Ellis v The Queen [2005] NTCCA 1

PARTIES:	ELLIS, Tryston Darryl v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 9 of 2004 (20011218, 20212024, 20313886, 20322983, 20403811, 20318617, 20322984, 20403825, 20322980, 20403799, 20403828, 20322981, 20403807, 20403829, 20322982, 20403809)
DELIVERED:	14 January 2005
HEARING DATES:	7 December 2004
JUDGMENT OF:	MARTIN (BR) CJ, ANGEL & THOMAS JJ

CATCHWORDS:

CRIMINAL LAW
Appeal – sentence – totality – multiple offences - 46 counts of dishonesty– juvenile - head sentence of imprisonment of 12 years imprisonment – non-parole period of 6 years imprisonment – whether manifestly excessive – whether addiction has a mitigating effect on sentence - appeal allowed

Criminal Code Act (NT) s 210(1); s 213(1), (4) & (5); s 218(1) &(2)(c); s 229(1) & (4); and s 251(1) &(2)(d)

Mill v The Queen (1988) 166 CLR 59, at 62, 63; *Griffiths v The Queen* (1989) 167 CLR 372, at 393; *The Queen v Rossi* (1988) 142 LSJS 451, at 453; *R v Proom* (2003) 85 SASR 120, para 49 – 51; applied

The Queen v Creed 37 SASR 1985 566, at 568; *Postiglione v The Queen* 1997 189 CLR 295*; R v Major* (1998) 70 SASR 488; *R v Place* (2002) 81 SASR 395; considered

REPRESENTATION:

Counsel:

Appellant:	S Cox QC
Respondent:	M Carey

Solicitors:

Appellant:	NTLAC
Respondent:	DPP

Judgment category classification:	A
Judgment ID Number:	Mar0501
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ellis v The Queen [2005] NTCCA 1
No. CA 9 of 2004 (20011218, 20212024, 20313886, 20322983, 20403811, 20318617, 20322984, 20403825, 20322980, 20403799, 20403828, 20322981, 20403807, 20403829, 20322982, 20403809)

BETWEEN:

TRYSTON DARRYL ELLIS
Appellant

AND:

THE QUEEN
Respondent

CORAM: MARTIN (BR) CJ, ANGEL & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 14 January 2005)

Martin (BR) CJ:

[1] This is an appeal against sentences imposed by a Judge for 46 offences of dishonesty. As a result of the sentences, the appellant is liable to serve a total period of twelve years imprisonment in respect of which a non-parole period of six years was fixed.

[2] In order to understand the totality of the criminal conduct with which the Judge was faced, a copy of the Indictment is annexed to these reasons. It is necessary to set out the relevant events in a chronological order.

[3] The appellant was born on 12 August 1985. He first came to the attention of the Juvenile Court in 1999 at the age of 13 years. Between July 1999 and June 2002 the appellant committed numerous offences of dishonesty for which he was dealt with by the Juvenile Court between July 1999 and September 2002.

[4] On 14 February 2003 the appellant appeared before the Judge who sentenced him on the occasion under consideration. The appellant was then aged 14 years. He pleaded guilty to one count of aggravated robbery which the Judge described as at the lowest end of the scale of seriousness for that offence. The respondent also pleaded guilty to 11 counts of aggravated unlawful entry and 9 counts of stealing. The Judge took into account 10 other offences.

[5] The Judge described the appellant's life as "blighted by instability, limited education, long periods of unemployment, drug taking and excessive alcohol consumption." At the time of sentencing the appellant had spent six months at the Don Dale Centre and had apparently turned his life around. The Judge had received reports which he regarded as very persuasive. His Honour made the following observations which are repeated in his sentencing remarks in the matter under consideration:

> "I must say that these reports are very, very impressive. In fact I can honestly say that I have never seen reports as favourable as these are in respect of someone of a background like you have, facing charges as serious as this. You are to be congratulated for the effort that you have made so far and it is my belief that the court must encourage you to continue with your efforts.

> Obviously your prospects of rehabilitation are excellent and in my view it would be counter productive to send you back into custody at this moment. The court's main concern, not only in this case, but in every case is to protect the community and I think that the best protection that can be offered to the community now is to encourage and to support your continued rehabilitation.
>
> Normally offending like this calls for a significant period of time in actual custody, certainly in the case of adults. A different approach is warranted in the case of juveniles. But even in the case of juveniles offending involving robbery of the kind that we are dealing with in count 2 would normally result in an extensive period of detention. But given your age at the time of most of this offending, your pleas of guilty, your remorse and your excellent prospects of rehabilitation, I think it is appropriate to order your immediate release on a suspended sentence and I note that that course is not opposed by the prosecutor."

[6] The appellant was sentenced to a total of three years imprisonment which was back dated to commence on 6 August 2002. His Honour ordered that the appellant be released forthwith on stringent conditions including supervision and curfews.

[7] Unknown to the Judge, at the time he imposed sentence in February 2003 the appellant had already committed the first of the numerous offences under consideration. On 29 June 2002 when the appellant was aged 16 he broke into private premises and stole a colour TV, a video recorder, a microwave and a bread maker. The total value of the stolen property was approximately $720. The TV and the microwave valued at $450 were later recovered. When the appellant was eventually interviewed in July 2003 he made full admissions to those offences stating that he was drunk.

[8] As I have said, the appellant was released on a suspended sentence on 14 February 2003. Seven weeks later on 3 April 2003 he committed the offences charged in counts 3 to 5. He broke into a private home by using a screwdriver to jemmy open the front door. After stealing a set of keys the respondent drove away with the victim's motor vehicle which was later recovered in bushland. The vehicle had been severely damaged and parts were missing. The total of the damage and parts missing was estimated to be approximately $10,000. The appellant later told police he had an argument with his girlfriend and wanted to do something stupid.

[9] On 29 April 2003 the appellant committed the offences set out in counts 6 and 7. While drinking at the Nightcliff jetty he decided to steal a car. He broke into private premises and stole keys. He used the keys to drive away in the victim's vehicle. The appellant told police he was arguing with his family and felt like doing stupid things.

[10] On 8 July 2003 the appellant committed the crimes charged in counts 8 to 10. Between the hours of 1am and 6am the appellant and three co-offenders broke into the Darwin Tennis Centre causing damage of approximately $600. They removed soft drink, chocolates and alcoholic beverages which were consumed at a nearby oval. The appellant told police he did it to get drunk.

[11] Between 13 and 20 July 2003 the appellant committed the offence of receiving charged in count 11. He received five watches which had been

stolen from Cash Converters. He exchanged the watches for cash and cannabis. The appellant knew the watches were stolen.

[12] On 23 July 2003 the appellant was arrested. He was granted bail on 24 July 2003 with conditions related to drug assessment.

[13] Eight days after being released on bail, on 1 August 2003 the appellant committed the offences charged in counts 12 to 14. He and an unknown co-offender broke into private premises and stole a quantity of property of a total value of approximately $2,490. On 22 August 2003 the appellant was arrested and remanded in custody. On 29 August 2003 the appellant was again remanded in custody for a further assessment. On 5 September a Magistrate was provided with reports from the Drug Rehabilitation Programme which indicated that the appellant would be accepted into the programme. On 5 September the appellant was granted bail for participation in the programme

[14] A little over four weeks later on 11 October 2003 the appellant committed the offences charged in counts 15 and 16. Whilst walking along a street with a co-offender the appellant decided to steal a car stereo. Using a large rock he broke the rear quarter glass panel on the driver's side and, together with his co-offender, removed the stereo from the centre consol. The theft was interrupted by the owner and the appellant fled. In the process he dropped the car stereo and damaged it.

[15] Between 11pm on 24 October 2003 and 9am on 25 October 2003 the appellant committed the offences charged in counts 17 and 18. Again using a rock to smash a window, the appellant stole items from a motor vehicle. He later told police he committed the offence to get money to buy a stick and get grog.

[16] On 28 October 2003, in three separate house breakings in Britannia Crescent, Moil the appellant committed the crimes charged in counts 19 - 28. Counts 19 – 22 relate to the first premises into which the appellant broke using a screw driver to dislodge a security door. Property to the value of approximately $3,630 was stolen. Some of the property was later recovered.

[17] Counts 23 and 24 relate to the second premises in Britannia Crescent. The appellant used a screw driver to dislodge a security screen following which he removed a number of louvres. Property of a total value of approximately $1,400 was stolen. Some of that property was later recovered.

[18] The appellant gained entry into the third premises in Britannia Crescent by dislodging a security screen. He stole approximately $10 in coins.

[19] On 29 October 2003, the day after the appellant committed the crimes in Britannia Crescent, he was arrested. He volunteered his guilt of those crimes. Prior to the appellant's confession the police were unaware of the crimes.

[20] On 30 October the appellant appeared in court when an assessment in relation to the drug programme was ordered. Unfortunately, the appellant was again granted bail on 21 November 2003 on the basis that he would participate in a residential rehabilitation programme. The appellant absconded two days after entering the programme. On 28 November bail was revoked and a warrant was issued for the arrest of the appellant.

[21] Between 4am and 5am on 29 November 2003 the appellant broke into private premises while the occupant, her boyfriend and two children aged 19 and 17 were asleep were inside. He stole property of the value of about $1,000. The appellant later told police he committed the offence to get money for drugs.

[22] On 9 December 2003 between the hours of 3am and 4am the appellant committed the offences charged in counts 31 and 32. He climbed a high fence and gained entry into a motor vehicle. He then broke into the residence and stole property to the value of about $998.

[23] Count 33 relates to events on 16 December 2003. The appellant used a rock to smash the rear passenger side corner window of a vehicle. He was disturbed by a resident.

[24] Counts 34 – 36 concern offences committed on 23 December 2003. The appellant broke into premises and stole property worth about $440. Later the appellant told police he took food because he was hungry.

[25] On 1 January 2004 the appellant committed the offences charged in counts 37 and 38. Between midnight and 1am the appellant broke into premises occupied by his former girlfriend. He stole property of the value of approximately $4,100.

[26] The appellant's most serious offending relates to counts 39 – 41 and occurred at about 4am on 10 February 2004. The appellant broke into premises in which the occupier was asleep on a couch near the window used to gain access. While the appellant was searching the premise for drugs, the victim woke up and switched on the television. The victim was unaware that the appellant was in his premises. After a short time the victim walked to a cupboard in the lounge room. The appellant approached the victim, yelled at him and demanded morphine. When the victim said he did not have any morphine the appellant became angry. He swung his fists towards the victim and punched him at least three times in the head causing the victim to fall back onto a wall and to the ground. The victim's head was lacerated and blood began to flow. The appellant continued to yell at the victim demanding cash and pills. The appellant then assisted the victim to sit on the couch before searching the victim's pockets.

[27] While the appellant continued searching, the victim remained on the couch. He was too scared to move. The appellant took a guitar and a small amplifier together to the value of approximately $370. As he exited the premises, the appellant turned and said to the victim:

> "I suppose you're going to call the cops, you c… . Well f'…n go and do it, I'm not scared of the cops. I've got a couple of years hanging over my head already."

[28] Subsequently the appellant told police he was looking for pills and sniffing around for dope. He admitted punching the victim in the face.

[29] As a result of the assault, the victim sustained a small laceration to the right side of his head which required a single stitch. He also sustained a large bruise over his right eye, a bruised and swollen throat and several bruises to his back. His injuries were treated at the Royal Darwin hospital.

[30] The final group of offences charged in counts 42 – 46 were committed between 10.30pm on 11 February and 3am on 12 February 2004. After unsuccessfully attempting to break into a residence, the appellant broke into a shed on the premises and removed a mountain bike, a knife in a leather case and a long screwdriver. Using the screwdriver the appellant attempted to jemmy open the front door. That attempt was unsuccessful, but the appellant was then successful in jemmying open the rear laundry door. While the victim, his wife and two children aged 12 and 6 were asleep in the residence, the appellant removed a substantial quantity of property.

[31] This brief overview of the appellant's criminal conduct demonstrates the difficult task with which the sentencing Judge was faced. He was required to sentence a young offender who had grown up in particularly dysfunctional circumstances that attract considerable sympathy. The appellant's offending was not minor in nature. Nor was it limited to a few crimes committed in a

short lived spree of offending. The criminal conduct for which the Judge was required to impose sentence began in June 2002 and concluded with the appellant's arrest in February 2004. Including the damage to the motor vehicle of $10,000, in the process of committing the crimes the appellant caused damage of the order of $13,000. He stole property of the value of approximately $17,230. The victim impact statements demonstrate the significant impacts that the appellant's crimes have had upon the victims.

[32] In addition, the Judge had before him a young man with a long record of prior offending. Notwithstanding that record and the serious nature of the appellant's previous offending, in February 2003 the appellant persuaded those with whom he was dealing and the Judge that he was a good candidate for rehabilitation. Considerable leniency was shown to the appellant and he was given the opportunity and assistance to bring the potential for rehabilitation to fruition.

[33] Unfortunately for the community and for the appellant, it took him less than two months to return to his criminal ways. After four separate criminal activities committed in April and July 2003, circumstances presented the appellant with a further opportunity to cease his criminal activity. In July 2003 he was arrested and granted bail on condition that he undertake drug assessment. One week later the appellant again offended. Three weeks later he was again arrested. Then came yet another opportunity with bail and entry into a drug rehabilitation programme. About four weeks later the

appellant's criminal offending commenced yet again. It continued unabated until his arrest on 29 October 2003.

[34] A final opportunity was given to the appellant with bail on 21 November 2003 on condition that he undertake a residential drug rehabilitation programme. It took only two days for the appellant to abscond from the residential programme. A week later the criminal conduct recommenced. The final group of offences occurred over a period from late November 2003 to February 2004 and included the most serious of the crimes committed in February 2004.

[35] The appellant has repeatedly been given opportunities to rehabilitate. He has abused every one of those opportunities. Those opportunities were not limited solely to leniency in terms of penalties. They included the provision of assistance which was positively rejected. The appellant's attitude was well demonstrated to the victim of his aggravated robbery when he told the victim that he was not scared of the cops and already had a couple of years hanging over his head.

[36] It is apparent from the remarks of the sentencing Judge that his Honour took into account everything that could have been taken into account in the appellant's favour. His Honour exercised a considerable degree of leniency in fixing a non-parole period that was only fifty percent of the head sentence. It is apparent that his Honour was acutely conscious of the

appellant's youth, but necessarily the gravity of the appellant's total criminal conduct far outweighed any claim to leniency on the basis of youth.

[37] There is no error apparent in the remarks of the sentencing Judge. Nor, in my opinion, is there any error in the way in which his Honour approached his difficult task. Having taken all relevant matters into account, including the pleas of guilty, the Judge arrived at individual sentences for each crime. It is unnecessary to set out each individual sentence.

[38] With a view to considering the question of totality, the sentencing Judge first determined whether the individual sentences would ordinarily be served concurrently or cumulatively. For each offence committed on a single occasion, his Honour correctly determined that the individual sentences would be served concurrently. With one exception which appears to have been an error, his Honour approached the matter on the basis that sentences for an individual episode, while concurrent with each other, should be cumulative upon sentences imposed for a separate episode. That approach was consistent with sentencing principles and, for the purposes of the exercise being undertaken by the sentencing Judge, was a legitimate approach. The one error appears to relate to count 22 which his Honour attached to counts 23 and 24 for the purposes of imposing concurrent sentences. Count 22 should have been attached to an earlier episode on the same day involving counts 19, 20 and 21. The error was of no significance to the end result.

[39] Having undertaken that process, the Judge was able to arrive at a total sentence and then address the question of totality. After considering the issue of totality and having determined that the total period of imprisonment to be served should be reduced, his Honour set about making orders of concurrency to achieve what he considered was the appropriate result. This approach accords with principle and is supported by numerous authorities.

[40] In *Mill v The Queen* (1988) 166 CLR 59, in a joint judgment of five Justices the High Court approved of the following passage as a succinct description of the totality principle (63):

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, *each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences,* to review the aggregate sentence and consider whether the aggregate is "just and appropriate". The principle has been stated many times in various forms: "when a number of offences are being dealt with and specific punishments in respect of them are being totted up to make a total, it is always necessary for the court to take a last look at the total just to see whether it looks wrong"; "when … cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences"." (my emphasis).

[41] The court also made the following observations about the method by which the appropriate result may be achieved (63):

> "Where the principle falls to be applied in relation to sentences of imprisonment imposed by a single sentencing court, an appropriate result may be achieved either by making sentences wholly or partially concurrent or by lowering the individual sentences below what would otherwise be appropriate in order to reflect the fact that a

number of sentences are being imposed. *Where practicable, the former is to be preferred*". (my emphasis).

[42] The approach identified by the High Court in *Mill* was echoed by Gaudron and McHugh JJ in a joint judgment in *Griffiths v The Queen* (1989) 167 CLR 372 at 393:

> "It is well established that in sentencing a person in respect of multiple offences regard must be had to the total effect of the sentence on the offender: … . This may be done through the imposition of consecutive sentences of reduced length with or without other sentences to be served concurrently or through the imposition of a head sentence appropriate to the total criminality with all other sentences to be served concurrently. In *Attorney-General (SA) v Tichy* [(1982) 30 SASR 84, at p 85], King CJ said:
>
> > "The essential thing to be borne in mind is that if the sentences are made consecutive there must be no overlapping of the factors brought into account in determining the length of each sentences; similarly, if the sentences are made concurrent the gravity of the total criminal conduct must be reflected in the leading sentence."
>
> But as Wells J pointed out in the same case [at 93]:
>
> > "The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time. What must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been guilty. Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. Where, whatever the number of technically identifiable offences committed, the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient. There are dangers in each course. Where consecutive sentences are imposed it may be thought that they are kept artificially apart where they should, to some extent, overlap. Where concurrent sentences are imposed, there is the danger that the primary term does not adequately reflect the aggravated nature of each important

> feature of the criminal conduct under consideration."" (some citations omitted).

[43] It is readily apparent from the statements of principle that the question of totality is the last step in the sentencing process. In *R v Creed* (1985) 37 SASR 566, King CJ spoke of the requirement that "at the end of the day" a sentencing Judge has to "stand back and look at the overall picture and decide whether the total of what would otherwise be the appropriate sentence is a fair and reasonable total sentence to impose" (568). In *Postiglione v The Queen* (1997) 189 CLR 295, Kirby J described the principle of totality as being in the nature of a check to be applied after reaching a conclusion as to the appropriate sentence having regard to the objective criminality of the conduct and matters of mitigation. The same view was taken by Doyle CJ and Olssen J in *R v Major* (1998) 70 SASR 488 at 490 and 497 and by a South Australian Court of Criminal Appeal comprised of five Judges in *R v Place* (2002) 81 SASR 395 at 426.

[44] When the various sentences to be accumulated were added together, a total figure of 16 years was reached. That figure was increased to approximately 18 years and 6 months by the revocation of the suspension of the balance of the sentences imposed in February 2003.

[45] Counsel for the appellant submitted that the period of 16 years demonstrated error. Counsel pointed out that if in fixing the individual sentences the Judge had made allowance for the pleas of guilty, which his Honour said he had done, and if the allowance was of the order of twenty five percent, the

starting point before allowance for the pleas would have reached the total of approximately 21 years. Having arrived at that figure, counsel endeavoured to argue that this was demonstrative of error because "the tentative head sentence was not duly proportional to the overall gravity of the offences".

[46] The submission is fundamentally flawed. It is an inevitable consequence of a commission of a large number of offences which require consecutive sentences that the strict application of accumulating proper individual sentences will result in such a high total that the total will not be duly proportionate to the overall gravity of the criminal conduct. This is particularly the case if serious offending has occurred which requires lengthy individual sentences. As King CJ said in *R v Rossi* (1988) 142 LSJS 451 (at 453):

> "There is a principle of sentencing known as the principle of totality, which enables a court to mitigate what strict justice would otherwise indicate, *where the total effect of the sentences merited by the individual crimes becomes so crushing as to call for the merciful intervention of the court by way of reducing the total effect ...* ". (my emphasis).

[47] The fact of an excessive total is not indicative of error. It is the very reason why the principle of totality exists. The appropriate means by which to check whether the Judge fell into error is to examine the individual sentences and to consider whether, individually, the sentences or some of them are excessive. Consideration can also be given to whether, at the initial stages, a sentencing court has erred in accumulating sentences.

[48] The major sentence contributing to the high total was the sentence of seven years imprisonment for the offence of aggravated robbery. Assuming an allowance for the plea of guilty in the range of 20 – 25% the starting point would have been of the order of eight years and nine months to nine years and three months. In my view, notwithstanding the seriousness of that particular crime and the appellant's prior criminal offending, bearing in mind the appellant's youth that starting point is, at the least, at the very top of the range of the sentencing discretion. In view of the decision I have reached based on principles of totality, it is unnecessary to decide whether, in isolation, that starting point was manifestly excessive.

[49] As to the other offences, it is sufficient to observe that the maximum total imposed for any individual unlawful entry and stealing, commonly referred to as a breaking and entering and stealing, was nine months imprisonment. Given the circumstances and the appellant's record of prior offending, viewed in isolation such a sentence could hardly be described as excessive. In many circumstances it would be manifestly inadequate. Checked in this way those sentences demonstrate that the sentencing Judge took a merciful approach.

[50] In the absence of any error in the approach of the sentencing Judge, the critical question is whether the end result of 12 years is manifestly excessive.

[51] I have found this question particularly difficult to answer. Viewed objectively in the context of the appellant's prior offending and continual abuses of the leniency and support offered to him, the nature and extent of the appellant's total criminal conduct leave little room for the exercise of mercy. General and personal deterrence are factors of particular significance.

[52] On the other hand, the appellant was young when he committed the crimes. He was immature. He came from a dysfunctional background and, when about 13 years of age, was left to fend for himself. It was in that context that at a very young age the appellant became heavily dependent upon cannabis and alcohol. It is likely that at the time he committed the offences under consideration he was also addicted to morphine. The appellant's addictions arose out of the dysfunctional and socially disadvantaged circumstances in which the appellant spent his youth.

[53] Numerous authorities have emphasised that addiction itself is not a basis for leniency. However, as Doyle CJ pointed out in a very helpful judgment in *R v Proom* (2003) 85 SASR 120, addiction remains a relevant circumstance which might, in some situations, have a mitigating effect. Doyle CJ reviewed a number of authorities and noted that addiction might explain that an offender is not a professional criminal or did not make a calculated decision to offend. His Honour also recognised that addiction might diminish individual moral culpability.

[54] On the other side of the coin, Doyle CJ made the following observations [49] – [51]:

> "49. The proposition that addiction will always or generally be a mitigating factor confronts an obvious question. For how long does addiction operate as a mitigating factor? Is it a mitigating factor for the first offence, for the first few offences, or always? Can an addicted offender continue to expect a lesser sentence? Surely not. To the contrary, an addict who is a repeat offender may be entitled to a lesser degree of leniency simply because of the repeated offending, and because the pattern of conduct gives the court no choice but to emphasise deterrence, recognising the bluntness of that response.
>
> 50. Addiction to drugs may indicate that assurances by an offender of a desire to be rehabilitated are unreliable, or must at least be treated with caution, and sadly may mean that even a genuine wish to rehabilitate may have to be treated with caution. In the worse case, if there is no reason to think that the addiction will be broken, there will be no basis for leniency by reference to the prospect of rehabilitation.
>
> 51. Finally, there is the obvious point that sentencing involves the balancing of a whole range of factors. When consideration of deterrence predominate, or require greater weight, there is less scope for leniency on the basis of addiction."

[55] The appellant was entangled in the vicious circle of addiction, destitution and offending. A number of crimes were committed for the purposes of obtaining food and alcohol. Others were committed to obtain funds to buy drugs. The most serious offence was committed in order to obtain morphine. While, as Doyle CJ pointed out in *Proom*, addicts do not lose their ability to make choices, nevertheless the choices made by the appellant were not the choices of a person who was thinking in a completely rational and calculated fashion. To that extent, the appellant's dependencies are

relevant to the appellant's moral culpability. He is not a professional criminal who committed the crimes as a way of living.

[56] The appellant's circumstances can be contrasted to that of a middle aged person who has matured and had opportunities over a number of years to rehabilitate or, at the least, to control an addiction to the point of avoiding further offending. The appellant is now only 18 years of age. He is still an immature person caught in the vicious circle to which I have referred. Each time the appellant was arrested he readily admitted his guilt and the charges proceeded to pleas of guilty by way of an ex officio indictment. The appellant has demonstrated an acceptance of responsibility for his criminal conduct.

[57] Prior to the sentence under consideration, the appellant had never been imprisoned. He had spent only a few months in detention. Those few months are far removed from the prospect of a head sentence of 12 years imprisonment and a minimum period in prison of six years. For a young person in the appellant's circumstances, that prospect is crushing.

[58] Notwithstanding the serious criminal offending in which the appellant engaged, and notwithstanding his abuses of leniency previously offered to him, it is not without considerable hesitation I have reached the view that the head sentence of 12 years is manifestly excessive for this young person who has never before been imprisoned. For that reason, I would interfere with the sentence, but only to a strictly limited extent.

[59] I would allow the appeal to reduce the total effect of the sentences by two years. This can reasonably be achieved by reducing the sentence on count 41 for the crime of aggravated robbery to five years imprisonment. In my opinion, having made allowance in the order of twenty five percent for the plea of guilty, a sentence of five years imprisonment is the more appropriate sentence for that crime. In all other respects I would make the same orders as were made by the sentencing Judge.

[60] In respect of the total of ten years imprisonment, I would fix a non-parole period of five years. Both the sentence and non-parole period should commence on 6 January 2004.

Angel J:

[61] Subject to what follows I concur with the Chief Justice.

[62] I agree with the sentencing judge that the aggravated robbery was a serious offence individually meriting a sentence of seven years' imprisonment. That offence was rendered all the more serious by reason of a prior conviction for robbery.

As Lord Diplock speaking for the Privy Council said in *Ziderman v Dental Council* [1976] 1 WLR 330 (PC) at 333H – 334A:

> "In their Lordships' view, the previous convictions of a person charged with an offence are relevant matters to be taken into account by a sentencing tribunal in assessing the gravity of the offence with which he is charged. … Justice requires that the gravity of an offence should be reflected in the severity of the sentence imposed; and, as is manifest … from the universal sentencing practice of

> judges … the national sense of what constitutes justice in the field of sentencing recognises that an offence which is committed by a person who has offended before is graver than a similar offence committed by a person who offends for the first time."

See also *R v Mulholland* (1991) 1 NTLR 1 at 13–14, and compare *Regina v Way* [2004] NSWCCA 131 at [94] – [97].

[63] With the considerable hesitation shared by the other members of the Court, I have also reached the conclusion that the head sentence of 12 years' imprisonment is manifestly excessive and should be reduced by two years.

[64] Were the sentence of seven years' imprisonment for aggravated robbery to be affirmed an overall head sentence of ten years' imprisonment might be achieved by confirming the individual sentences and orders of the sentencing judge save to order that his sentences in relation to counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 be served concurrently but cumulative upon the remaining sentences. To so order would result in a head sentence of 10 years' imprisonment. However I wish to say that in cases of multiple offending such as the present it is not only appropriate and convenient but also desirable that the Court pass one aggregate sentence pursuant to s 52 Sentencing Act (NT) rather than pursue the tortuous path of individual sentences with orders of accumulation and concurrence that are – to some degree – necessarily artificial in order to attain the desired result. In the present case, somewhat surprisingly, the offence of aggravated robbery contrary to s 211(2) Criminal Code (NT) is not a violent offence for the

purposes of s 52, not being mentioned in Schedule 2 of the Act, so s 52 may be employed.

[65] I would allow the appeal, vacate the sentencing orders of the sentencing judge and substitute therefore an aggregate head sentence of 10 years' imprisonment. I would order that the balance of the previously suspended sentence of 14 February 2003 be served concurrently with that aggregate head sentence. I agree that having regard both to the appellant's youth and this being his first bout of incarceration in gaol that it is appropriate to fix the minimum permissible non–parole period under the Sentencing Act of five years' imprisonment.

Thomas J:

[66] I have read the Draft Reasons for Judgment prepared by Martin (BR) CJ. I agree with his Honour's reasons.

[67] I would allow the appeal. I agree with varying the head sentence to 10 years imprisonment with a non-parole period of five years. The sentence and non-parole period to commence on 6 January 2004 to take account of time spent in custody.

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Annexure

IN THE SUPREME COURT OF THE
NORTHERN TERRITORY OF AUSTRALIA

EX OFFICIO INDICTMENT

The Deputy Director of Public Prosecutions for the Northern Territory of Australia, charges that

TRYSTON DARRYL ELLIS

Count 1 (20313886)

On 29 June 2002 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely 19 Phoenix Street, Nightcliff, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing,
(ii) that the building was a dwelling house, and
(iii) that the unlawful entry occurred at night-time.

Section 213(1),(4) & (5) of the Criminal Code.

Count 2 (20313886)

On 29 June 2002 at Darwin in the Northern Territory of Australia, stole a television set, a video recorder, a microwave oven and a bread maker, valued at $720.00, the property of Elexa Simmons.

Section 210(1) of the Criminal Code.

Count 3 (20313886)

On 3 April 2003 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely 18 Lippia Court Karama, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing,
(ii) that the building was a dwelling house, and
(iii) that the unlawful entry occurred at night-time.

Section 213(1),(4) & (5) of the Criminal Code.

Count 4 (20313886)

On 3 April 2003 at Darwin in the Northern Territory of Australia, stole a set of keys, valued at $20.00, the property of Sue Haigh.

Section 210(1) of the Criminal Code.

Count 5 (20313886)

On 3 April 2003 at Darwin in the Northern Territory of Australia, unlawfully used a motor vehicle, namely, a Nissan Pulsar sedan.

AND THAT the said unlawful use involved the following circumstances of aggravation, namely,

(i) that the motor vehicle was damaged by Tryston Darryl Ellis and the cost of repairing the same was $1,000 or more, namely, $10,000.00.

Section 218(1) and (2)(c) of the Criminal Code.

Count 6 (20313886)

On 29 April 2003 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely 1 Lantana Street, Nightcliff, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing,
(ii) that the building was a dwelling house, and
(iii) that the unlawful entry occurred at night-time.

Section 213(1), (4) & (5) of the Criminal Code.

Count 7 (20313886)

On 29 April 2003 at Darwin in the Northern Territory of Australia, stole set of keys, valued at $20.00, the property of Ben Maison.

Section 210(1) of the Criminal Code.

Count 8 (20313886)

On 8 July 2003 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely Darwin Tennis Centre, Coconut Grove, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing, and
(ii) that the unlawful entry occurred at night-time.

Section 213 (1), (4) & (5) of the Criminal Code.

Count 9 (20313886)

On 8 July 2003 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely, a glass door and padlocks, the property of the Darwin Tennis Centre.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely:

(i) that the damage was caused when preparing to commit a crime, namely stealing.

Section 251(1) and (2)(d) of the Criminal Code.

Count 10 (20313886)

On 8 July 2003 at Darwin in the Northern Territory of Australia, stole 3 bottles of soft drink, assorted chocolates and a quantity of alcohol, altogether valued at $310.00, the property of Darwin Tennis Centre.

Section 210(1) of the Criminal Code.

Count 11 (20313886)

Between 13 July 2003 and 20 July 2003 at Darwin in the Northern Territory of Australia, received five watches, which had been obtained by means of a crime, namely, stealing, knowing them to have been so obtained.

Section 229(1) and (4) of the Criminal Code.

Count 12 (20318617)

On 1 August 2003 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely Unit 3/11 Nation Crescent, Coconut Grove, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing, and
(ii) that the building was a dwelling house.

Section 213(1) and (4) of the Criminal Code.

Count 13 (20318617)

On 1 August 2003 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely, a security screen, the property of Matthew Potts.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely:

(ii) that the damage was caused when preparing to commit a crime, namely stealing.

Section 251(1) and (2)(d) of the Criminal Code.

Count 14 (20318617)

On 1 August 2003 at Darwin in the Northern Territory of Australia, stole a DVD player, a desktop computer and speakers, a quantity of compact discs and a quantity of jewellery having a total value of approximately $2,490.00, the property of Matthew Potts.

Section 210(1) of the Criminal Code.

Count 15 (20322984)

On 11 October 2003 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely, a window of a Volkswagen Kombi NT registration ARAFURA.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely:

(iii) that the damage was caused when preparing to commit a crime, namely stealing.

Section 251(1) and (2)(d) of the Criminal Code.

Count 16 (20322984)

On 11 October 2003 at Darwin in the Northern Territory of Australia, stole a car stereo, valued at $600.00, the property of Mark Reidel.

Section 210(1) of the Criminal Code.

Count 17 (20322980)

On or about 25 October 2003 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely, a window of a Ford Laser sedan NT registration 627-007.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely:

(i) that the damage was caused when preparing to commit a crime, namely stealing.

Section 251(1) and (2)(d) of the Criminal Code.

Count 18 (20322980)

On or about 25 October 2003 at Darwin in the Northern Territory of Australia, stole a backpack, wallet, 2 pair of glasses, 2 CDs and 1 DVD, having a total value of $1,370.00, the property of Neil Gray.

Section 210(1) of the Criminal Code.

Count 19 (20322982)

On 28 October 2003 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely a security screen at 30 Brittania Crescent, Anula.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely,

(i) that the damage was caused when preparing to commit a crime, namely unlawful entry of a building.

Section 251(1) and (2)(d) of the Criminal Code.

Count 20 (20322982)

On 28 October 2003 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely 30 Brittania Crescent, Anula, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing, and
(ii) that the building was a dwelling house.

Section 213(1) and (4) of the Criminal Code.

Count 21 (20322982)

On 28 October 2003 at Darwin in the Northern Territory of Australia, stole $2800 cash, 5 speakers, a DVD player, 1 remote control unit, 3 watches, a string of cultured pearls and a carry bag having a total value of approximately $5000 the property of Samuel Banks and Michael Banks.

Section 210(1) of the Criminal Code.

Count 22 (20322983)

On 28 October 2003 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely a security screen at 9 Brittania Crescent, Anula.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely,

(i) that the damage was caused when preparing to commit a crime, namely unlawful entry.

Section 251(1) and (2)(d) of the Criminal Code.

Count 23 (20322983)

On 28 October 2003 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely 9 Brittania Crescent, Anula, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing, and
(ii) that the building was a dwelling house.

Section 213(1) and (4) of the Criminal Code.

Count 24 (20322983)

On 28 October 2003 at Darwin in the Northern Territory of Australia, stole two cameras, jewellery, ornaments, keys and cash, having a total value of $1,954.00, the property of Carole White.

Section 210(1) of the Criminal Code.

Count 25 (20322981)

On 28 October 2003 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely a security screen at 11 Brittania Crescent, Anula.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely,

(i) that the damage was caused when preparing to commit a crime, namely unlawful entry.

Section 251(1) and (2)(d) of the Criminal Code.

Count 26 (20322981)

On 28 October 2003 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely 11 Brittania Crescent, Anula, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing, and
(ii) that the building was a dwelling house.

Section 213(1) and (4) of the Criminal Code.

Count 27 (20322981)

On 28 October 2003 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely a filing cabinet at 11 Brittania Crescent, Anula.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely,

(i) that the damage was caused when committing a crime, namely stealing.

Section 251(1) and (2)(d) of the Criminal Code.

Count 28 (20322981)

On 28 October 2003 at Darwin in the Northern Territory of Australia, stole approximately $10.00 in cash, the property of Elaine Barry.

Section 210(1) of the Criminal Code.

Count 29 (20403829)

On 29 November 2003 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely 12 Floyd Court, Coconut Grove, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing,
(ii) that the building was a dwelling house, and
(iii) that the unlawful entry occurred at night time.

Section 213(1), (4) & (5) of the Criminal Code.

Count 30 (20403829)

On 29 November 2003 at Darwin in the Northern Territory of Australia, stole a quantity of compact discs, a quantity of jewellery, a mobile phone and cash, having a total value of approximately $1,000.00, the property of Karen Field.

Section 210(1) of the Criminal Code.

Count 31 (20403811)

On 9 December 2003 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely 5 Wilmot Street, The Narrows, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing,
(ii) that the building was a dwelling house,
(iii) that the unlawful entry occurred at night time.

Section 213(1), (4) & (5) of the Criminal Code.

Count 32 (20403811)

On 9 December 2003 at Darwin in the Northern Territory of Australia, stole a mobile phone, a Sony play-station and 2 hand controllers, approximately 6 games, 2 DVD's, a watch, a wooden jewellery box and a backpack, having a total value of approximately $998.00 the property of Karen Gutteridge.

Section 210(1) of the Criminal Code.

Count 33 (20403809)

On 16 December 2003 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely a window of a Toyota Coupe NT registration 659-050.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely,

(i) that the damage was caused when preparing to commit a crime, namely stealing.

Section 251(1) and (2)(d) of the Criminal Code.

Count 34 (20403825)

On 23 December 2003 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely a flyscreen at Unit 8/2 Runge Street, Coconut Grove.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely:

(i) that the damage was caused when preparing to commit a crime, namely stealing.

Section 251(1) and (2)(d) of the Criminal Code.

Count 35 (20403825)

On 23 December 2003 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely Unit 8/2 Runge Street, Coconut Grove, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing, and
(ii) that the building was a dwelling house.

Section 213(1) & (4) of the Criminal Code.

Count 36 (20403825)

On 23 December 2003 at Darwin in the Northern Territory of Australia, stole a quantity of food a quantity of clothing and 2 doona covers a first aid kit, tobacco, a compact disc and a quantity of jewellery, having a total value of approximately $440.00, the property of Carrlyn Troode.

Section 210(1) of the Criminal Code.

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Count 37 (20403828)

On or about 1 January 2004 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely Unit 47/25 Progress Drive, Nightcliff, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing,
(ii) that the building was a dwelling house, and
(iii) that the unlawful entry occurred at night time.

Section 213 (1), (4) & (5) of the Criminal Code.

Count 38 (20403828)

On or about 1 January 2004 at Darwin in the Northern Territory of Australia, stole a stereo sound system approximately 40 DVDs and 80 CDs, having a total value of approximately $4,100.00, the property of Asia Allen.

Section 210(1) of the Criminal Code.

Count 39 (20403807)

On 10 February 2004 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely a flyscreen at 72/47 Progress Drive, Nightcliff.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely,

(i) that the damage was caused when committing a crime, namely unlawful entry.

Section 251(1) and (2)(d) of the Criminal Code.

Count 40 (20403807)

On 10 February 2004 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely 72/47 Progress Drive, Nightcliff, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing,
(ii) that the building was a dwelling house,
(iii) that the unlawful entry occurred at night time.

Section 213(1), (4) & (5) of the Criminal Code.

Count 41 (20403807)

On 10 February 2004 at Darwin in the Northern Territory of Australia, stole an electric guitar and amplifier, the property of Timothy Buckley, and immediately before doing so used violence upon Timothy Buckley in order to obtain the said property.

AND THAT the said robbery involved the following circumstances of aggravation:

(i) that immediately before the said robbery, Tryston Ellis caused bodily harm to Timothy Buckley.

Section 211(1) & (2) of the Criminal Code.

Count 42 (20403799)

On or about 12 February 2004 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely steel security bars mounted in the window frame at 1/11 Harris Street, Millner.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely,

(i) that the damage was caused when preparing to commit a crime, namely, unlawful entry of a building.

Section 251(1) and (2)(d) of the Criminal Code.

Count 43 (20403799)

On 12 February 2004 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely a storage shed at Unit 1/11 Harris Street, Millner with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing, and
(ii) that the unlawful entry occurred at night time.

Section 213(1) and (4) of the Criminal Code.

Count 44 (20403799)

On or about 12 February 2004 at Darwin in the Northern Territory of Australia, stole a portable CD player, 2 mobile phones, a DVD player, keys, cash, a boxed set of wine glasses, a video remote control, a Digi-camera, and a sports bag, a mountain bike, a skinning knife in a leather case and a screwdriver having a total value of approximately $3,000 the property of Richard Howes.

Section 210(1) of the Criminal Code.

Count 45 (20403799)

On or about 12 February 2004 at Darwin in the Northern Territory of Australia, unlawfully damaged property, namely door frame at Unit 1/11 Harris Street, Millner.

AND THAT the unlawful damage involved the following circumstance of aggravation, namely,

(i) that the damage was caused when preparing to commit a crime, namely, unlawful entry of a building.

Section 251(1) and (2)(d) of the Criminal Code.

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Count 46 (20403799)

On 12 February 2004 at Darwin in the Northern Territory of Australia, unlawfully entered a building, namely Unit 1/11 Harris Street, Millner, with intent to commit an offence therein.

AND THAT the unlawful entry involved the following circumstances of aggravation, namely,

(i) that the offence intended to be committed therein was a crime, namely, stealing,
(ii) that the building was a dwelling house, and
(iii) that the unlawful entry occurred at night time.

Section 213(1), (4) & (5) of the Criminal Code.

Dated at Darwin this day of March 2004.

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WJ KARCZEWSKI QC
Deputy Director of Public Prosecutions