PARTIES:	MUNUNGURR
	V
	THE QUEEN
TITLE OF COURT:	In the Court of Criminal Appeal of the Northern Territory of Australia
JURISDICTION:	Court of Criminal Appeal of the Northern Territory of Australia exercising Territory jurisdiction
FILE No:	CA 18 of 1993
DELIVERED:	Delivered at Darwin 11 February 1994
HEARING DATES:	Heard at Darwin 1 and 2 December 1993
JUDGMENT OF:	Martin CJ, Angel and Mildren JJ

CATCHWORDS:

Criminal law - Leave to appeal - appeal against severity of sentence - considerations of Appeal Court to infer a failure properly to exercise the sentencing judge's discretion.

Criminal law - Appeal against sentence - whether sentencing judge failed to consider relevant considerations - factors to be given weight - Court should not reject matters put in mitigation of penalty without giving opportunity to call evidence - traditional law and punishment - relevance of wishes of prisoner's own community - evidence needed to prove community's views.

Criminal law - Appeal against sentence - sentencing principles - totality principle - offences from same set of circumstances - relevance of previous convictions - `gap' principle.

Statutes

Criminal Law (Conditional Release of Offenders) Act s7(2)
Supreme Court Act s13(2)
Criminal Code (NT) s188(2)(f); s419
Police Administration Act ss25, 26, 27, 28
Local Government Act

Cases

Robertson v Flood (unreported, Mildren J, Supreme Court NT, 29.10.92) mentioned.
The Queen v Davey (1980) 50 FLR 57 discussed.
Minor v R (1991-2) 79 NTR 1 applied.
Irvin v Whitrod (No. 2) (1978) QdR 271 referred to.
House v The King (1936) 55 CLR 499 considered.
Adami v Adami (1989) 42 A Crim R 8 followed.
Wayne v Boldiston (1992) 85 NTR 8 followed.
Wood v Samuels (1974) 8 SASR 465 applied.
Webb v O'Sullivan (1952) SASR 65 applied.
Yardby v Betts (1979) 22 SASR 108 applied.
Mulholland v R (1991) 1 NTLR 1 referred to.
Mill v The Queen (1988) 166 CLR discussed.

Text

Thomas, Principles of Sentencing 2nd Ed., p200

REPRESENTATION:

Counsel
Applicant: C McDonald
Respondent: R Wild QC

Solicitors
Applicant: NAALAS
Respondent: DPP

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

№ CA 18 of 1993

ON APPEAL FROM SCC № 85 of 1993

BETWEEN:

TERRY MARRITJNGU MUNUGURR
Applicant

AND:

THE QUEEN
Respondent

CORAM: Martin CJ, Angel and Mildren JJ

REASONS FOR JUDGMENT
(Delivered 11 February 1994)

The Court: This is an application for leave to appeal against sentences imposed upon the applicant by Kearney J on the 6 September 1993. The application, as well as the appeal itself, was heard on 1 and 2 December 1993. On 3 December 1993 the court announced that leave to appeal was granted and that the appeal was allowed, and in lieu of the sentences imposed by Kearney J the court imposed the sentences and made the orders which are set out in the schedule to these reasons. The court also announced that it would deliver its reasons at a later date. We now do so.

The charges

The applicant was charged with three counts to which he had pleaded guilty. Count 1 was that at 2 April 1993 he unlawfully caused grievous harm to Graham Maymura (referred to as "Graham Maymorou" in the facts and submissions before Kearney J); Counts 2 and 3 were that on the same date he unlawfully assaulted Constable Blanch and Senior Constable Majid respectively, and in respect of each assault charge the applicant also pleaded guilty to the circumstance of aggravation that each of those officers was at the time a public servant [acting] in the execution of his duty. The

maximum penalty which the applicant faced in respect of Count 1 was fourteen years' imprisonment. The applicant also faced a maximum penalty of five years' imprisonment in respect of each of Counts 2 and 3.

We raised at the outset of the hearing of the application with counsel for both sides whether the circumstances of aggravation alleged in respect of Count 2 and 4 were appropriate, as our tentative view was that police officers were not members of the public service within the meaning of s188(2)(f) of the *Criminal Code*, or, if they were, the duties carried out by police officers in preventing a breach of the peace were not acts carried out in the execution of their duty as public servants, but arose out of the duty of their office to keep the peace: see ss25 to 28 of the *Police Administration Act* and Form 1 to the Schedule of the Act and the remarks of DM Campbell J in *Irvin v Whitrod (№ 2)* (1978) Qd R 271 at 275-6. There were other circumstances of aggravation which appeared to be more appropriate (s188(2)(k) or (m)) and which would have attracted the same maximum penalty. Mr McDonald, who appeared for the applicant, did not seek to agitate these issues. We proceeded, therefore, on the basis that all charges had been properly laid and that the applicant had properly pleaded guilty to them and to the circumstances of aggravation alleged notwithstanding our doubts as to these matters.

The sentences imposed by Kearney J

His Honour imposed a total head sentence of four and one half years' imprisonment made up of three years' imprisonment in respect of Count 1; six months' imprisonment in respect of Count 2 (cumulative); and twelve months' imprisonment in respect of Count 3, cumulative upon the sentence imposed in respect of Count 2. A non-parole period of 12 months was fixed. By the time of the Court's orders on 3 December 1993 the applicant had served almost three months of those sentences.

The relevant facts

The applicant is an Aboriginal male about forty-six years old. He was born at Caledon Bay in eastern Arnhem Land. He is a member of the Yolgnu people and is of the Djapu clan and is of the Dhuwa moiety. He is married with four children. He has lived in the Northern Territory all of his life except for a period of eight months when he went to work in Brisbane. Whilst there he attended night classes and attained a tradesman's certificate in welding. He reached year 10 at Yirrkala Community School and can read and write. He had a good work history, mainly as a welder. In March 1992 he took up an elected position as secretary of the Lanhupuy Homelands Association, an organisation responsible for twenty-one outstations in the area where the applicant lives. The Association encourages and assists Aboriginal people to return to their tribal lands, to develop their own communities and run their own affairs in accordance with traditional culture. The Yolgnu people are divided into fourteen clan groups which are in turn divided into two moieties. Traditional marriages must be between members of the opposite moieties. In modern times, the Yolgnu people have established their own local town council at Yirrkala on the Gove Peninsular, the Yirrkala Dhanbul Community Association Incorporated.

The applicant has a strong traditional background and plays an important part in traditional ceremonies. He is a non-drinker. His only previous conviction occurred in September 1987 for unlawfully causing grievous harm - we will refer to this matter in more detail later. His youngest son had just been initiated and there was evidence that the applicant was needed to pass on to his son the traditional and cultural skills and learning he would need for the future. He was acknowledged as a respected leader of the Djapu clan. Evidence was also given as to his positive good character. As secretary of the Lanhupuy Homelands Association he was responsible for organising meetings of the communities as well as other duties, and there was evidence that he performed those duties well.

Prior to about 1970, the Yolgnu people lived under the influence of the Uniting Church. Arnhem Land at that time was an Aboriginal reserve, and a restricted area so far as availability of alcohol was concerned. Since mining operations commenced in the Gove Peninsular area and the township of Nhulunbuy was established in 1979, the Yolgnu people have moved more and more towards drinking alcohol as the influence of the church and traditional tribal discipline waned, with the result that it is now common for large numbers of young men to stay in Nhulunbuy every day just to drink. They sleep on the beach, and as a result of their drunken habits, ignore their clan leaders (such as the applicant) as well as their responsibilities to their families.

In addition to his own immediate family, the applicant had assumed parental responsibility for a fifteen year-old male, whom we will call "X," both of whose parents were deceased. X was the son of the applicant's wife's brother - a member of the Gumatj clan. On the evening of 1 April 1993, X had been drinking and was killed in a drunken brawl in front of the take-away bottle shop of the Gove Resort Hotel at Nhulunbuy.

At about 5pm on 2 April 1993, approximately forty to fifty Yolgnu men and women attended at a banyan tree at the rear of the Gove Resort Hotel to discuss, in the traditional way, the death of X. The identity of those thought responsible for X's death was not known to them at that time, but it was believed that they were from the Gurrawiwi clan. There were several family groups at this meeting, led by their elders. The groups included members of the Djapu and Dhalwangu clans as well as other clans, but not the Gurrawiwi. The meeting was effectively under the control of the leader of the Djapu clan, Mr Gatjil Djerrkura. Some of the men were carrying traditional weapons, such as shovel-nosed spears and woomeras, which are usually part of traditional grieving ceremonies, and apparently commonly taken to traditional meetings of this kind as well. This traditional meeting involved a formalised dispute between the clans involved, as a means of arriving at the truth. As well, exaggerated allegations are commonly made

about who had cared for the deceased during his life time and where he should be buried, often leading to fights, as a means of showing how much the deceased was cared for. Four police officers were standing by, watching, not intending to interfere, and speaking to Mr Djerrkura who was explaining the situation to them when a man called Yikaki (Peter) Maymorou came towards the group and began to shout and yell abuse.

Peter Maymorou is a member of the Mangalilli clan but his mother is from the Djapu clan. His abuse was in Aboriginal language and was upsetting to the applicant. He was suggesting in abusive language that the Djapu clan should pay back the Gurrawiwi clan, and that the Djapu were cowards. The insult to the applicant was made worse as he called the applicant 'uncle.' Peter Maymorou was under the influence at the time. He was himself an important man in the community - a commissioner with ATSIC - but for some time had been in the habit of drinking heavily. This lead to some pushing between Peter Maymorou and another person present and eventually punches were thrown. Graham Maymorou (Peter's brother), who was also drunk, came to support his brother. The applicant had also intervened to stop the fighting, but his efforts proving fruitless, he lost his temper, went to the back of Gatjil Djerrkura's car, armed himself with a large machete, and went back to the Maymorou brothers, swinging the machete around as he approached them. At this point others nearby tried unsuccessfully to restrain the applicant. One of the police officers, Constable Blanch, shouted to the applicant to drop the machete, but the applicant swung the machete vigorously at him, narrowly missing his stomach region. (This was the assault the subject of Count 2). Then Mr Djerrkura attempted to stop the applicant who, by this time, was facing Graham Maymorou. The applicant pushed Graham Maymorou causing him to stagger backwards, and he then struck him with the machete on the left forearm. The applicant continued to swing the machete at Graham Maymorou, but none connected. Mr Djerrkura stepped in again between the two men, but in the confusion, Graham Maymorou fell over. As he was getting up again, the applicant struck him with the machete on the left leg above the knee. He

continued to swing the machete, and Constable Majid rushed at him. At the same time, Mr Djerrkura grabbed him from behind, just as the applicant swung the machete at Constable Majid, making contact with the latter's right shoulder. The blow split Constable Majid's epaulette, but caused no injuries. The assault on Constable Majid was the subject of Count 3. The applicant was then disarmed by police. Graham Maymorou suffered a deep laceration to the left arm, including a fractured ulnar and damage to the extensor muscle and tendons resulting in a permanent loss of function of 40 per cent of the use of his wrist and fingers, and a 10cm laceration to the left leg. Notwithstanding these injuries, Graham Maymorou has been able to return to his former employment as a CDEP supervisor.

The applicant's previous conviction

On 18 September 1987 the applicant has also been convicted of the offence of causing grievous harm. That offence occurred on 30 April 1987. The victim on that occasion was a 'brother' to the applicant and a life-long friend. He had arrived in Gove to participate in a ceremony, and was sitting peacefully on the ground with some others drinking kava. The former Chief Justice, who heard that matter, accepted that the applicant believed that the victim had threatened or was intending to do some harm to the applicant's brother, and that in those circumstances the applicant believed he was under an obligation to attack the victim, and had probably been reminded of that obligation by other members of his clan. The applicant came up from behind the victim and speared him in the back, causing serious injuries, including the loss of a kidney. The former Chief Justice accepted that there was no intent to do more than harm the victim. The applicant and the victim later made up their differences, and there had been a "general tribal settlement in which all grievances had been adjusted." The applicant on that occasion had no prior convictions. He was convicted and sentenced to three years' imprisonment, suspended forthwith, upon his entering into a bond to be of good behaviour for three years. The applicant observed the conditions of this bond.

The submissions before Kearney J

It is necessary to briefly mention certain of the submissions made by the applicant's counsel before Kearney J. At the beginning of his submissions, a letter written on the letterhead of the Yirrkala Dhanbul Community Association Inc and signed by the Chairman and Town Clerk was tendered. The text of that letter was as follows:

> "1 September 1993
>
> TO WHOM IT MAY CONCERN
>
> I am writing on behalf of the Yirrkala Dhanbul community and the Rirratjingu Association regarding Terry Marritjingu Munugurr who was involved in an incident that lead to the death of a young man in Nhulunbuy a while ago.
>
> The argument between these two people was due to a family upset and had been going on for a while. The end result was an unfortunate accident. Since that time, the Yirrkala Dhanbul community has held a "reconciliation" ceremony and there is no bad feeling within the community.
>
> Terry Marritjingu Munugurr is of good character and is a responsible family man. We are very concerned that if he is imprisoned, it would have a terrible impact not only on his family as a whole, but particularly on his son who has just gone through his initiation ceremony and needs his father to pass on the traditional and cultural skills and learning that he will need for the future. He commands a great deal of respect as a Djapo leader, and holds a position with Laynhapuy Homelands. He also plays an important part in our ceremonies.
>
> The community does not want to see Terry go to jail. We would like to see him returned to the community to be dealt with in a traditional manner. If this is not possible, perhaps he could be placed on a good behaviour bond or confined to the community for a period of "home detention" punishment.
>
> Our community has recently set up an anti-drugs and alcohol program, which has proved a success so far. We are trying to make people more aware of the harm that alcohol and drugs can do not only to themselves, but how it reflects on their families, particularly the children, and our traditional culture as a whole.
>
> We would also like to say that the Aboriginal people of Eastern Arnhem Land are very concerned with the judicial system and would like to see customary/traditional law come into effect for Aboriginal people living in this region. This would mean that should an Aboriginal person break the law, they would be returned to their community and punished in the traditional manner.

We would appreciate it if you would consider what we have written. Should you wish to discuss this letter further, please do not hesitate to contact either of us on 873433.

DJUWALPI MARIKA
Town Clerk

BAKAMUMU MARIKA
Chairman"

We would observe that it is not easy to reconcile the first paragraph and the first two sentences of the second paragraph of that letter with the uncontested facts of this case. The prosecutor did not object to the first four paragraphs of the letter, which he described as a "character reference," but objected to the relevance of the remaining paragraphs. His Honour said that he would receive the letter and hear submissions on what weight he would give to it. The letter was admitted as Ext D1.

The applicant's counsel then called two witnesses (neither of whom signed the letter or referred to it). Although one witness mentioned something about "talk between our family and it just went smoothly well," none of the important matters referred to in the letter were canvassed with them. Counsel for the applicant then proceeded to make submissions which dealt with how the applicant had been provoked by the actions of the Maymorou brothers, the degree of provocation involved, the applicant's good character, his early plea of guilty, the cultural difficulties involved, and the fact that the applicant had previously honoured his bond, the applicant's grief over the loss of X at the time, that the applicant had no intention to cause any injury to the police, and that in all the circumstances a fully suspended sentence was appropriate. No further submissions were made in relation to the letter by either counsel, which seems to have been simply overlooked by all concerned.

The grounds of appeal

A number of grounds were urged upon us. It is not necessary to mention them all, but we will deal with those of importance.

It was submitted by Mr McDonald on behalf of the applicant that in all the circumstances, the penalties imposed were manifestly excessive. We are not persuaded that this is so. The offences were serious; potentially a life threatening weapon was used on the police officers concerned and on Graham Maymorou, who has been left with a permanent disability. It is not enough that this Court might feel that it would have imposed a different or more lenient sentencing regime. What the applicant has to show in order to succeed on this ground is that the sentences imposed were, upon all the facts of the case, unreasonable or plainly unjust, so that, although no particular error has been disclosed, this Court might infer that in some way there has been a failure properly to exercise the discretion which the law reposed in the sentencing judge: see *House v The King* [1936] 55 CLR 499 at 505. Neither the individual sentences, nor the total head sentence, nor the failure to suspend any part of those sentences went outside of the learned sentencing judge's discretion. We would not allow the appeal on this ground.

However, we have reached the conclusion that the learned sentencing judge fell into error in other ways. As we have already observed, the issues raised by the letter from the Yirrkala Dhanbul Community Association Inc were not addressed by either counsel in their submissions on sentence. Clearly the letter raised issues of considerable importance:

1. the nature of the reconciliation ceremony referred to;
2. the effect of imprisonment, not only upon the applicant's family, but on the Yolgnu people generally;
3. the weight to be given to the expressed wish of the community that the applicant not be imprisoned, but returned to the community to be dealt with in a traditional manner (and what this involved);
4. what traditional punishment, if any, the community had in mind in this case.

None of these matters were, in our opinion, satisfactorily dealt with; nor could they have been, because counsel for the applicant, probably by oversight, failed to address those issues in his submissions.

His Honour, in dealing with the letter in his remarks on sentence observed that a sentence of imprisonment would have a bad effect on the applicant's family, but that this happens to a great many persons who are sent to prison, and it is clear that he did not take that into account as a mitigating factor. So far as this goes, we agree. Unless there are exceptional circumstances, the effect of a sentence on the applicant's family or his dependants is not relevant (*Adami v Adami* (1989) 42 A Crim R 8; *Wayne v Boldiston* (1992) 85 NTR 8) and we would not regard the effect on the applicant's son as being an exceptional circumstance. The hardship to the applicant's son in having the benefit of his father's tuition in traditional skills and learning will be delayed, but not lost, and is comparable to the same sort of loss of parental guidance which always occurs whenever a parent is imprisoned, regardless of race or culture. However, the matter did not rest there. The applicant, as secretary of the Lanhupuy Homelands Association had important duties to attend to in relation to the twenty-one outstations established or being established in the area. Furthermore, he played an important role in the ceremonies of his people generally. He was a clan leader, a non-drinker, and strongly attached to traditional culture. This term of imprisonment was likely to have an effect upon his community as a whole - a community, be it noted, which was experiencing difficulty with the harmful effects of alcohol and the consequential breakdown in traditional tribal discipline. These were matters which should have been taken into account. It appears likely from his Honour's sentencing remarks that they were not given any weight at all.

Furthermore, the letter expressed the view that the Association did not wish the applicant to be sent to prison, and preferred that the applicant be sent to the community to be dealt with in the traditional manner, or, if this were not

possible, that he be placed under a bond or confined to the community for a period of "home detention" punishment. In view of the applicant's importance to his community, and the likely effect that imprisonment would have on the community as a whole, we consider that the expression of this view by the applicant's community ought to have been given considerable weight by a sentencer, particularly as the letter also stated that a "reconciliation" ceremony had already taken place and "there was no bad feeling in the community." The views, wishes and needs of the community of which the applicant is a member are clearly relevant considerations, although they cannot prevail over what is a proper sentence : see *Minor v R* (1991-2) 79 NTR 1 at 14.

Mr Wild QC, who appeared for the Director of Public Prosecutions, submitted that his Honour was entitled to place little or no weight on the community's views because the letter indicated that the community had an erroneous appreciation of the facts, the proposed traditional punishment was left unexplained, and because the applicant's conduct in assaulting the two police officers involved considerations of the need to protect the wider community, and the need for general and special deterrence. There is much force in these submissions. Mr McDonald submitted that because of the inherent difficulties involved in putting the views of remote Aboriginal communities to the Supreme Court, it was often necessary to adopt measures to place this information before the court in a manner which may not be strictly admissible. In *The Queen v Davey* [1980] 50 FLR 57 at 60-1, Muirhead J said:

> "The court has for many years now considered it should, if practicable, inform itself of the attitude of the aboriginal communities involved, not only on questions of payback and community attitudes to the crime, but at times to better inform itself as to the significance of words, gestures or situations which may give rise to sudden violence or which may explain situations which are otherwise incomprehensible. The information may be made available to the court in a somewhat informal and hearsay style. This is unavoidable as it will often depend on consultation with aboriginal communities in remote areas. In this case the Crown Prosecutor did not object to the presentation of the submissions, the evidence in mitigation of sentence, nor the manner in which the

evidence was submitted."

However, conditions in the Northern Territory have changed considerably since 1980. Changes to the *Local Government Act* in 1979 have permitted the establishment of community government councils, which are incorporated bodies constituted under a community government scheme approved by the Minister, with powers to carry out a broad range of local or community government functions. The object of community government is to provide a form of local government to small rural townships and settlements, including Aboriginal settlements, which could be invested with powers suitable to each community on an ad hoc basis, depending upon the size, importance, population, level of sophistication and needs of each particular community. Since that time, there has been a considerable number of community government councils established in Aboriginal settlements. There have also been established a number of other Aboriginal associations with similar aims, although not formally vested with powers under the *Local Government Act*, and it appears likely that Yirrkala Dhanbul Association Community Inc is one such body. Often the senior officers of these bodies are persons of some importance in these communities according to traditional law, and can be expected to know the wishes of their communities. With their establishment have come permanent offices, and the means of communication needed for them to be run on a proper footing. We note, for example, that the letterhead of the Yirrkala Dhanbul Association Community Inc indicates that it has a post office box, telephone and fax machine. The letter itself is typed and well written, indicating as one would expect with the advances which have been made in education in the remote communities that communication in the English language ought not to present a significant problem, and that these organisations have people with skills in communication available to them. We do not think that it is any longer satisfactory for information of this kind to be placed before the court by means of the kind adopted in this case. As Asche CJ emphasised in *Minor v R* (1991-2) 105 NTR 1 at 2 statements from the bar table are of little assistance if they are not

backed up by evidence from those fully conversant with the language and customs [and we add, views] of the community concerned. The same can be said of letters written by communities which are expressed in delphic tones. They are of little value if on their face, the facts appear to be wrongly stated, or if the views and opinions expressed in them raise more questions than answers. In this case much more information ought to have been put to the court than was attempted, and this ought to have been attempted, at the least by the provision of more detailed statements in the form of affidavits or statutory declarations served upon the Crown in time for the prosecution to make its own enquiries, to decide whether to call evidence of its own and to decide if it required the deponents to be made available for cross-examination. It was suggested by Mr McDonald that the Crown had a duty to make positive enquiries as to these sort of matters and to place that information before the court even if the accused does not. We do not agree. The Crown is under no such duty, although the prosecutor would be duty bound to appraise the court of relevant information which came to its notice if satisfied as to its truth.

We do not, by these observations, overlook the difficulty and expense involved to Aboriginal legal aid agencies in gathering and presenting material of this kind, but legal officers from these agencies regularly visit remote communities as part of their normal duties in appearing before the Court of Summary Jurisdiction, which is far more peripatetic than the Supreme Court, during which time instructions can be obtained. Where *viva voce* evidence from witnesses is desirable, the court can also be approached with a request that it consider sitting in the community. It is desirable that judges of this Court sit in the communities from time to time, not only to save expense, but also because Aboriginal witnesses are more comfortable giving evidence in their own communities, and the opportunity arises for the community to hear that evidence and see that justice is being done. These arrangements are, under the provisions of s13(2) of the *Supreme Court Act*, subject to the Chief Justice's approval, and obviously he has to take

into account many considerations. No doubt, in a proper case, the Chief Justice's approval can be obtained, as happened in *Robertson v Flood* (unreported, Mildren J, 29/10/92) when Mildren J sat at Ali Curung. Videoconferencing is an alternative and increasingly available option for overcoming of problems in relation to the giving of evidence between distant places.

The importance of having evidence put before the court in a proper manner cannot be over-emphasised. The court must be satisfied that the information which is presented to it is reliable. It would be very easy for the court to be mislead by information reflecting only the views of the defendant's relatives and supporters.

Nevertheless, the situation which faced his Honour in this case ought not to have been resolved by ignoring the Council's letter, or by treating it merely as a reference, as his Honour appears to have done. The prosecutor had objected to a number of paragraphs in the letter. This objection should have been resolved. Instead, the letter was admitted into evidence, with an invitation to counsel to address the court on what weight ought to have been accorded it, and there the matter rested. In our view, Kearney J ought not to have proceeded to sentence the applicant without drawing to his counsel's attention that he needed to make further submissions on the letter, indicating to him that as matters stood, he proposed not to give the letter any weight, and giving him the opportunity to call evidence: see *Ross v Skivart* (1989) 99 FLR 134 at 138-9 and cases there cited, which discuss the principle that when there is a plea of guilty before a summary court, the court should not reject matters put in mitigation of penalty, unless the explanation passes the bounds of reasonable possibility, without giving the defendant the opportunity to call evidence upon oath. Those principles are equally applicable to a plea of guilty before a judge of the Supreme Court.

The learned sentencing judge, in his remarks on sentence said:

> "Anybody who resorts to the use of a deadly weapon in an

aggressive fashion such as the way you did, going and getting a machete and swinging it around, when other people have only got the use of their fists, can expect no mercy from the courts. To rely on cultural patterns as a defence in that situation can go to mitigation of punishment, but nevertheless the need for personal and general deterrence is paramount in such a case.

In this case I consider that Mr Munungurr armed himself with a deadly weapon, a heavy machete, when he lost his temper, and he swung it around causing the injuries which I've already described. Very fortunately for him he did not injure the two policemen. Unfortunately for him he did cause grievous harm to the victim Graham Maymorou.

If he had not committed grievous harm 6 years ago, it is possible that his otherwise excellent record as a citizen, as a man, would enable him to escape a sentence of immediate imprisonment. Unfortunately for him his prior conviction for a crime which was not dissimilar to this, means that the leniency which was extended to him in 1987, can no longer be extended to him in 1993."

Mr McDonald submitted that these remarks disclosed error. First, Mr McDonald argued that the statement that the appellant "could expect no mercy" in the circumstances and the emphasis on the paramountcy of the need for personal and general deterrence indicated that his Honour had placed too much emphasis on those factors, and had given too little weight to the matters put in mitigation. Secondly, Mr McDonald submitted that his Honour placed too much weight on the prior conviction in 1987, and had not given enough weight to the 'gap' between that offence six years ago, and the fact that the applicant had observed the conditions of his bond on that occasion, as is indicated by his Honour's view that the prior conviction meant that "the leniency which was extended to him in 1987, can no longer be extended to him in 1993." In our view, his Honour does not appear to us to have given sufficient credit to the applicant for the gap between the two convictions. Where there is a significant period free from conviction, this will normally justify substantial mitigation of the sentence: see generally, Thomas *Principles of Sentencing* 2nd ed, pps200-202. We do not think it was correct to say that his prior conviction precluded him from any leniency. His Honour does not appear to have considered that a partially suspended sentence of imprisonment, with early

release upon conditions, appropriate. Given the applicant's good character and personal circumstances, the importance to his community of his early release, and the attitude of the community to his imprisonment, we are unable to see why a partially suspended sentence was not considered appropriate. After all, a suspended sentence is still a sentence of imprisonment (see, for example, *Wood v Samuels* (1974) 8 SASR 465 at 468); *a fortiori* where the sentence is partially suspended. The offences included serious assaults on police officers, but it is relevant that the applicant did not intend to injure them and in fact did not do so, but was trying to prevent them from interfering. As Napier CJ observed in *Webb v O'Sullivan* [1952] SASR 65 at 66:

> "The courts should endeavour to make the punishment fit the crime, and the circumstances of the offender as nearly as may be. Our first concern is the protection of the public, but, subject to that, the court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest."

To this we would add, with respect, the observation of King CJ in *Yardley v Betts* (1979) 22 SASR 108 at 113:

> "The protection of the public must remain our first concern, but if, consistently with that, we can, in our compassion, assist another human being to avoid making ruin of his life, we ought surely to do so."

We therefore consider that it has been demonstrated that his Honour fell into error, and that this Court should therefore impose such sentence as it considers to be just.

Further evidence received

During the course of hearing submissions by the applicant's counsel, we indicated that the court was interested to know precisely what punishment the community had in mind for the applicant, and more about the matters referred to in the letter from the Yirrkala Dhanbul Association Community Inc. This Court has a wide discretionary power to receive further evidence (see s419 of the *Criminal Code*). Mr Wild did not object to this course, but he very properly did urge upon us that this material would be of no assistance to us unless we

were satisfied that Kearney J had fallen into error. We received it on this basis. No objection was taken to the accuracy of the information presented to us, which was in the form of a signed statement from Mr Banambi Wunungmurra, a member of the Dhalwangu clan, and the CDEP Coordinator for the Lhanupuy Homelands Association Inc. Mr Wunungmurra was also one of the witnesses called at the hearing before Kearney J. From this material, the following additional facts have emerged.

Mr Wunungmurra confirmed that the authors of the letter from the Association have authority to speak on behalf of the members of the Yirrkala community, that that community comprises all clan groups in the Yirrkala area, and that the Association represents all Aboriginal persons and clan groups in the area.

Mr Wunungmurra's statement dealt with two specific matters which we raised as follows:

> "In relation to the specific questions asked by the Court of Criminal Appeal yesterday I can say the following:-
> (a) <u>What is meant by the phrase 'returned to the community to be dealt with in a traditional manner'?</u>
>
> There has already been a reconciliation meeting between the elders of Djapu and Mangalilli clans, but not a public meeting. Now Mungarrapin' [the victim] 'and his family and Marritjngu' [the applicant] 'and his family can be brought together at a family meeting involving Djapu and Mungalilli clans. At the meeting there would be a discussion in a traditional way of bringing Marritjngu and Mungarrapin together. The two persons can speak together to seal the peace in front of the other clan members who witness the talk. The talk also takes place in the presence of a sacred Djapu dilly bag. The talk will not involve any physical punishment to Marritjngu or to Mungarrapin. It will be a matter for the group to discuss, but the presence of the sacred dilly bag will give Mungarrapin a status of having respect for the Djapu clan. It also puts on Mungarrapin a responsibility to the Djapu clan. It is possible that Mungarrapin and his family may be made custodians of the sacred Djapu dilly bag which is a position of honour, trust and status. The receiving of the knowledge of the dilly bag represents a sealing of the peace. Mungarrapin can then be said to be the 'Yothu'

(child) of Djapu clan as his mother ('yindi') in the Djapu clan.

(b) What type of conditions would the community want to see if Marritjngu is released by the court?

The community, as I understand their wishes, want Marritjngu and Mungarrapin to have the meeting and ceremony where the peace is sealed. It is not particularly concerned about any other conditions which should be imposed, as Marritjngu and Mungarrapin will be free to live and mix in each other's clan life when the peace is sealed. When the peace is sealed personally between Marritjngu and Mungarrapin before their families that is the end of the matter and life goes on as before."

Mr Wild submitted that what the community proposes does not involve any punishment. Whilst this is true, attendance by the applicant and the victim at the meeting to be called and the sealing of the peace is not in itself the only purpose of the meeting. By becoming "yothu" of the Djapu clan, the applicant and victim accept mutual responsibilities to each other not to breach the peace.

The appropriate sentences

Mr Wild also submitted that in view of the observations of this Court in *Mulholland v R* (1991) 1 NTLR 1 at 13, relating to the relevance of previous convictions to the mental element of the crime and the increased criminal culpability involved, and the added fact that the applicant had assaulted two police officers, a more severe sentence was warranted than had been imposed by Asche CJ in 1987. We accept the force of these submissions. A wholly suspended sentence, in all the circumstances, is in our opinion inappropriate.

Submissions were also made by Mr McDonald that his Honour had erred in making the sentences of imprisonment in relation to the assaults on the prison officers cumulative upon the sentence of three years for the offence of causing grievous harm. In our view, it is the total head sentence which has to be considered and in our view a total head sentence of four and one half years is appropriate. His Honour, in his remarks on sentence, plainly took the totality principle into account,

and it was open to him to structure the sentence the way he did, although it would have been preferable had he imposed a sentence of four and one half years for the offence of causing grievous harm, and imposed concurrent sentences for the two assault charges: see *Mill v The Queen* (1988) 166 CLR 59 at 63. We considered that the proper course to be adopted at the time we re-sentenced the applicant was to impose a sentence of four and one half years for the offence of causing grievous harm, and to impose sentences of six months and twelve months respectively on the assault charges, to properly reflect the gravity of the offences. As the offences all occurred out of the same set of circumstances it is proper that they all should be made concurrent.

In all the circumstances, we further considered that those sentences should be partially suspended to properly reflect all relevant matters, including the fact that offences had been committed against persons other than Graham Maymorou, the total criminality involved, and the weight to be given to the matters personal to the applicant as well as the needs and wishes of the community. Bearing in mind the community's wishes, and the effect of imprisonment upon the community, we considered that the minimum amount of time needed to be spent in prison in the public interest was three months. Accordingly, we ordered that the application for leave be granted, the appeal be allowed, and that the sentences be imposed and orders made as set out in the schedule. As to the condition of the bond that the applicant attend the proposed meeting of the Djapu and Mungalilli clans, we considered that it was in the interests of his community that the applicant attend at that meeting, make the peace and keep it accordingly. We recognised that the timing of this meeting, whether or not the meeting was called at all, and whether or not the peace was made, may not be entirely up to the applicant, and the difficulty in determining whether the applicant had in fact done all he could to comply with that condition. For that reason, we requested the Director of Correctional Services to provide the court with a report when he is satisfied that the meeting has been held, and we have

reminded the Director of his powers under s7(2) of the *Criminal Law (Conditional Release of Offenders) Act* to seek a variation of the terms of the recognizance. In the event that the foreshadowed meeting does not take place within a reasonable time, we would expect the Director to make such an application and we will then consider what should be done.

oOo

SCHEDULE

For reasons which will be published later it is ordered that the application for leave to appeal be granted, the appeal allowed and for the sentences imposed by his Honour there be substituted the following sentences and orders:

Count 1: For unlawfully causing grievous harm to Graham Maymorou 4 years and 6 months imprisonment.

Count 2: For unlawfully assaulting Constable Blanch with circumstances of aggravation 6 months' imprisonment.

Count 3: For unlawfully assaulting Senior Constable Majid with circumstances of aggravation 1 year's imprisonment.

All sentences are to be served concurrently and are deemed to have commenced on 6 September 1993.

Order that the appellant be released after having served 3 months of that sentence and upon his entering into a bond in his own recognizance in the sum of $2,000 that he will be of good behaviour for a period expiring upon the expiry of the sentences and upon the following further conditions:

1. That he attend and participate in the proposed meeting of Djapu and Mungalilli clans for the purpose of sealing the peace in the traditional

aboriginal way and that he make the peace and keep the peace accordingly.

2. That he be subject to the supervision of the Director of Correctional Services or a person nominated by him and that he accept all reasonable directions of that person including as to his place of residence.

AND we request the Director to report to this Court when he is satisfied that the meeting referred to in the first of these conditions has been held and as to the result of it. We point out that the Director may apply to vary the conditions of the recognizance at any time.