entered a plea of guilty are based solely on his own admission. He pleaded guilty at the earliest opportunity.

I now turn to consider the grounds of appeal:

Ground 1. The learned magistrate erred in not giving sufficient weight to the circumstances of mitigation relied on by the applicant.

Counsel for the appellant submitted there were four factors in mitigation that the learned stipendiary magistrate failed to sufficiently take into account. These factors were (1) Mr Hour's background, (2) the emotional stress Mr Hour was undergoing following the death of his wife, (3) Mr Hour's remorse as indicated by the admission he made to police and his own acknowledgment of his wrongdoing, (4) the gap in time from the conviction for his last offence to the commission of this offence a period of 3 years and nearly 9 months.

It is the submission of counsel for the appellant that his Worship failed to balance the objective features of the offence with the mitigating factors.

During the course of his remarks on sentence, the learned stipendiary magistrate stated as follows:

> "You are a 23 year old man who has, quite obviously, suffered some difficulties in early life because of coming from Vietnam and having to reside in a refugee camp. You were finally allowed to travel to Australia, where you attended school, leaving school part way through your secondary education. Also to your credit is the fact that you've resumed studies.
>
> You have suffered significant heartache in the last 12 months. Your wife of one year was shot dead in what circumstances this court is unaware. You have a one year old son who is in the care of your parents. This has caused you grief and depressive anxiety. It is put that because you have not been in trouble for some 3 years, it can be assumed that the loss of your wife has caused you further instability and led you back into the path of offending. I think that is something that this court could accept.
>
> Nevertheless, it is not put and I would not accept that it was directly because of that death that you have committed these offences. You've pleaded guilty at a very early opportunity. You have had 3 years free of

> offending and I take that into account, as I do your co-operation with police. You do not come before the court as a young man without prior conviction."

These remarks indicate his Worship did have regard to all of the matters mentioned under this ground of appeal. I am not persuaded the magistrate was shown to be in error in the way in which he dealt with the background of the offender or the emotional stress he was suffering at the time of the offence. His Worship also clearly took into account that the appellant co-operated with police. In his reasons for sentence he had earlier stated "to your credit, you did fully co-operate with police and tell them of your activities". In respect of the period of time that elapsed since the appellant committed his last offence his Worship "referred to 3 years free of offending." Later on during the course of his remarks on sentence, his Worship analysed the appellant's record of prior convictions and noted convictions between 1988 and November 1993. In stating there was a period of 3 years since the last conviction his Worship acknowledged a significant gap in the offending of a 23 year old man. That was the important factor. His analysis of the prior convictions would indicate he was aware of exactly how long it was since the conviction for the last offence i.e. some 3 years and nearly 9 months.

I accept the principle expressed in *Veen v R* (No. 2) (1988) 77 ALR 385 at 393:

> "…. the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so

would be to impose a fresh penalty for past offences: *Director of Public Prosecutions v Ottewell* [1970] AC 642 at 650."

I am not persuaded that the sentence imposed by the learned stipendiary magistrate offends this principle or that the other matters raised under this ground of appeal have been made out.

This ground of appeal is dismissed.

Ground 2. The learned magistrate erred in not giving sufficient weight to the principle of rehabilitation.

I agree with the submission of counsel for the appellant that under the provisions of the *Sentencing Act* one of the purposes for which sentence may be imposed is to rehabilitate the offender. The provisions of s5(1)(b) are as follows:

> "(1) The only purposes for which sentences may be imposed on an offender are -
>
> (b) to provide conditions in the court's order that will help the offender to be rehabilitated;"

Further during the course of his remarks on sentence, the learned stipendiary magistrate says:

> "You have suffered misfortune in the last 12 months. You have suffered grief. But you've gone out and absolutely disregarded the rights of people in this town as to their property and you have totally disregarded the rights of a tourist to this Territory, not only taking his property after making his acquaintance but throwing part of that property away.

> I do not believe there is any alternative to imprisonment. I do not accept that you should be given a suspended term of imprisonment, as submitted by your counsel. You have been given ample opportunity in the past to avoid a course of criminal conduct. You are a man who has little regard for the rights or the property of others, and you must perhaps finally learn that if you wish to commit offences such as this, then you will receive a harsh punishment.
>
> I do not ignore the principles of rehabilitation and I will set a non-parole period. But you must learn that your conduct will simply not be tolerated, at least in this Territory. ....."

The submission by counsel for the appellant is that the only time the learned stipendiary magistrate refers to rehabilitation is in the reference to the fixing of a non parole period.

I agree that mitigating circumstances should be taken into account in the fixing of the head sentence (*Bugmy v The Queen* 169 CLR 525 at 531-532):

> ".... it follows that the considerations which the sentencing judge must take into account when fixing a minimum term will be the same as those applicable to the setting of the head sentence. Obviously, the weight to be attached to these factors and the way in which they are relevant will differ due to the different purposes behind each function.
>
> A prisoner's prospects of rehabilitation will be relevant to the fixing of a minimum term, both by way of mitigation and because the community benefits from the reformation of one of its members. ...."

I do not interpret his Worship's remarks as being that he ignored the principle of rehabilitation in fixing a head sentence but rather that he was acknowledging the relevance of rehabilitation to the fixing of a non parole period. The whole tenor of his sentencing remarks would indicate his Worship was weighing the objective facts of the offence with the mitigating circumstances. I am not persuaded that in fixing a total head sentence for the

five offences the magistrate failed to have regard to the aspect of rehabilitation. In fixing a non parole period the learned stipendiary magistrate fixed the minimum period of non parole being 50% of the head sentence.

The issue relating to the period of time since the appellant's last conviction was raised again under this ground of appeal. I have already dealt with that aspect in respect of Ground 1. The learned stipendiary magistrate did say that: "You are a person who has displayed a history of total disregard for the property of others." His statement correctly summarised the history of prior convictions. These comments need to be read in the context of the magistrate also making reference to the period of time since the last conviction as part of his considerations on sentence. In particular, he took into account that the appellant had some 3 years free from offending. This is a factor relevant to the issue of rehabilitation as is the credit given by the magistrate to the appellant for resuming his studies. It had been submitted to the learned stipendiary magistrate that at the time of committing the offences the appellant was a student in computing and biology residing in Sydney.

The magistrate is required to balance the mitigating factors with the need to take account of the aspects of specific and general deterrence (*Antony Valentini & Garvie v The Queen* (1980) 2 A Crim R 170 and *May & Wells v The Queen* (1981) 3 A Crim R 283). I am not persuaded that the learned stipendiary magistrate placed insufficient weight on the aspect of rehabilitation.

Accordingly, this ground of appeal is dismissed.

Ground 4: The learned magistrate erred in giving undue weight to the principle of retribution.

The aspect of retribution is a factor in the sentencing exercise. Section 5(1)(a) and (d) of the *Sentencing Act* provide as follows:

> "(1) The only purposes for which sentences may be imposed on an offender are -
>
> (a) to punish the offender to an extent or in a way that is just in all the circumstances;
>
> ....
>
> (d) to make it clear that the community, acting through the court, does not approve of the sort of conduct in which the offender was involved;"

The learned stipendiary magistrate was required under the provisions of the *Sentencing Act* to take retribution into account. The appellant has not satisfied me that the magistrate erred in giving undue weight to the principle of retribution.

Ground 6: The learned magistrate erred in attaching excessive weight to the appellant's prior convictions, particularly those in the Children's Court.

The learned stipendiary magistrate addressed the issue of the appellant's prior convictions as follows (t/p 7-8):

> "I refer to exhibit P1, which are the criminal histories provided from both Queensland and Victoria. I don't have regard to these criminal

histories with a view to punishing you again, because that would be quite wrong. You should not be punished for offences with which you have already been dealt with. I do have regard, however, to those histories to ascertain whether this series of events is an isolated one or whether it is part of a course of conduct, which it is.

I also have regard to that criminal history - or those criminal histories to look at those punishments that have been imposed in the past and whether they've had any effect, and therefore it would influence me in the type of punishment that should be imposed in order to protect the community from further behaviour and in order to deter you from committing further offences.

I will refer briefly to the criminal history because it is important the sentencing exercise is seen in the light of that history. It dates from Melbourne in 1988 when you faced charges of theft and with shop burglary two charges and theft two charges. Later in '88 burglary three charges, theft four charges. October '88 theft of motor car, theft, unlawful possession and theft.

November '88 two charges of theft of motor car, two charges of theft, two charges of burglary, further charges of burglary and theft extending in to '88, wilful damage; '89 theft. Further three charges of theft, two charges of burglary in '88. July '89 theft of motor car. September '89 theft, attempt to obtain property by deception, forge and utter. September '89 escape. I can't make out the month, but in '89 also three further charges of theft of motor car, attempted theft, four charges of criminal damage, going equipped to steal, burglary five charges, theft 11 charges, attempted theft.

Further theft, 11 charges. Loiter with intent 1990. Theft five charges, burglary, theft of motor car two charges and it goes on. Excuse me for a moment whilst I total things up. It might be easier. Leaving aside drug offences and escaping from custody and matters of that nature, besides those offences to which I've referred I've counted up another 162 offences of a dishonest nature. That is in Victoria, the last of those being in 1992, a charge of escape which was struck out. Otherwise in March 1992 various offences of dishonest nature.

In Victoria you received probation on a number of occasions, supervised adjournments, periods of detention or imprisonment at youth training centres, fines, imprisonment, convicted and discharged, suspended terms. In Queensland 1993 two charges of stealing for which you received bonds to be of good behaviour, and then in November, 4 days later in '93, two charges of stealing for which you received probation. False pretences and

stealing, for which you received probation.

So I have no idea the total of offences of dishonesty, but it must be getting up close to 200. You come before this court charged with a series of offences which are serious in themselves. ...."

The learned stipendiary magistrate made a thorough analysis of the record of convictions. He was aware from the record of the number of those convictions that had been imposed by the Children's Court. His Worship stresses that the appellant should not be punished for the offences which have already been dealt with. The learned stipendiary magistrate was required to take into account the prior criminal record of the offender. This prior criminal record was extensive and for offences of a similar nature to the offences committed by the appellant on this occasion. Even allowing for the fact that less weight is attached to prior convictions in the Children's Court the extent of the record and nature of the previous offences had to be considered. I do not accept the submission of counsel for the appellant that the learned stipendiary magistrate attached excessive weight to the appellant's prior convictions, particularly those in the Children's Court.

Accordingly, the ground of appeal is dismissed.

Ground 5: The sentence imposed was in all the circumstances manifestly excessive.

In his reasons for sentence the learned stipendiary magistrate reviewed the objective facts of the offence in these terms (t/p 6-7):

"…. Mr Hour, the facts in relation to these matters have been detailed to this court just a short time ago, and they were admitted. But put shortly, you arrived in Alice Springs from Brisbane and took a letter from a mailbox. That letter contained a credit card. You placed your signature upon that card. A week or thereabouts later you went to a car sales yard in Alice Springs.

You convinced those at the car sales yard to allow you to take a test drive without supervision and you headed north in that motor vehicle intending, as I understand it, to visit a friend in Darwin. The value of that motor vehicle was $12,500. Subsequently you purchased fuel on two occasions using the credit card. In addition to that, at Tennant Creek you made the acquaintance of a Japanese tourist. You managed to, through trickery, obtain the key to his room and you removed that tourist's property which included such items as wallet, passport and things of that nature. You headed north and discarded the property that you apparently did not want, until finally you were apprehended in Elliott and, to your credit, you did fully co-operate with police and tell them of your activities."

and (t/p 8):

"…… You come before this court charged with a series of offences which are serious in themselves. The taking of that motor vehicle in the circumstances that you did was serious. That was a local business that trusted you with its property as part of its business and you breached that trust.

You had a clear intention when you took that car of removing it from the possession of the owner, and it would seem eventually returning to Sydney in it. You took a person's mail that was left for them and you used the credit card that was in that mail to obtain further advantage. Perhaps one could think the worst of all was gaining the acquaintance of a tourist in this country, entering his room, removing property that you must have known would have caused him great difficulty on his travels within this country and which, no doubt, left a very sour taste in his mouth as far as this country is concerned."

The agreed facts demonstrate a degree of planning and pre-meditation on the part of the appellant. These were not offences committed on impulse when

an opportunity arose and without thought or planning. The appellant embarked on a course of conduct to obtain a motor vehicle by means of deceit and dishonesty. It involved a degree of skill and forethought. Similarly, in respect of the stealing of the wallet and other property from the Japanese tourist. This also involved a degree of planning and dishonest scheming to obtain access to the tourists hotel room under false pretences. The appellant then discarded those items such as passport and other items of no value to the appellant but the loss of which must have caused considerable distress and inconvenience to his victim.

The learned stipendiary magistrate found these offences to be serious and deserving of a sentence of imprisonment. His Worship also addressed his mind to the factors in mitigation including rehabilitation, the plea of guilty, the full admission made to the police which, in respect of some of the offences, was the only evidence, the indication of remorse, the period of time that had elapsed since the appellant's last conviction, and the other factors personal to the appellant to which I have already referred. The learned stipendiary magistrate arrived at a total head sentence of 16 months imprisonment with a non parole period of 8 months. The appellant has not satisfied this Court that the sentence imposed was in all the circumstances manifestly excessive.

Accordingly, the appeal against sentence is dismissed.
