PARTIES:	ROBERTSON v FLOOD
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	JUSTICES APPEAL from the Court of Summary Jurisdiction exercising Territory Jurisdiction
FILE №:	SCC 22 of 1992
DELIVERED:	Delivered at Darwin 29 October 1992
HEARING DATES:	Heard at Alice Springs on 11 June 1992 and Ali Curung on 18 September 1992
JUDGMENT OF:	Mildren J

CATCHWORDS:

ABORIGINALS - Crimes by Aboriginals - Alcohol problem - Community response - "Night patrol" - Range of tribal punishment - Considerations peculiar to aboriginals

Police Administration Act (NT), ss129,130,131,132,133
R v Minor (1991) 79 NTR 1, referred to.

ABORIGINALS - Crimes by Aboriginals - Isolated community - Alcohol problem - Assault police - Council request that offenders be imprisoned

APPEAL AND NEW TRIAL - Appeal - General principles - Admission of fresh evidence - Justices appeal - Hearing *de novo* - Sentence manifestly excessive

Seears v McNulty (1987) 28 A Crim R 121, applied.

COURTS AND JUDGES - Courts - Supreme Court of the Northern Territory of Australia sitting at Ali Curung

Supreme Court Act (NT), s13

COURTS AND JUDGES - Courts - Magistrates - Aboriginal council request that offenders be imprisoned - Warnings by magistrates

CRIMINAL LAW AND PROCEDURE - Jurisdiction, practice and procedure - Judgment and punishment - Sentencing - Principles applicable - Necessity to protect police

Liquor Act (NT)
Police Administration Act (NT), s158
Kumantjara v Harris (unreported, Kearney J, 24/8/92), applied.
Gadatjiya v Lethbridge (unreported, Mildren J, 28/2/92), referred to.
Halsey v Haymon (unreported, Mildren J, 10/6/92), referred to.
Leo Juli (1990) 50 A Crim R 31, referred to.
R v Minor (1991) 79 NTR 1, referred to.
Yardley v Betts (1979) 1 A Crim R 329, referred to.
Yovanovic v Pryce (1985) 33 NTR 24, referred to.

REPRESENTATION:

Counsel
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Respondent: J Adams

Solicitors
Appellant: CAALAS
Respondent: DPP

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

№ 22 of 1992

IN THE MATTER of a Justices Appeal

BETWEEN:

RODNEY ROBERTSON
Appellant

AND:

KENNETH JOHN FLOOD
Respondent

REASONS FOR JUDGMENT
(Delivered 29 October 1992)

Introduction
This is an appeal from a Court of Summary Jurisdiction pursuant to the provisions of the *Justices Act*.

On 24 February 1992, the appellant pleaded guilty to two counts of unlawfully assaulting a member of the police force in the execution of his duty, one count of resist arrest, and one count of using objectionable words in a public place. On the first count of unlawfully assaulting Constable Paul Ryan, he was sentenced to three months' imprisonment; on the second count of unlawfully assaulting Police Aide Ronnie Larry, he was sentenced to one month's imprisonment concurrent; on the resist arrest count, the court recorded a conviction without penalty; on the objectionable words count, the appellant was fined $200 plus $20 victim's levy, in default, five days' imprisonment.

The appellant has appealed only against the sentences of imprisonment on the first and second counts. The grounds of the appeal, as set out in the Notice of Appeal, are (1) that the sentences are manifestly excessive (2) that the learned magistrate failed to give proper weight to the appellant's youth and (3) that the learned magistrate

failed to consider alternatives to imprisonment. A further ground contained in the Notice of Appeal was abandoned at the hearing of the appeal.

The appellant was not granted bail in respect of his appeal until 3 April 1992 and has been on bail ever since. Thus he has already served five weeks and four days of his sentences (thirty-nine days).

I commenced hearing the appeal at Alice Springs on 11 June 1992. During the course of hearing the appellant's submissions, Miss Liddle for the appellant sought to rely upon certain observations of Muirhead J in *Jabaltjari v Hammersley* (1977) 15 ALR 94 at 97 concerning the traditional upbringing of an Aboriginal child at Papunya and the effect of initiation upon a young Aboriginal male's acceptance of responsibility to his community. In *Jabaltjari, supra,* there was evidence before Muirhead J to support his Honour's conclusions, whereas, in the present case, there was no such evidence before me, and I advised Miss Liddle that I was not prepared to assume that his Honour's observations in 1977 in relation to Jabaltjari, who was a member of the Papunya community, were appropriate today to the appellant, who lived at Ali Curung, a community I had never visited and knew nothing about. I also pointed out, that the learned magistrate's remarks on sentence indicated that he had previously warned this community that if police officers were assaulted, this would probably result in a prison sentence, but that I did not know when or why this particular warning had been given. It also transpired, from what I was told from the bar table, that very often magistrates who sat in courts of summary jurisdiction located on communities are given information, either formally or informally, by community leaders about the problems facing those communities, and that Ali Curung had a particularly serious problem with alcohol. The end result was that both the appellant and the

respondent indicated that they wished to call witnesses to give evidence concerning those matters. Most of these witnesses were located at Ali Curung or Tennant Creek. By consent I adjourned the hearing until Friday 18 September which was the next date available to me to resume the hearing.

After the formal proceedings had been adjourned it occurred to me that I ought to visit Ali Curung, and that, as most of the witnesses were from that area, it might be more convenient to hear the appeal there. In addition, it seemed to me that it might be helpful if I were to ask the learned magistrate for a report, to amplify certain of his remarks on sentence, which seemed to me to be directed towards those in Ali Curung who would have been aware from other hearings what his Worship meant by certain of those remarks, but which meant little to me. Consequently I invited counsel to see me in my chambers and put those matters to them. As a result, my suggestions were acceptable to both parties, and I made arrangements to sit in Ali Curung and to obtain a report from the learned magistrate. This report was later tendered in evidence.

The Ali Curung community

Ali Curung is an Aboriginal township situated about twenty-one kilometres east of the Stuart Highway and approximately 170 kilometres south of Tennant Creek. There is a police station, school, community store, and health centre, as well as a number of, mostly small, detached dwellings to house the population of approximately 450 permanent residents. The township is situated on Aboriginal land within the meaning of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*, and it is necessary for visitors to obtain a permit to visit it from the Central Land Council. There is no industry in the township or the locality to provide any employment, although I was told that some individuals involve themselves in market

gardening in a small way. At one time, there was a piggery, but this was destroyed by floods following heavy rains in the aftermath of Cyclone Tracy in 1974. In short, the township is isolated with only a few bare facilities and its occupants are amongst the poorest of the Northern Territory's inhabitants.

Ali Curung was originally known as Warrabri. The people are from four tribes, the Kaitja, Aleywarra, Walpiri, and Waramanga. (The spelling of these tribal names is not entirely clear). The traditional owners of the land near Ali Curung are the Aleywarra and the Kaitja. Each tribe has its own language. The Waramanga and Walpiri languages are similar to each other; the Kaitja and Aleywarra languages are similar to each other, but quite different from the Waramanga and Walpiri languages. Despite these differences, the people of Ali Curung have lived in reasonable harmony with each other for some time.

The police presence at Ali Curung consists of the OIC of the station, Senior Constable Flood, a constable and a police aide. There is a small lock-up at the police station.

The alcohol problem

Ali Curung is a 'dry community' under the provisions of s74 of the *Liquor Act*. Consequently, it is an offence to bring liquor in one's possession or control within the community, or to consume liquor within the community without a permit: *Liquor Act*, ss75 and 87. The nearest licensed premises to the community is the roadhouse at Wycliffe Well, some thirty-seven kilometres distant. The next nearest licensed premises are at Wauchope (fifty-five kilometres away) and at Tennant Creek. The precise terms of the liquor licences granted in respect of outlets at these locations was not in evidence. However, the report of the learned magistrate indicates that the Wycliffe Well roadhouse has, as a

condition of its licence, a limit on the number of cans of beer that can be sold for consumption away from the premises. There was no evidence before me critical of the licensee of the Wycliffe Well roadhouse. I visited the roadhouse and stayed there overnight on Friday 18 September 1992. The premises appeared to be well-run and there were no obvious signs of any problems there. However, there was evidence, which I accept, that a small core of mostly young hard drinkers from Ali Curung obtain their supplies, or some of their supplies, of liquor from Wycliffe Well, as well as from Wauchope and Tennant Creek, which they bring, or attempt to bring, into the community to consume. These people are, and have been, a considerable source of trouble to the community. I will return to this topic later.

The community is run by an elected Council of approximately twenty-four persons, made up of representatives from each of the four tribes. Apparently the Council has no legal standing; it does not possess any powers of a local government under the *Local Government Act*. Evidence was given by Mr Alan Haywood, the vice-president of the Council, and by Ronnie Larry Jungari, a member of the Council, elder of the Walpiri tribe, and also the police aide, concerning the problems that the community have experienced through alcohol. Mr Haywood said that when he first came to live at Ali Curung, there was no drink problem. The people lived a traditional life-style. The older people still do not drink. He said that the Council was concerned for the young men. There was nothing for them to do; they were bored, and took to drinking heavily. The Council is proposing to the people to introduce a CDEP program into the community. This would provide work and training for them and "keep them young people out of grog, make them work." [CDEP is an acronym for 'community development employment project.' Funds are allocated by the Commonwealth to the Aboriginal and Torres Strait Islander Commission for distribution to those communities which

chose to participate in a CDEP program. The basic idea is that, in return for the community voluntarily foregoing its members' entitlement to social security benefits under the *Social Security Act*, funds are allocated to the community by the Commission and the community provides part-time employment for remuneration at about the same rate as a job search allowance: see my judgment in *Harrower v Craig* (unreported, 29 September 1992).]

Police Aide Larry said that the community had a lot of problems with domestic violence caused by alcohol. Excessive alcohol consumption was a major cause of death in the community through motor vehicle accidents and "drunks sleeping on the roadside out in the bush." Whenever there is a death, the relations of the deceased have to go into a 'sorry camp' where "a number of things have to be done." A sorry camp might take weeks, or even months, before it is "finished up," depending on a number of things, including the closeness of the relationship of the deceased to his family, and the time taken for all of the family to hear the news of the deceased's death and attend the camp. He explained that the Council was concerned that there were too many sorry camps; so it resolved to establish a night patrol. He spoke passionately about the need to do something "to keep our people alive":

> "Ms Liddle: And when that night patrol started, the council itself wanted it to come here and start in this community?---The council wanted the night patrol to go out, try to prevent so many sorry camps and that.
>
> And they see that as the Aboriginal people themselves running that and trying to keep grog under control, don't they?---Yes, because in this community we are less people from our grog. That's how we set up this night patrol: to keep our people alive.
>
> And it's already working, isn't it?---Yes.
>
> Now, Ronnie, I want to talk to you about the amount of people who come into town and drink. When they come to drink, they don't normally drink here do they?---No, they drink out at Wycliffe area or out in the bush.

Best thing for them to stay there.

His Honour: Did you say Wycliffe Well?---Area.

Ms Liddle: And most people buy their grog from Wycliffe to they?---Yes, and Wauchope and Tennant Creek.

All about the same is it?---Some go on next days and (incomprehensible) in the car they - that's - we don't know what's - what they always bring back. I told them: 'You can't (incomprehensible) drunk in the community' and we have to do something to keep them alive by getting them locked up for the night to sleep."

The response to the alcohol problem

Senior Constable Flood said that he arrived in Ali Curung as OIC in December 1990. At that time, he said he had a lot of:

"... assault police and it took a while to get the community more tame. I achieved this - I believe I achieved the taming of the community by having a number of community meetings and with the assistance of the council here a night patrol was formed, and - so we got to a situation of heavy policing."

At that time, there was no police aide at the station; Police Aide Larry did not arrive until July 1991. The only assistance he had was one other constable; if further assistance was needed, it had to come from Tennant Creek. He explained how the night patrol operated. There were as many as twenty people involved including elders, women, and juveniles and the police aide. The police aide and the elders drive around in a police vehicle; the others use vehicles (including the garbage truck) and motor cycles supplied by the community, as well as some private vehicles. The vehicles are equipped with two-way radios. As soon as the drunks arrive, the police are notified and they are apprehended and taken into "protective custody." (Pursuant to s128 of the *Police Administration Act*, a member of the police force is empowered to apprehend, and take into custody, without arrest or warrant, a person in a public place or trespassing on private land reasonably

believed to be intoxicated. Sections 129 to 133 provide, in short, for the person to be released as soon as he has sobered up; he is not to be charged, questioned, photographed or fingerprinted, and cannot be held for longer than six hours without being brought before a justice of the peace who may order his release or further detention if still not sober). Over the last twelve months a total of 463 persons had been taken into protective custody; the majority of apprehensions have taken place on Thursdays or Fridays following receipt of unemployment benefits or other pensions; on those nights, up to twenty people have been apprehended in one night; some people have been apprehended three or four times a week; his best estimate was that only a very small percentage of the total community were so apprehended - allowing for women and children, he estimated that those apprehended may represent as little as 3 per cent of the total population.

Senior Constable Flood was asked about the effectiveness of the night patrol in reducing violence and crime generally. He gave most of the credit to the success of the night patrols to Police Aide Larry. He said:

> "Are you able to give an assessment, just a working assessment, of how effective - or what sort of reduction in crime rates has occurred since your - since the night patrol in Ali Curung has been operational?---Well, I can't get figures like - because you - one cannot estimate how many lives are saved, you know, through the night patrol. But the - I believe the community response has been outstanding. At the initial beginning of, you know, getting the night patrol together, one problem that had to be overcome was family members dobbing in other family members for being drunk and with possible pay-backs for dobbing in. Once that was overcome, the night patrol - where it was a community support, it' - and I believe the whole idea is to stop the violence. And with that, the two years I've been here we haven't had a homicide or a sexual assault involving the abuse of alcohol.
>
> Have you ever seen a community during your time as a policeman - not necessarily an Aboriginal community. Have your ever seen another community with scale of acceptance of being paced in custody?---No, I regard

this community as unique. For example, during my time here I don't experience break and enter offences, stealing; which is, you know, quite unique on a settlement. So I don't think you can compare two settlements. In comparison, I think Ali Curung would be streets ahead of other communities."

However, a not surprising consequence of the night patrol system's effectiveness is that there is a high level of assault police offences. Senior Constable Flood said:

"... a lot of the times a typical scenario is family reports a family member of being drunk and abusive, aggressive. Most of the time the family are fearing violence from that person, so that person's reported to the police. So if police didn't attend, that scenario could be played out where it's not police that are assaulted, it's other persons that are assaulted."

According to statistics kept by the police, there were a total of forty-five offences resulting in charges (including summons as well as arrest matters) at Ali Curung in the last year. Of this total, twenty were for assault police and 8 of those were given a gaol sentence. Senior Constable Flood was asked about this topic:

"Mr Adams: Now I can change the subject a little bit at this stage. You have been assaulted from time to time since you came to Ali Curung, have you?---Yes.

Are you able to say how many times?---I cannot say how many times; I've lost count.

What sort of assaults have you suffered?---Different assaults from being punched, wrestled, threatened with knives, boomerangs, nulla-nullas, star pickets. About the only assault I haven't endured is a firearm.

You've received five stitches to your head during one assault?---That is correct, yes.

And you received an injury to your knee during another?---Yes. I've got a recurrent knee problem which in the - some time in the future I believe will require surgery.

You get a cracking sensation in your knee, do you?---Yes, I have trouble bending the knee after it's been rested for certain periods.

Now, in those assaults do you have any view as to the number of them - the proportion of them that were - proportion of the offenders that were affected by alcohol at the time of the assault?---Yes. I strongly believe that every assault has been alcohol related.

Now, have you any views - I'll withdraw that. Are you aware that Mr Hook, and indeed - well, Mr Hook certainly has sent some offenders to gaol for assault police?---Yes.

Do you have any views on whether the bench exercising that power to send offenders to gaol is of support to you and your colleagues or not?---Yes, I believe that if I didn't have the backing of the court, I could not operate as I do.

What do you mean by that?---Well, from my experience here - bearing in mind the number of persons that are apprehended for being drunk, on a number of occasions some drunks have shown aggression and I've informed these drunks that if they do not - if they don't settle down or if they assault me, they can expect to go to gaol. And also with that, having a police aide here - part of his job is for the community to know that if anybody assaults police, woman or child they can expect to go to gaol.

And when you inform the drunks of that, what's in your view been the reaction?---Well, it's been favourable because a number of potential offenders know here that if they do assault police, they can expect to go to gaol and that's an ally; it's - well, it saves me being a punching bag on - every week."

Assault police - court action and community attitudes

As to warnings given to the community by the magistrates sitting at Ali Curung, Senior Constable Flood said that on a number of occasions prior to the appellant's offence he had been present in court and had heard the magistrate say that "if police are acting within a correct manner, that any person who assaults police can expect to go to gaol." Police Aide Larry gave similar evidence. I accept that this is the position.

Evidence was also given that on a number of occasions in the past, representatives of the council have approached the magistrates, in the presence of counsel for the accused

person, and have indicated that the council wanted those persons imprisoned or "exiled" from the community for assaulting police. 'Exile' has been achieved by release on a bond containing a condition to this effect. The learned magistrate in his report confirms that he has been asked to "exile" offenders on occasions. The general attitude of the community, according to Mr Haywood, is that those who assault the police should be sent to gaol. His belief is that this attitude has in the past been conveyed to the magistrates by other elders. Mr Haywood generally agreed, in cross-examination, that it would be preferable for offenders, particularly those who had not been in trouble before, to be dealt with in accordance with tribal custom, but my impression of his evidence is that the community believes that it is better for the courts to deal with troublemakers, particularly those who assault police. I accept Mr Haywood's evidence, which was in general supported by the other Aboriginal witnesses (with the sole exception of Mr Dick Robertson Jambajimba).

One other matter of some importance to this case relates to the community's attitude to acceptance of responsibility by young persons for what they do. The appellant's uncle, Dick Robertson Jambajimba, explained that, as children, members of the Walpiri tribe are not strongly disciplined. They may be smacked, but the usual approach is to give "a lot of love." Mrs Joanna Kidd Nambajimba, the appellant's aunt, said that young children are brought up by their mothers, aunts or grandmothers. In the case of a male child, it is not until initiation that the male members of the family assume any significant responsibility for their upbringing. She maintained however that young children who were in trouble would be "given a hiding." According to the evidence, a male child is often initiated whilst in his early teenage years. Once initiated, he achieves the status of an adult, can marry, and is expected to accept full responsibility for his behaviour, subject to the guidance

of an appropriate close relative (usually his father or an uncle). If he then misbehaves, that relative assumes some responsibility for his punishment. This might take the form of "growling"at the offender if the offence was minor; in other cases, the father or uncle might take him to an outstation; but in serious cases the offender would be taken bush by a number of his relatives and required to participate in special ceremonial instruction to teach him right from wrong. It does not appear that members of the immediate family usually impose any physical punishment, although Mrs Joanna Kidd Nambajimba maintained that in some cases, a young initiated offender would be "given a hiding." Whatever the form of punishment, in serious cases it appears that the punishment to be imposed is decided by the offender's family at a meeting called for that purpose. In general terms, my impression of the evidence is that little account is taken of the age of an offender who has been initiated in deciding upon the punishment to be imposed. In the case of the appellant, the evidence was that the appellant's family had discussed his case and decided that he ought to go back to gaol to finish the term of imprisonment imposed by the court; the community council had also reached the same conclusion; and that the only person who disagreed was Mr Dick Robertson Jambajimba. If he were to be imprisoned, neither the family nor the community would impose any other punishment upon him.

I should add that I was impressed by the way in which all of the Aboriginal witnesses gave their evidence. There was none of the usual shyness or reticence; nor would these witnesses provide answers to questions in order to please the questioner, not even in cross-examination and not even in response to leading questions. I suspect that the fact that the court was sitting in their community may well have contributed to this. There were some language difficulties, but in the end result I was able to reach a clear

understanding of each witness' evidence. I accept the evidence of these witnesses as truthful, frank and honest. By way of example I was impressed by the patently honest evidence of the appellant's aunts, Joanna Kidd Nambajimba and Ena Rex Nambajimba, both of whom were called by the appellant, who were adamant that, in their respective personal opinions, the appellant should go to gaol. Ena even proffered this opinion in examination in chief.

The offences

The facts, as outlined to the Court of Summary Jurisdiction, were that on Thursday 13 February 1992, the defendant had been drinking moselle with others. Police were called to a disturbance at about 6.00 pm, which the appellant was involved in. When asked to quieten down, the appellant replied with obscenities: "You can't tell me what to do", and directed other obscenities toward police. He was then informed that he was under arrest.

Police Aide Larry then placed his right hand on the appellant's left arm. When this happened, the appellant, with a clenched right fist, struck Police Aide Larry to the right side of the jaw, momentarily stunning him. Constable Ryan came to the assistance of Larry and was held at arm's length and then kicked in the stomach by the appellant's right foot, causing him to stumble several metres backwards.

The appellant was then taken hold of and taken to the rear of the police van, when he struggled violently, flinging both his arms about then grabbing hold of the cage and refusing to get in the van. During all this time the appellant was calling obscenities out to the police. The appellant was eventually subdued and placed in a cell. He was subsequently bailed and processed the following morning. At no stage did the appellant have permission to

strike either of the victims in any way.

The circumstances of the appellant

At the time of the offences, the appellant was aged seventeen, having been born on 6 October 1974. He was born in Ali Curung and raised in accordance with tribal custom. The appellant was initiated when he was fifteen. He recently married according to tribal custom. He was raised from an early age by his aunt Joanna Kidd Nambajimba, because his mother spent most of her time in Tennant Creek getting drunk in the hotels. His father died before he was initiated, and the responsibility for him then passed to his uncle Dick Robertson Jambajimba. He is a member of the Walpiri tribe. His uncle, who says he is the appellant's "second father" is strongly attached to him: "He's the only son I've got"; and considers himself responsible for his future: "He's on my hand now." The appellant is not known to be violent to his wife or family.

The appellant has little recollection of the events and was heavily intoxicated at the time.

He has completed primary school at Ali Curung and attended at an Aboriginal community college in Adelaide for a short time. It appears that his formal education is minimal. He has spent nearly all of his life at Ali Curung. He is unemployed, and his only interest seems to be playing football.

He has a number of prior convictions, all apparently for alcohol related offences. Some of these matters were dealt with in the Court of Summary Jurisdiction instead of the Juvenile Court due to a mistake as to his age. His first offence was on 14 November 1989 at Hermannsburg for bringing liquor into a restricted area. He was fined $350. On 11 September 1990 he was convicted of criminal damage

and ordered to perform forty hours community service. As he did not comply with that order, on 4 June 1991 he was sentenced to seven day's imprisonment by the Alice Springs Juvenile Court. On 1 July 1991 he was convicted of assault and criminal damage, fined $300 on each count and ordered to pay $500 restitution. I was told that the person he assaulted was the proprietor of the Wycliffe Well roadhouse. On 4 December 1991 he was convicted of criminal damage, fined $400 and ordered to pay $15 restitution. I would regard the prior conviction for assault as the most serious of these prior convictions.

The appellant has been assessed by a probation and parole officer as unsuitable for community service work.

The relevant sentencing principles

The relevant sentencing principles are not in doubt, but they do not all point in the same direction.

Firstly, it is appropriate to note that as I have, by consent, heard evidence called by both parties, this appeal is a *de novo* hearing calling for the exercise by this Court of original, and not appellate, jurisdiction. Accordingly, my function is to form my own independent opinion of the evidence on the material before me and give judgment as if I were sitting as a court of first instance: see *Seears v McNulty* (1987) 28 A Crim R 121 at 127-8.

The appellant was seventeen years of age at the time of this offence. In *Gadatjiya v Lethbridge* (unreported, 28/2/92) I had occasion to refer to a number of authorities relevant to the imposition of punishment for charges of assault, including those authorities which discuss imprisonment as an appropriate sentence in those cases where the offender is a youthful first offender. I will not repeat what I then said. Obviously the appellant is not a

first offender. The prior conviction for assault is relevant, as it indicates that the appellant is more morally culpable than someone without any prior history of violence. That fact, and the fact that these offences occurred whilst the appellant was under the influence of alcohol, point towards the need to give some priority to the deterrent purposes of punishment. As to the appellant's age, there are again conflicting considerations. The appellant was not a juvenile at the time of the commission of these offences. Thus the special considerations which apply to juveniles do not apply to him. On the other hand, at seventeen, he is not, according to the *Criminal Code*, an adult. Yet, according to the values of his own community, he is to be treated no differently to a person who is an adult. In *Yovanovic v Pryce* (1985) 33 NTR 24 at 27-8, Muirhead ACJ said:

> "There is wealth of authority supportive of the view that the courts should be slow to imprison young offenders, that the courts should keep rehabilitation much in mind. Few of those experienced with the effects of imprisonment and the sentencing of young offenders can feel much satisfaction that a sentence of imprisonment is a constructive step qua the offender himself. But there is a very real danger that repeated exercises in leniency bring the law into contempt, not only in the eyes of the offender, but in the eyes of the community. His Worship made clear reference to his responsibilities to the local community in his remarks on sentence. Unfortunately when previous efforts to rehabilitate by conditional release, community work orders and the like have failed, imprisonment remains the only option and there is always the hope that punishment may deflect the repetitive offender from the path he has taken - especially when other efforts have failed."

I consider that those observations (which were made in relation to a non-Aboriginal youth of seventeen years) are just as appropriate to an initiated Aboriginal young offender. They have a relevance also because the appellant has been assessed as unsuitable to perform community service. This still leaves a suspended sentence open as an

option, including the possibility of a house detention order. He has not been assessed for the latter. Also, one must have regard to the general policy of leniency towards those Aboriginal offenders who are disadvantaged socially, economically and in other ways because of their membership of a deprived section of the community: see generally *R v Minor* (1991) 79 NTR 1 especially at 12. In this respect, it is also relevant to consider the effect that alcohol has had on the appellant's chances in life. His mother, through drunkenness, left him to be raised by one of his aunts. Until relatively recently, little was able to be done to relieve the community in which he was raised from its adverse consequences. That the effects of alcohol can in such circumstances be seen as a mitigating factor has on many occasions been accepted. In *Juli* (1990) 50 A Crim R 31 at 36-7, Malcolm CJ referred to the circumstances under which alcohol may be treated as a mitigating factor, and to the relevant authorities, including numerous instances of reported judgments of this Court, and I need not repeat those observations. On the other hand, there are competing considerations which to my mind, are more important in this case. The first, is the need to protect the community. The evidence establishes, conclusively in my view, that Ali Curung is a community which has a significant alcohol problem caused by a small minority of mostly young drinkers. The community has taken positive steps to protect itself from these people. It is a declared restricted area under the *Liquor Act*. The legal processes involved virtually require the community's support before such a declaration is likely to be made. It has, in cooperation with the police, instituted a system of night patrols. In consequence, the level of violent and other alcohol related crime towards members of the community has diminished; but that violence is now directed towards the police who are there to protect the community. This gives rise to the second consideration. In order to protect the police, the

courts, through the magistrates, have indicated that assaulting a police officer invites a gaol sentence; so warnings have been given, quite properly in my view, and a number of persons have been imprisoned. Like offenders should receive like punishment. The third consideration is the need to protect the police. The evidence is clear that they are in need of protection of the courts. The assaults on Senior Constable Flood speak for themselves. The need to impose condign punishment on those who assault police working in remote Aboriginal communities was recently referred to by Kearney J in this Court in *Kumantjara v Harris* (unreported, 24/8/92). In that case, his Honour said:

> "When imposing punishment on those who commit aggravated assaults on police officers carrying out their duty, the courts are always conscious of the need for general deterrence. By the nature of their work, which is carried out in the public interest of maintaining peace and good order, police are always in a vulnerable position. The courts have always seen them as a particular category of persons who require the protection of the courts, as far as it can be given, from physical violence. This aspect is particularly to the fore, when the officers are in a particularly vulnerable situation, such as those posted to remote locations. The appropriate sentence in such cases will be one of immediate imprisonment, of a fairly long term."

His Honour's remarks were in relation to aggravated assaults upon police officers, but in my opinion similar considerations apply to the offence of assaulting a police officer in the execution of his duty contrary to s153 of the *Police Administration Act*, in the context of a community like Ali Curung where actual violence has been used. Of course, it is necessary to bear in mind the remarks of King CJ, with whom Mitchell J agreed, in *Yardley v Betts* (1979) 1 A Crim R 329 at 332-34. Assaults vary greatly in seriousness, from the type of assault I dealt with in *Halsey v Haymon* (unreported, 10/6/92), where the appellant spat at a police officer, and a fine is

appropriate, to more serious assaults where actual violence is used, and it is necessary to also bear in mind that the degree of injury suffered is not always a satisfactory measure of the offender's culpability. Similarly, offenders vary from those who are normally law abiding to those who are habitually violent. Consequently there can be no general judicial policy applying throughout the Territory that assault police is an offence where there is a presumption that the appropriate disposition is a gaol term. Each case has to be individually assessed. Nevertheless, in a place like Ali Curung, where there is serious actual violence upon police, gaol will often be appropriate because of the need to protect the police and maintain that community's protection; *a fortiori*, in those cases where the assaults are aggravated because they are committed in company with others or where a weapon is used. (It is somewhat odd that s188(1) of the *Criminal Code* imposes a maximum penalty of one year's imprisonment for common assault, and a maximum of five years' imprisonment if an assault is committed upon a person doing an act in execution of his duty or if the person is a public servant acting in the execution of his duty; yet the maximum penalty fixed by s153 of the *Police Administration Act* is only six month's imprisonment. Perhaps the reason for this attitude by the legislature is that assaulting a police officer is an occupational hazard for which they are trained to deal. However, in my opinion, those sorts of considerations have little weight in the context of a community like Ali Curung).

The final consideration is the attitude of the community itself. As I observed in *R v Minor, supra,* at 14, it is appropriate for the court to take into account the special interests of the community of which the offender is a member, and to take into account the wishes of that community so long as they do not prevail over what might

otherwise be a proper sentence. By this I meant that a court would not be justified in imposing a sentence more harsh than is otherwise appropriate, merely because that is the wish of the community. In this case, the community's wish is that the appellant should complete the terms of imprisonment fixed by the learned magistrate. In those circumstances, the community's attitude is not helpful to the appellant.

Conclusions

Bearing these matters in mind, and making due allowance for the appellant's plea of guilty, I consider that the proper sentences which ought to be imposed for these offences is a term of imprisonment. The assaults were accompanied by considerable violence on both the officers concerned, the appellant was heavily intoxicated and was involved in ma disturbance which the police were called upon to settle. Situations like this are potentially volatile. The appellant has a prior conviction for assault, and is unsuited to community service. I am not persuaded that home detention is a feasible option to someone living at Ali Curung who is unemployed. The conditions of that kind of confinement would invite a breach. I have considered whether the sentences should be suspended, but in all the circumstances I consider that, an actual term of imprisonment is necessary to deter others, as well as the appellant, from committing this kind of offence. Although the appellant is only seventeen years of age, he is not yet of an age where he is lawfully permitted to be supplied with liquor, and I bear in mind that the community is rightly concerned with the affects of alcohol on its young people, the need to discourage young people from getting violent when intoxicated and the fact that many of trouble makers in the community are in fact young drinkers.

I am unable to see why the assault on the police aide should have attracted a sentence by the learned magistrate of one month and yet the assault on Constable Ryan three months' imprisonment. To my mind, both assaults were equally serious and the same penalty should have been imposed in respect to both, and these sentences should have been ordered to be served concurrently as they arose out of the same set of circumstances. Having regard to the total conduct involved as well as of all the other matters to which I have referred, the fact that no serious injuries were sustained and no weapon was used, I consider that a term of imprisonment of two months is the appropriate sentence. I have power pursuant to s177(2)(b) of the *Justices Act* "to mitigate or increase any penalty" when hearing an appeal. No submission was made by the Crown that I ought to take that course in relation to the assault on the police aide and neither party made submissions on the point. I therefore do not consider it appropriate that I take that course. Having regard to the fact that the appellant has already served five weeks and four days of the original sentences imposed, I will frame the sentences so that he will now only have to serve the remainder. Accordingly, the appeal in relation to the sentence of one month for unlawfully assaulting Police Aide Ronnie Larry is dismissed. The appeal in relation to the sentence of three months' imprisonment for unlawfully assaulting Constable Paul Ryan is allowed and the sentence in respect thereof is set aside, and in lieu thereof I substitute a term of two months'imprisonment concurrent with the sentence imposed by the learned magistrate in respect of unlawfully assaulting police aide Ronnie Larry.