CITATION:	*The Queen v Mamarika* [2019] NTCCA 24
PARTIES:	THE QUEEN v MAMARIKA, Ian
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 3 of 2019 (21830950)
DELIVERED:	30 December 2019
HEARING DATES:	5 December 2019
JUDGMENT OF:	Grant CJ, Southwood and Kelly JJ

CATCHWORDS:

CRIME – Appeals – Appeal against sentence – By Crown against inadequacy

Respondent sentenced to imprisonment for two years and three months – Sentence suspended on conditions after the respondent had served nine months – Objective circumstances placed offending in the middle range of seriousness – Starting point of three years' imprisonment disproportionate to the objective circumstances of the offending – Sentence manifestly inadequate – At time appeal heard respondent had been in home community for eight months on order suspending sentence – Residual discretion to dismiss prosecution appeal if interests of justice require – To allow the appeal and resentence the respondent would disrupt rehabilitation, cause the respondent significant confusion, and give rise to unfairness – Circumstances such that residual discretion exercised to dismiss appeal even though manifest error demonstrated.

Criminal Code 1983 (NT) s 181

R v Wilson (2011) 30 NTLR 51, *Smiler v The Queen* [2018] NTCCA 2, *The Queen v Ryan; Miller v The Queen* [2019] NTCCA 20, *TM v The Queen* [2017] NTCCA 3, referred to.

REPRESENTATION:

Counsel:

Appellant:	D Morters SC
Respondent	No appearance

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent	No appearance

Judgment category classification:	B
Number of pages:	8

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

The Queen v Mamarika [2019] NTCCA 24
No. CA 3 of 2019 (21830950)

BETWEEN:

THE QUEEN
Appellant

AND:

IAN MAMARIKA
Respondent

CORAM: GRANT CJ, SOUTHWOOD and KELLY JJ

REASONS FOR JUDGMENT

(Delivered 30 December 2019)

THE COURT:

[1] This is a Crown appeal against sentence on the ground of manifest inadequacy. For the reasons which follow, we have come to the conclusion that the sentence imposed in this case was so manifestly inadequate as to constitute an error in point of principle. However, at the time the appeal came before this Court the respondent had been back in his home community for almost eight months on an order suspending sentence under supervision by Community Corrections. Those circumstances were such that we have exercised the residual discretion to dismiss the appeal even though manifest error has been demonstrated.

Background

[2] On 6 February 2019 the respondent pleaded guilty to one count of unlawfully causing serious harm contrary to s 181 of the *Criminal Code 1983* (NT). The maximum penalty for that offence is imprisonment for 14 years.

[3] The respondent was 24 years of age at the time he committed the offence. The victim was his 21 year old cousin. The respondent and the victim lived on Groote Eylandt. The respondent was told by somebody that the victim had engaged in sexual intercourse with the respondent's girlfriend. The respondent then concealed a machete under his shirt and went looking for the victim.

[4] The respondent found the victim, confronted him with the accusation and threatened to kill him. The offender and the victim then engaged in a consensual fistfight during which they traded blows before the respondent's nose began to bleed as a result of one of those blows. The respondent then pulled the machete from under his shirt and struck the victim with it on the left forearm, the left side of his neck and the right elbow.

[5] The victim was taken by ambulance to the Alyangula health clinic and then evacuated to the Royal Darwin Hospital. He was treated there for a large laceration approximately 20 centimetres in length over the left side of his neck; a deep laceration to the outer aspect of his left forearm; a superficial laceration approximately seven centimetres in length to the outer aspect of

his right elbow; and a superficial laceration to the left shoulder. The cut on the victim's neck transected three major neck muscles and caused a blood clot in the deep muscle tissues. The cut on the victim's forearm penetrated to the bone and lacerated six tendons in the forearm. Both wounds required extensive surgical repair. If they had gone untreated it is likely that the victim would have experienced functional loss.

[6] The respondent left the scene following the assault and actively avoided police. Police spoke to the respondent's father and impressed on him the importance of the offender handing himself in. The offender surrendered to police the following day and was arrested. He declined to participate in an interview with police.

[7] The offender had a criminal history which included convictions for recklessly endangering life and being armed with an offensive weapon. Those offences had been committed in November 2015 and July 2016 respectively. The first of those offences involved the offender throwing a spear and firing a slingshot at another group of males. He was sentenced to imprisonment for 14 months for that offence which was suspended after he had served almost three months in prison.

[8] On 8 February 2019 the Supreme Court sentenced the respondent to imprisonment for two years and three months after a 25 per cent discount for his plea of guilty. That sentence was backdated to the date of the respondent's arrest on 18 July 2018, and suspended on conditions after the

offender had served nine months in prison. The respondent was released from prison on 17 April 2019 and returned to Groote Eylandt under the supervision of Community Corrections.

Manifest inadequacy

[9] As this Court stated in *The Queen v Ryan; Miller v The Queen* [2019] NTCCA 20 at [54]:

> The sentencing range for the offence of unlawfully causing serious harm is very broad. This is because the circumstances of the offender and the offending vary widely between cases. That variance is seen in matters such as the facts of the offending in question, whether a weapon was used, whether the offending took place in company, the nature and duration of the assault, the nature and timing of the guilty plea and what it indicated, the age of the offender, the extent to which the offender assisted law enforcement authorities, the nature and extent of the prior criminal history, the seriousness of the resulting injuries and the impact of the offending on the victim.

[10] Offences which fall within the most serious category, or in the upper range, typically involve heinously gratuitous violence, marked degradation, a prolonged course of conduct and/or a male assailant and a female victim: see *Smiler v The Queen* [2018] NTCCA 2 at [32].

[11] Apart from the respondent's guilty plea and relatively young age for sentencing purposes, there were no mitigating circumstances. Although the respondent was afforded a 25 per cent discount on sentence, he showed no immediate remorse in the aftermath of the attack, provided no assistance to the victim and actively evaded police before turning himself in. He had

previous convictions for committing acts of violence with weapons and going armed with an offensive weapon.

[12] The offending in this case was objectively serious. The assault took place on a public street. The assault involved a dangerous weapon with the potential to cause very significant injury or death. The concealment of the machete indicated a degree of premeditation. The nature of the wounds indicated that the assault with the machete involved the application of a significant degree of force on repeated occasions. The injuries were grave. Those features place this offending squarely in the middle range of seriousness for such offences. The starting point of three years' imprisonment adopted by the sentencing judge was disproportionate to the objective circumstances of the offending. Having regard to the respondent's age, a starting point of somewhere between five and six years was indicated.

[13] Although the head sentence imposed was manifestly inadequate, an order suspending sentence would still have been an available disposition in these circumstances. In making that determination a sentencing court takes into account the same considerations which inform fixing the head sentence, but may apply different weightings to those considerations for the purpose of determining whether an order suspending sentence should be made and, if so, after what period of imprisonment. It is both legitimate and appropriate where warranted by the circumstances of the case for a sentencing court to give greater weight to the purposes of punishment, denunciation and deterrence when fixing the head sentence, and to give greater weight to the

purpose of rehabilitation in making an order suspending sentence: see *TM v The Queen* [2017] NTCCA 3 at [35].

[14] Even allowing for those different weightings, the suspension of the sentence after the respondent had served only nine months was also manifestly inadequate having regard to the objective and subjective circumstances. In particular, the respondent had engaged in serious premeditated violence against a background of violent offending.

Residual discretion

[15] The appeal court retains a residual discretion to dismiss a prosecution appeal if the interests of justice militate in favour of that result. The "[f]actors that may be relevant to the exercise of the residual discretion to dismiss an appeal … include the presence of unfairness arising from such matters as delay, parity, the totality principle, rehabilitation and fault on the part of the Crown": see *R v Wilson* (2011) 30 NTLR 51 at [27]. Even where some manifest error has been demonstrated, an appeal court will be slow to intervene where there is a countervailing factor which may warrant the exercise of the residual discretion.

[16] There was no fault on the part of the Crown in this case. The Notice of Appeal was filed within time. It appears that the appeal did not proceed to hearing for a protracted period because of difficulties experienced in serving the respondent with the appeal papers, and because the respondent was thereafter unrepresented. However, by reason of that delay the respondent

had been back in the community for almost eight months by the time the appeal was heard.

[17] This Court ordered a report from Community Corrections detailing the respondent's compliance with the conditions of supervision during that period. The report states that the respondent was repatriated directly to Groote Eylandt on his release. Since that time he has been residing with his mother, father and four-year-old daughter for whom he has custodial responsibility. The respondent's parents are supportive of and interested in his rehabilitation. He does not have any problem with the misuse of alcohol or dangerous drugs. He has reported strictly as directed during the period of supervision. He successfully completed the Family Violence Program on 9 May 2019. He leads a quiet lifestyle in his home community of Umbakumba. He goes fishing with extended family and plays Australian Rules football with the local team. In short, the respondent's compliance has been excellent.

[18] To resentence the respondent at this stage with the consequence of imposing more time in prison before the order suspending sentence took effect would require him to be taken from the community setting and reincarcerated. That would disrupt what has to date been a demonstrably successful rehabilitation process, would no doubt cause the respondent significant confusion, and would give rise to unfairness. Those consequences and the change in the respondent's circumstances since the sentence was imposed call for the exercise of the residual discretion.

Disposition

[19] The appeal is dismissed.
