Parnell and Ellis v Rigby [2008] NTSC 40

PARTIES:	PARNELL, Jared AND ELLIS, Duane v RIGBY, Kerry
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	JA 34 of 2008 (20724961) and JA 35 of 2008 (20724971)
DELIVERED:	19 SEPTEMBER 2008
HEARING DATES:	12 SEPTEMBER 2008
JUDGMENT OF:	MARTIN (BR) CJ
APPEAL FROM:	COURT OF SUMMARY JURISDICTION MR G CAVANAGH SM, 15 May 2008

CATCHWORDS:

JUSTICES

Appeal –against sentence – manifestly excessive – disparity of sentences – first appellant appeal dismissed – second appellant appeal allowed – re-sentenced.

R v MacGowan (1986) 42 SASR 580 at 582 – 583, applied.
Moore v Materna (1996) 136 FLR 142; *Russell v Littman* [2006] NTSC 50, distinguished.
Lowe v The Queen (1984) 154 CLR 606; *Postiglione v The Queen* (1997) 189 CLR 295; *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 477, followed.

Sentencing Act 1995 (NT), s 5(2)(g)

REPRESENTATION:

Counsel:

First Appellant:	H Norris
Second Appellant:	J Payten
Respondent:	K Ellson

Solicitors:

First Appellant:	North Australian Aboriginal Justice Agency
Second Appellant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

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

Parnell and Ellis v Rigby [2008] NTSC 40
Nos. JA 34 of 2008 (20724961) and JA 35 of 2008 (20724971)

BETWEEN:

JARED PARNELL
First Appellant

DUANE ELLIS
Second Appellant

AND:

KERRY RIGBY
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 19 September 2008)

Introduction

[1] The appellants were jointly charged on information with the offence of Unlawful Assault accompanied by the circumstance of aggravation that the victim suffered harm. Each pleaded guilty. The appellant Parnell also pleaded guilty to a charge on complaint that without lawful excuse he carried an offensive weapon, namely, a pool cue.

[2] For the offence of unlawful assault, each appellant was sentenced to 18 months imprisonment suspended after service of 12 months with an operational period of four years. For the offence of carrying an offensive

weapon, Parnell was sentenced to two months imprisonment to be served concurrently with the sentence imposed for assault.

[3] The appellants appeal against their sentences of 18 months imprisonment on the basis that the sentences are manifestly excessive both as to the length of the sentence and the period of custody to be served. There is also a complaint about the length of the operational period. In addition, each appellant alleges that the learned sentencing Magistrate erred in a number of respects. In a separate complaint, Ellis contends that the Magistrate erred in failing to properly reflect the difference between the antecedents of the appellants by imposing a lesser sentence on Ellis.

Facts

[4] The facts of the offending were in dispute. The victim gave evidence and his evidence concerning the assault was accepted by the Magistrate beyond reasonable doubt.

[5] By way of background to the assault, the victim had previously been the subject of a number of burglaries and, during the evening before the assault, found persons inside his house. He chased the intruders away and pursued a female person who was limping because her leg was in a cast. The victim apprehended the female intruder. He said he forced her to the ground with the bat by pushing her on her left shoulder. He denied striking her with the bat.

[6] The female intruder apprehended by the victim was Parnell's sister. Parnell was upset because of the victim's actions against his sister.

[7] Against this background, about 8pm on 1 September 2007 the victim was watching television and opened the front door in response to the doorbell. The appellants were together at the front door and Parnell was carrying a pool cue. According to the finding of the Magistrate, a finding which was open to his Honour, the appellants went to the home of the victim for the purpose of giving him a "hiding". Parnell asked "Did you hit my sister with a baseball bat?". As the victim replied "Yes I did", he turned to the left to see the other person (Ellis) and, in the victim's words, he was "king-hit". The victim described being "smashed" with a closed fist to his nose after which his nose "exploded and eyes just all went blurry".

[8] The victim said that as soon as the punch was landed, he was grabbed by the top of the shirt and back of the head and pulled onto his knees. During cross-examination he said he was grabbed on the shoulders and pulled onto his knees. Asked who grabbed him on the shoulders, the victim said it was the man who punched him "and then the other one came in". The victim said he was kneed in the stomach, face and head and he fell onto the concrete where he tried to cover his head and face. The victim's description of the attack that followed was in the following terms:

> "[I] then just took multiple, multiple kicks and punches. And something, you know, pretty solid, like something wooden, was just then hammered and hammered into me."

[9] Asked where the wooden item was hammered into him, the victim said:

> "I had a terrible bruised vertebrae on the back of the neck, ribs and the shins; the shins were probably the main area they attacked, to try and break my tibia and fibula."

[10] Subsequently the victim confirmed that he was being bashed continuously over the shins with something wooden. He said he lost consciousness and, when he regained consciousness, the attackers were astonished that he stood up and started to try and defend himself. One of the offenders said "Strewth, he can walk. Get out, get out".

[11] In examination the victim said one of the offenders came back and threatened that if he called the police, they would kill him. During cross-examination the victim said that the offender did not threaten to kill him; the actual words were "call the police and we'll come back and get you" or "we'll smash you again" or "bash you again" or words to that effect. The victim agreed that the offender asked why the victim had struck the offender's sister.

[12] It was common ground that Ellis struck the first blow to the victim's face. The victim said it was the other offender who returned and made the threat.

[13] The victim suffered broken nose cartilage which continued to bleed for about four days together with bruising across his face in the area of the cheekbones and face generally. He sustained bruising to the back of his

neck and vertebrae areas and very bruised ribs. His shins were badly scarred and, at the time of giving evidence in May 2008, scarring remained.

[14] In his victim impact statement, the victim described the very significant emotional trauma that he and his wife have experienced as a consequence of the appellants' attack.

[15] At the time of the attack, the victim's children aged three, five and seven years were at home. The victim gave evidence that the children watched the attack through the lounge room window and that the oldest child had required serious counselling. The effects on the second child were somewhat delayed. Subsequently she got into trouble at school and was angry.

[16] Neither of the appellants gave evidence. Through counsel Ellis conceded striking the initial blow. Parnell acknowledged that he was part of the enterprise to apply violence to the victim, but through his counsel maintained that he "did not lift a finger against the victim".

[17] The Magistrate made observations indicating that from a sentencing point of view, the difference in roles was not of significance. However, his Honour found that Parnell was an active participant:

> "In some respects, the law, and indeed common sense, wouldn't see much difference from a sentencing point of view whether or not one or other of the two defendants played a much greater role in the actual violence or not. The fact of the matter is they both went around there, to use a phrase, to see that this bloke got a hiding. That was their common purpose. I don't see a lot of difference that

> one stood there while the other one did everything or one did more than the other. That may surprise various people but I don't see a lot of difference between you both. You went around there to do what's sometimes referred to as vigilante justice.
>
> But I've heard sworn evidence from Mr Beale and I don't think he was aware of much after he was punched so heavily in the face. But I think he was aware of enough for me to be convinced beyond reasonable doubt on all that I've heard from him. When he says he was being kicked, punched and belted with a wooden or heavy-type object, that given the number of times, the frequency of times and the timing, that more than one bloke was involved in doing that to him …
>
> I found Mr Beale's evidence to be credible and reliable enough for me to find beyond reasonable doubt that both these men were violent towards him. But I reiterate: in terms of sentencing, in terms of their moral guilt, for one to stand there while the other one got so viciously stuck into the bloke, I don't see all that much difference. Especially because they went around there with the same purpose.
>
> So I don't think all the evidence I've heard which has been trying to persuade me that Parnell didn't lay a finger on him himself would make all that much difference to an actual sentence. I think he's just as morally guilty as the other bloke. *But having said that, I do find beyond reasonable doubt that he did, and I do find that some kind of implement, probably a pool cue, was used as well.* (my emphasis)

[18] The observations cited were made after the Magistrate had heard the records of interview conducted with the appellants and submissions had been made concerning the facts in dispute. Subsequently, after receiving the information as to the appellants' prior offences, the victim impact statement, a reference for Ellis and submissions concerning sentence, the Magistrate made remarks addressed to the facts before adjourning to consider further the question of sentence:

"I have accepted and accept beyond reasonable doubt Beale's account of his beating. He was punched to the face; he was pulled down; he was kneed; he was kicked and he was hit with another object, probably the pool cue. He was beaten severely. It was a vicious, brutal and horrific assault on his doorstep, at his home in the northern suburbs; at his front doorstep, in front of his young kids. He was left a bloodied mess. I have no doubt about that. And these two men went around to deliver just that kind of violence.

One is 23 and one is 21. They're well built. A bit younger last year; they might not have been as well built then. The victim is a 48-year old smaller fellow, with glasses. So I can add an extra adjective to this: it was cowardly. And it really is not excused by the fact that they might think Beale was cowardly several hours before that in causing a bruise to the back of the legs or the back of the sister of one of them. What occurred to Beale was entirely and completely over the top.

It is not to be tolerated in a civilised society, and I've got to consider all that, together with the fact that unfortunately violence of this kind is prevalent in the northern suburbs of Darwin and the community is screaming out for the courts to do something about it. In my view, a jail sentence is entirely appropriate, with a fair portion of it to be served. I'll have to think upon that particular sentence and it'll take some further consideration.

I, for instance, want to distance myself from any feelings I've got about the facts; I want to be completely objective, so that the interests of the community and the defendants are fairly considered. I don't want to crush these two men. They've got futures, they've got families they love and they've got jobs. But what they did is totally unacceptable and there must be jail, in my view. Sentencing is adjourned to 9.30am on 29 May before me."

[19] Sentence was imposed a little over two weeks later. The Magistrate's sentencing remarks were as follows:

"HIS HONOUR: Ellis and Parnell pleaded guilty before me on the 15th of this month, to assault with circumstances of aggravation, being an assault on an Allan Beale. Both men pleaded guilty on the morning that had been set for a defended hearing. I apprehend that the briefs of evidence had only been received a week or so prior to

that hearing, and that caused some delay in their eventual pleas of guilty. I take that into account, however, it was, and can only be described as a late plea of guilty by both men. The facts were disputed and agitated before me, and Mr Gill gave evidence. He was the only person to give evidence, and I found him to be a believable and credible witness.

The facts revealed a brutal and ferocious violent attack on a bespectacled middle aged man of slight build, a family man, with this attack taking place at the door of his home, with his young children watching. The defendants are, and were at the time, well built and apparently fit young men in their early twenties. They went to the victim's home with the intent of doing violence to him. That is to say, this attack was premeditated and planned, with one man confronting the victim after he answered the knock on his front door, and the other man positioned out of sight next to the front door. The attack was cowardly in the extreme.

They had a reason to go there. There had been something to do with the sister of one of them, who had been involved in an incident the night before, however, in my view, their reason for this attack provides no excuse and indeed no mitigation for what they did. It was apparently some kind of revenge attack, similar to vigilante activity. I will not dignify their actions by calling it vigilante justice. It was vigilante activity.

Amongst other things this attack was a direct and blatant flouting of the rule of law, and as I've already said was not mitigated, in my view, is not mitigated or excused in any way. This man was left a bloodied and sore mess on the doorstep of his own home. Furthermore I note that both men have expressed no remorse for what they did. Their records of interview were provided to me. When I say no remorse, hardly any remorse.

The attack was – I found it to be further aggravated by one of these men threatening further violence in the future to the victim, as they ran off in their cowardly fashion, in their cowardly way after he rose to his feet.

This court has noticed that such violent attacks have become more and more prevalent in Darwin, in the suburbs of Darwin. It is not unusual the situation that two or more men are attacking single people. In my view the protection of the community is an important

consideration in today's sentencing, and a strong message of deterrence needs to be sent out by this court that such violence is not to be tolerated.

These men have been before the courts of law in the past for criminal activity. They are not to be sentenced again for such activity, but they certainly are not to receive the leniency that first offenders receive. Having said that they are still youthful. They have pleaded and will receive a discount for that. They are working men. They've got loving families, and I don't want to crush them such that they don't see much future for themselves.

Having regard to the principles and guidelines of the Sentencing Act, all that was put to me by counsel when the matter was last before me, both men are sentenced to 18 months imprisonment, suspended after twelve months on the basis they commit no further offences for four years.

Ms Nobbs, I want the files noted that if there's any breach of that suspended sentence, especially were it to be of violence, matters are to be brought back to me, and I can promise these men that there would have to be something extraordinary to prevent me restoring the six months that will be hanging over your heads for that four years."

Manifestly Excessive

[20] Each appellant complains that their sentence is manifestly excessive. This complaint requires a consideration of the seriousness of the criminal conduct carried out by each appellant and matters personal to each appellant which can reasonably be called in aid of mitigation of penalty.

[21] As to the objective circumstances of the offending, the gravity of the crime committed by each appellant should not be underestimated. Whatever the appellants may have thought about the conduct of the victim during the previous evening when his premises were invaded by a number of persons, including Parnell's sister, the appellants engaged in a premeditated and

unprovoked attack upon a defenceless and vulnerable victim. The appellants acted together and Parnell carried a weapon for the express purpose of using it against the victim. There is no doubt that Ellis was aware that Parnell was carrying the pool cue. Together the appellants carried out their joint intention in a vicious and sustained attack on the front doorstep of the victim's house where the victim had been minding his own business with his children in his home. The weapon was used. Significant physical harm was caused to the victim and he and his family have been emotionally affected in significant ways. There are no mitigating circumstances relating to either appellant accompanying the commission of the crime.

[22] As to matters personal that might reasonably be called in aid of mitigation, while there were positive features such as youth, employment and acceptance of responsibility through pleas of guilty, neither appellant was entitled to mitigation by reason of prior good character. The positive personal features were far outweighed by the objective seriousness of the crime. It has been said many times by criminal courts at first instance and by courts of criminal appeal that while youth and rehabilitation of a youthful offender are always significant matters in the exercise of the sentencing discretion, in cases of serious crime those factors and other matters personal to an offender may attract less weight or be subservient to the requirements of general deterrence, punishment and denunciation. It is a matter of achieving the correct balance which will not always be achieved in the case of a youthful offender by giving primary weight to youth and rehabilitation.

The Magistrate was entirely justified in emphasising the objective seriousness of the crime and the importance of general deterrence.

[23] As to the sentence of 18 months imprisonment, leaving aside the issue of whether a distinction in sentence should have been made between the appellants by reason of their differing records of prior offending, in my opinion the head sentence of 18 months was well within the range of the Magistrate's sentencing discretion with respect to each appellant. The Magistrate arrived at that period after describing each plea as a "late plea of guilty" and stating specifically that each appellant would "receive a discount" for their plea. If the reduction by reason of the plea was in the range of 10% - 20%, the Magistrate's starting point was of the order of 20 – 23 months. In my view, a starting point in that range was well within the range of the sentencing discretion.

[24] As to the period of 12 months to be served by each appellant, again considering each appellant in isolation from the other with respect to their prior record of offending, in my view the period of 12 months was also well within the range of the Magistrate's sentencing discretion. Neither appellant was a first offender and, as I have said, there were no mitigating circumstances attending the commission by each appellant of the crime. Given the seriousness of the offending, a significant term to be served, such as 12 months, was not outside the range of the sentencing discretion.

[25] The operational period of each suspension, namely, four years is a lengthy period. It is significantly longer than most operational periods imposed in respect of suspensions of sentences of the length under consideration. However, there is no tariff for operational periods outside of which the period fixed will be considered either too short or excessive.

[26] A reading of the transcript of the proceedings before the Magistrate, including his Honour's sentencing remarks, leaves me with the clear impression that his Honour was gravely concerned about the nature of the offending by each appellant and was determined to give the appellants the clear message that future breaches of the law would not be tolerated. I infer that his Honour reached the view that rather than a non-parole period, a significant period with six months hanging over their heads was the best means of ensuring that upon their release the appellants would stay out of trouble. It is not surprising that his Honour reached such a view.

[27] In respect of operational periods, the sentencing discretion is not circumscribed by boundaries and it is only if the period fixed is outside the permissible range of the sentencing discretion that this Court is justified in interfering. Again leaving aside a comparison between the appellants, in my view, while the period of four years was a lengthy period at the very top end of the range available to his Honour, and was longer than I would have fixed, that period is not manifestly excessive.

[28] Once it is accepted that the sentence imposed was not manifestly excessive, in the absence of specific error which might nevertheless affect the exercise of the sentencing discretion to the extent that the discretion miscarried, it is idle to suggest that the Magistrate erred in failing to have regard to matters of mitigation or in failing to give appropriate weight to such matters or in giving excessive weight to matters such as general deterrence and protection of the community. As to the personal circumstances of the appellants, it cannot reasonably be suggested that the Magistrate fell into apparent error. His Honour acknowledged that the appellants were "working men" with loving families. His Honour specifically referred to their youth. While his Honour addressed significantly more remarks to the objective seriousness of the offending, in the particular circumstances he was well justified in doing so.

[29] Parnell complained that the Magistrate erred in failing to give appropriate weight to Parnell's plea of guilty. Counsel argued that his Honour erred in categorising the plea as "late". In my view, this complaint is without substance. Although, as accepted by the Magistrate, some delay in the eventual pleas was caused by the fact that briefs of evidence had only been received by the appellants a week or so prior to the hearing, the fact remained that both appellants pleaded guilty on the morning set for a defended hearing. The appellants first appeared in court on 16 January 2008. There was nothing to prevent either appellant from acknowledging guilt immediately upon being charged or soon after the laying of a charge.

The general observation by the Magistrate that each could "only be described as a late plea of guilty" was accurate and there is nothing in the material before this Court to suggest that his Honour made an inadequate allowance for the pleas of guilty.

Prevalence

[30] Both appellants submitted that the Magistrate fell into specific error in finding that the particular offence committed by each appellant was prevalent or had become more prevalent. As the submissions progressed, the criticism was primarily directed at his Honour's observations that the offence is prevalent in the "northern suburbs" and that "the community is screaming out for the courts to do something about it". Similar criticism was made of the observation that the situation of two or more men attacking single people is "not unusual".

[31] The specific passages to which exception is taken and which the appellants submit disclose error were as follows:

15 May 2008 -	"It [the assault] is not to be tolerated in a civilised society, and I've got to consider all that, *together with the fact that unfortunately violence of this kind is prevalent in the northern suburbs of Darwin and the community is screaming out for the courts to do something about it*". (my emphasis)
30 May 2008 -	"*This Court has noticed that such violent attacks have become more and more prevalent in Darwin, in the suburbs of Darwin. It is not unusual the situation that two or more men are attacking single people.* In my view the protection of the community is an important consideration in

> today's sentencing, and a strong message of deterrence needs to be sent out by this Court that such violence is not to be tolerated". (my emphasis)

[32] Section 5(2)(g) of the Sentencing Act requires the court to take into account "the prevalence of the offence". The court is entitled to draw on its own experience, and the experience of other criminal courts, in making a judgment as to prevalence. In respect of less common offences, a court may not, without evidence or reliable statistics, be in a position to make such a judgment. However, numerous offences are so commonly before the criminal courts that evidence will not be required in order to assess the prevalence of the offence.

[33] The Magistrate is an experienced Magistrate who has sat for many years in Darwin and throughout the Territory. Bearing in mind the volume of violent offences of the type under consideration with which Magistrates deal every day of the week, his Honour is well placed to make general observations about the prevalence of this type of offending. Further, his Honour is not alone in his recognition that this type of offending is prevalent. The Supreme Court regularly observes that this type of offending is prevalent. The prevalence is blatantly obvious from the constant stream of media reports concerning this type of violence and the volume of cases involving offending of this nature coming before the criminal courts of the Northern Territory.

[34] The same observations can be made with respect to the Magistrate's other remarks to which I have referred. In particular, the difficulties experienced in recent years over the very wide area described as "northern suburbs" is readily apparent from media reports and localities of offences brought before the criminal courts.

[35] The Magistrate was not intending to produce a statistical analysis. In substance, his Honour was making a general observation about the prevalence of the offence, particularly in the northern areas, and the concern of the community that courts impose penalties which will act as a general deterrent. This is a common observation made every day by criminal courts in observing that general deterrence is a matter of importance in the exercise of the sentencing discretion with respect to offences involving the type of violence perpetrated by the appellants.

[36] Counsel referred to the decisions of B F Martin CJ in *Moore v Materna*[1] and Southwood J in *Russell v Littman*[2]. In the former decision, the Magistrate found that breaking into the residence of the store manager at Beswick was a prevalent offence. However, the Chief Justice was of the view that there was no basis upon which the Magistrate could arrive at such a finding. In the latter case, Southwood J was similarly of the view that the Magistrate erred in taking into account a misconception that offending by way of throwing rocks at taxis was prevalent.

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[1] (1996) 136 FLR 142.
[2] [2006] NTSC 50.

[37] The decisions in *Moore* and *Russell* turned upon their individual facts. They demonstrate that care needs to be taken in drawing conclusions as to prevalence of particular offences, but they do not support the proposition that a sentencing court will always require evidence before drawing a conclusion as to the prevalence of a particular offence in Darwin or a more limited geographical area of Darwin. In particular, they do not support the proposition that a sentencing court requires evidence that crimes of violence of the type committed by the appellants are prevalent in Darwin and are a significant problem in the northern suburbs.

[38] In my view, the Magistrate did not err in making the general observations about prevalence and deterrence to which I have referred. There is no basis for inferring, as submitted by the appellants, that his Honour determined there was increased need for deterrence which had to be reflected in a longer penalty than would otherwise have been appropriate. His Honour was emphasising the nature of the problem and the need for a penalty that properly reflected the element of general deterrence.

[39] If, contrary to my view, the Magistrate was in error with respect to the specifics of prevalence, such as the reference to the northern suburbs and to the incidence of two offenders attacking a single victim, and should I be required to interfere and exercise my own sentencing discretion afresh, I would make similar general observations that crimes of violence of the type committed by the appellants are prevalent within our community and there is a need for courts to impose penalties that will act as a general deterrent. As

to Parnell, I would impose the same head sentence of 18 months imprisonment and order that he serve 12 months. However, on suspension of the balance I would fix an operational period of two years and six months from the date of release.

[40] As to Ellis, should I be required to exercise my own sentencing discretion afresh, I would impose the same head sentence of 18 months imprisonment. However, by reason of his lesser record of prior offending and other matters to which I will refer later in these reasons, I would order that Ellis be released after serving nine months and fix an operational period of two years.

Ellis – Parity/Disparity

[41] As to Ellis, the final complaint raises the issue of parity of sentence, or, perhaps more accurately, the absence of disparity between the sentences imposed upon the appellants. While there were no facts in connection with the commission of the offence that would have justified any disparity, Ellis submitted that a distinction should have been made between the sentences imposed upon the appellants by reason of the differences between their respective prior records of offending.

[42] Ellis appeared before the Katherine Court of Summary Jurisdiction on a number of occasions dating back to March 2003. Apart from the offence of possessing cannabis committed on 12 August 2006 in respect of which a fine of $400 was imposed, and an offence in 2005 of possessing a trafficable

quantity of a dangerous drug in respect of which a fine of $1,000 was imposed, the prior offending by Ellis is limited to a social nuisance type offence and driving offences. This record of offending stands in significant contrast to the history of offending by Parnell which began in 1999 when he committed a number of offences of dishonesty for which he was dealt with in January 2000. Later in 2000 Parnell was convicted of breaching a community service order and suspended sentence. Although the date is not clear from the record of prior offending, it appears that in 2000 Parnell committed two offences of entering an occupied dwelling at night, one of which involved an intention to commit a crime. A sentence of seven months imprisonment was imposed for each offence, those sentences to be served concurrently and suspended after service of three months. On the same occasion that the Court dealt with Parnell for those offences. He was also convicted of two offences of stealing and one of unlawfully damaging property.

[43] Significantly for the purpose of comparing the records of prior offending, on 11 March 2004 Parnell committed the crime of armed robbery. A sentence of three years imprisonment was imposed and suspended after service of five months and two weeks on conditions involving supervision. The operative period of the suspension was two years from 29 April 2004. On 14 August 2006 the appellant was convicted of breaching that order of suspension and the operative period was extended to 24 December 2006. On 4 January 2007

a further breach was proved and ten days of the suspended sentence was restored.

[44] The issue of parity or disparity in sentencing raised by Ellis concerns an important principle of sentencing discussed in numerous authorities following the decision of the High Court in *Lowe v The Queen*[3]. More recently it was again discussed by the High Court in *Postiglione v The Queen*[4]. The overall principle is not in doubt, but the particular exposition of the principle will vary according to the circumstances, in particular whether the offenders have been sentenced by the same or different Judges or Magistrates. Where, as in the matter under consideration, the offenders have been sentenced on the same occasion by the same Magistrate, the relevant principle was explained by King CJ, with whose judgment Mohr and Von Doussa JJ agreed, in *R v MacGowan*[5]:

> "1. Where two or more persons are sentenced by the same judge for the same crime or crimes the sentences imposed on them should be proportionate to their respective degrees of culpability and to the various personal factors of aggravation and mitigation. Any distinctions in the sentences imposed should fairly reflect differences in the respective degrees of culpability and the circumstances of the offenders and should be explained by the sentencing judge. Unjustified disparities will be rectified by the Court of Criminal Appeal on appeal by the Attorney-General or the offender even though the sentence under review, considered apart from disparity, might be regarded as within the permissible sentencing range."

[45] As Gibbs CJ explained in *Lowe*, the court interferes when unjustified disparity exists because "it considers that the disparity is such as to give rise

[3] (1984) 154 CLR 606.
[4] (1997) 189 CLR 295.
[5] (1986) 42 SASR 580, 582–583.

to a justifiable sense of grievance, or in other words give the appearance that justice has not been done"[6]. Just as unjustified disparity may give rise to a legitimate sense of grievance, so may the absence of disparity when the respective degrees of culpability or matters personal to the offenders require, as a matter of fairness, that the distinction between the offenders should be reflected in the respective sentences.

[46] As I have said, considered in isolation from the sentence imposed upon Parnell, in my opinion the sentence imposed on Ellis was well within the range of the Magistrate's sentencing discretion. However, as I have explained, Parnell has a significantly longer and more serious record of prior offending than Ellis. The question for determination is whether the distinction between their records of prior offending should have led the Magistrate to impose a shorter sentence on Ellis than the sentence imposed on Parnell. If his Honour should have done so, should this Court interfere by reducing the sentence imposed on Ellis notwithstanding that it is otherwise within the range of the sentencing discretion?

[47] As was pointed out in the joint judgment of Mason CJ, Brennan, Dawson and Toohey JJ in *Veen v The Queen [No 2]*[7], a prior record of offending may assist the court in determining whether the offence "is an uncharacteristic aberration" or whether the commission of the offence has demonstrated "a continuing attitude of disobedience of the law". Their Honours also

[6] Above n 3, 610.
[7] (1988) 164 CLR 465, 477.

observed that the antecedent criminal history may "illuminate the moral culpability of the offender in the instant case" or demonstrate the "dangerous propensity" of the offender and the need to impose "condign punishment to deter the offender".

[48] Although the record of prior offending by Parnell was significantly more serious than that of Ellis, it was not such as to demonstrate that his moral culpability in the commission of the offence was greater than that of Ellis. Nor did it demonstrate a "dangerous propensity". The prior record of offending of both appellants tended to illustrate that both possessed "a continuing attitude of disobedience of the law" with the consequence that personal deterrence was a significant factor in sentencing both appellants.

[49] In respect of the head sentence of 18 months, in my view the difference between the record of prior offending of the appellants cannot reasonably lead Ellis to possessing a legitimate sense of grievance because his head sentence was not less than that imposed upon Parnell. There was no basis for distinguishing between the moral culpability of each appellant nor between their individual conduct in the commission of the attack upon the victim. Ellis struck the first blow, but Parnell used the pool cue. They acted together and are equally responsible for everything that occurred in the attack. It was well within the discretion of the Magistrate to decline to distinguish between the appellants in respect of the head sentences.

[50] The area that has given me cause for concern is the absence of distinction with respect to the period of the sentence to be served. This was the primary focus of counsel for Ellis. Counsel suggested that the issue is not so much one of parity or absence of disparity. Rather, the question is whether Ellis' lesser record of prior offending, coupled with other matters personal to him, should have led the Magistrate to a view that Ellis possessed greater prospects of rehabilitation and to distinguish between Ellis and Parnell in respect of the period to be served.

[51] The matters upon which counsel for Ellis relied were summarised in written submissions in the following terms:

> "• Appellant was 23 years old, and 22 years old at time of offence;
>
> • He had made admissions to the assault to police, and pleaded guilty to the original charge;
>
> • He was employed at the time of the offence as an apprentice butcher;
>
> • He was employed at the time of submissions with All-Cast (NT) Drainage Systems. A positive reference from this employer was also tendered in support;
>
> • Although not drunk while committing the offence, at around the time of the offence the appellant was suffering from a serious alcohol problem, that was affecting his ability to exercise self control and responsibility;
>
> • Since the offence and prior to submissions being made, the appellant had entered and successfully completed the Alcohol Court program with respect to another offence;

- On the other offence, which was committed 7 days after the present offence, the appellant had been sentenced to 7 months home detention. That sentence had been passed only two days before submissions made on the present offence;

- The appellant's antecedents were of a different, less serious, nature, although they reflected the alcohol abuse issue. There were no violent antecedents;

- He had participated in the Alcohol Court program by attending all counselling sessions, complying with breath tests, and remaining abstinent. There were reports from the Alcohol Court available but which were not admitted. He had been leading a quieter life, and getting on with employment. The reference supported these submissions;

- As a result of the home detention sentence the appellant would be required to continue with a very strict lifestyle."

[52] In addition to the lesser record of offending, two features arise from the matters advanced on behalf of Ellis that are of importance. First, since the commission of the offence Ellis had made significant efforts towards his own rehabilitation. He had successfully completed the Alcohol Court program. Secondly, Ellis produced to the Magistrate a reference from Ellis' current employer who spoke very highly of him in terms of his work and personality. That employer was prepared to continue the employment while Ellis was subject to home detention.

[53] Had the only factor relied upon by Ellis been the lesser record of prior offending, I would not have reached a conclusion that Ellis could reasonably possess a legitimate sense of grievance because the period to be served was not less than the period to be served by Parnell. However, when the lesser

record of prior offending is combined with the other matters of mitigation to which I have referred, including matters that Parnell could not call in aid of mitigation, I am persuaded that the Magistrate erred in not drawing a distinction between the appellants to the extent of fixing a lesser term to be served by Ellis.

[54] For these reasons, the appeal by Ellis is allowed to the limited extent of setting aside the order that he serve 12 months. I fix a period of nine months to be served before the sentence is suspended with an operational period of two years and six months.

[55] The appeal by Parnell is dismissed.
