The Queen v Holmes [2009] NTCCA 16

PARTIES:	THE QUEEN
	v
	HOLMES, Jermaine
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA 13 of 2009 (20900045)
DELIVERED:	26 November 2009
HEARING DATES:	30 October 2009
JUDGMENT OF:	MARTIN (BR) CJ, MILDREN AND KELLY JJ
APPEAL FROM:	Southwood J

CATCHWORDS:

CRIMINAL LAW - APPEAL - CROWN APPEAL AGAINST SENTENCE

Unlawfully causing serious harm – use of a dangerous weapon – personal circumstances of appellant – weight to be given to rehabilitation and requirements of general deterrence and denunciation – appeal dismissed.

Criminal Code 1984 (NT), s 181; *Police Administration Act 1978* (NT), s 140.

Markaria v The Queen (2005) 228 CLR 357, applied.

Ireland v The Queen (1987) 49 NTR 10; *R v Ciccone* (1974) 7 SASR 110; *R v Goodwin* [2003] NTCCA 9; *R v J O* [2009] NTCCA 4; *R v Osenkowski* (1982) 30 SASR 212; *Veen v The Queen (No 2)* (1988) 164 CLR 465; *Waye v The Queen* [2000] NTCCA 5; *Yardley v Betts* (1979) 22 SASR 108, discussed.

Daniels v The Queen (2007) 20 NTLR 147; *Director of Public Prosecutions (Vic) v King* (2008) 187 A Crim R 219; *R v Jones* (2008) 186 A Crim R 191; *R v Lange* [2007] NTCCA 3; *R v Raggett* (1990) 101 FLR 323; *R v Riley* (2006) 161 A Crim R 414, referred.

REPRESENTATION:

Counsel:

Appellant:	M Nathan, P Usher
Respondent:	M O'Reilly

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	Central Australian Aboriginal Legal Aid Service

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

The Queen v Holmes [2009] NTCCA 16
No. CA 13 of 2009 (20900045)

BETWEEN:

THE QUEEN
Appellant

AND:

JERMAINE HOLMES
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & KELLY JJ

REASONS FOR JUDGMENT

(Delivered 26 November 2009)

Martin (BR) CJ:

Introduction

[1] This is an appeal by the Director of Public Prosecutions ("the Director") against a sentence of 18 months imprisonment, suspended after service of one month, imposed by Southwood J for the crime of Unlawfully Causing Serious Harm. Three grounds of appeal were argued:

> "1. That the learned sentencing Judge failed to give adequate weight to the principles of general deterrence and denunciation in light of his finding that this is a prevalent offence.
>
> 2. That the learned sentencing Judge erred in giving the greatest weight to rehabilitation.

3. That in all circumstance of the case the sentence imposed by the learned sentencing Judge was manifestly inadequate."

[2] For the reasons that follow, in my opinion the learned sentencing Judge erred and, as a consequence, imposed a head sentence that was too low, but in the exceptional circumstances of this case suspension after service of only one month was justified and the appeal should be dismissed.

Facts

[3] The facts are set out in detail in the reasons of Mildren J. The respondent committed a serious crime which was marked by the presence in his hand of a dangerous weapon in the form of an empty beer glass. At the time that the respondent swung a punch at the face of the victim, he was aware that he held an empty beer glass in his hand and he foresaw the possibility that his action could cause serious harm to the victim. The blow was struck with sufficient force to break the glass and resulted in a seven centimetre laceration to the victim's neck and a partial cut to the sternomastoid muscle requiring surgery. The victim initially lost approximately 400 millilitres of blood and, notwithstanding treatment at the Tennant Creek Hospital, when the victim arrived at the Alice Springs Hospital he was still bleeding from the wound to the muscle. If the ongoing bleeding had been left untreated, it could have formed a large expanding haematoma which had the potential to compromise the victim's airway and, in that way, the serious injury caused by the blow was likely to endanger the victim's life.

[4] In a victim impact statement of May 2009, the victim stated that he has a "long raised scar behind [his] left ear which is raised and very noticeable". In addition, the victim is left with a lack of feeling between his left temple and behind his left ear, running along the scar tissue, which he described as a "strange void numbness". The victim has also been left with significant ongoing psychological effects which it is unnecessary to canvass.

[5] Finally in respect of the aggravating features of the crime, it is appropriate to note that the victim was vulnerable to this type of attack. He was lawfully escorting the respondent from licensed premises in the early hours of the morning in circumstances where alcohol fuelled violence is prone to occur. Persons in the position of the victim are vulnerable to attacks by drunk men who resist or who are angered by eviction from licensed premises late at night and such persons are entitled to the full protection of the law.

[6] Although the features of the respondent's criminal conduct to which I have referred demonstrate that he committed a serious offence, it should not be overlooked that the crime was not accompanied by any element of premeditation. When asked to leave the premises the respondent complied and it was only after a verbal exchange outside the premises that the respondent stopped, turned and spontaneously on the spur of the moment struck a single blow. The respondent did not follow up with further blows. Nor did he engage in a sustained attack upon the victim.

[7] Importantly, the respondent did not specifically intend to strike the victim with the glass. The circumstances of this crime are far removed from those cases in which the offender deliberately smashes a glass or bottle for the purposes of using it as a weapon and follows up by intentionally using the broken glass as a weapon. Although the respondent was aware that the glass was in his hand and foresaw the possibility of serious harm being caused by striking the victim, he did not possess the specific intention to use the glass as a weapon and he did not intend to cause harm to the victim.

"Glassing"

[8] Having mentioned the wide range of circumstances in which glass can be used as a weapon, I draw attention to the misguided and unfortunate use of the term "glassing". The popular use of this term is counter productive to the interests of justice. To immature minds this term has the potential to distort the true nature of crimes involving the use of glass and, in an irrational way, to add notoriety to such crimes. There is no separate or special category of crime called "glassing". The use of glass in committing crimes of violence is but one example of crimes involving the use of a weapon.

[9] Secondly, as Kelly J pointed out during submissions, the use of this term tends to lump together as one category all cases in which glass of one form or another is used. As a consequence, reports tend to overlook the wide variety of circumstances in which offences involve the use of glass. In

determining sentence, each case must be judged according to its particular circumstances and it is misleading to apply the term "glassing" to all cases in which glass in one form or another is used as a weapon. As I have said, these types of cases are examples of crimes involving the use of a dangerous weapon and the seriousness of a particular offence is to be judged by its individual circumstances and not by a popular label given to such offences.

Personal Circumstances

[10] To be weighed against the seriousness of the crime are the personal circumstances of the respondent. Unlike so many offenders who come before the Criminal Court, particularly young Aboriginal men who have grown up in difficult circumstances, the respondent reached the age of 22 years without getting into trouble with the law. He completed a good education and has a sound work history. In 2006, recognising that he had a problem with alcohol, the respondent voluntarily undertook a rehabilitation program at an interstate location.

[11] At the time of the offending the respondent had been working for four months with the Julalikari Council Aboriginal Corporation in Tennant Creek in the "Ready for School Initiative Program". This is a program designed to encourage young indigenous children to attend school. The respondent and other members of the team acted as role models for young indigenous children and provided tangible assistance in ensuring the attendance of those children at school. This included arranging meals and interacting with the

parents of the children, primarily in town camps around Tennant Creek. The projects officer under who the respondent worked described the respondent as a "quiet, peaceful, young man" with a "gentle, pleasing manner". He also referred to the respondent as "unintimidating and good-natured". The officer spoke highly of the respondent's work ethic and regarded the criminal conduct as completely out of character. Others also provided references for the respondent describing him as quiet and gentle and a person who has sought to avoid trouble.

[12] At the time of his offending the respondent was a young Aboriginal man of positive good character who stood out in Tennant Creek as a good role model for younger indigenous persons. He was a productive member of the community and was contributing to the community in the difficult area of indigenous affairs. He had taken control of his own life in a positive way, avoiding the trap of substance abuse and crime into which so many young indigenous men have fallen. On the evening in question, being New Year's Eve, the respondent made the mistake of consuming too much alcohol. However, he was not violent inside the premises. He was asked to leave because he was being rowdy in the course of a heated discussion with a cousin. As I have said, the respondent complied with the request to leave and it was not until outside the premises and a verbal altercation had occurred that he swung the single blow on the spur of the moment.

[13] It was plain on the material before the sentencing Judge, and was accepted by his Honour, that the respondent's conduct was entirely out of character.

The respondent was immediately very sorry for his conduct and subsequently wrote a letter of apology to the victim. In addition, within a few days of committing the crime, the respondent sought counselling for his use of alcohol. The counsellor noted that the respondent was an occasional drinker and, having consumed too much alcohol on the occasion in question, now sought assistance in avoiding a relapse. In keeping with his underlying good character, not only has the respondent accepted full responsibility for his actions, but he has actively pursued his own rehabilitation.

Grounds 1 and 2

[14] Grounds 1 and 2 can conveniently be dealt with together. They complain that the sentencing Judge failed to give adequate weight to the requirements of general deterrence and denunciation and erred in giving too much weight to rehabilitation. These complaints are based upon the following passage in his Honour's sentencing remarks:

> "In all of the circumstances of this case, *I have given the greatest weight to rehabilitation. I've also given some weight to punishment and to denunciation and to general deterrence. I have given less weight to specific deterrence.* The community strongly disapproves of the offender's conduct and committee members of clubs are entitled to be safe when escorting drunken people off club premises. Courts must do what they can to protect them." (my emphasis)

[15] In view of the respondent's youth, excellent background and very good prospects of rehabilitation, it is not surprising that the sentencing Judge was particularly concerned with the question of rehabilitation. However, I am troubled by his Honour's view that rehabilitation warranted the "greatest

weight", while punishment, denunciation and general deterrence warranted only "some weight".

[16] Rehabilitation is always a significant factor when dealing with young offenders, particularly those who are before the Criminal Court for the first time and in respect of whom a sentencing Judge accepts that the criminal conduct is out of character. However, as a matter of sentencing principle and community expectation, there are times when the offending by a young person, even a young person of prior good character, is so serious that considerations of youth and rehabilitation must take second place to the elements of punishment, denunciation and general deterrence. It is a matter of achieving the correct balance in each case.

[17] As the learned sentencing Judge recognised, serious crimes involving alcohol fuelled violence by young men are prevalent in our community. Unfortunately, the use of dangerous weapons, including glass, is commonly associated with such crimes. Over many years the criminal courts in the Northern Territory have frequently emphasised the community's disquiet about these types of crimes and the importance of both denunciation and general deterrence when sentencing for such crimes.

[18] Counsel for the respondent contended that the remarks of the sentencing Judge to which I have referred should not be read literally as his Honour had already decided to impose a sentence of imprisonment and was addressing the difficult question as to the period to be served. I do not agree. His

Honour had dealt with the personal background of the respondent and with the circumstances of the offending. Having observed that the offending was out of character and the respondent is remorseful with good prospects of rehabilitation, it was then that his Honour made the observations to which I have referred and proceeded to impose sentence. In my opinion his Honour's approach demonstrates that in determining both the length of the head sentence and the period to be served, his Honour applied his view that the greatest weight should be given to rehabilitation and lesser weight to punishment, denunciation and general deterrence. While rehabilitation was undoubtedly important, in view of the prevalence of serious crimes of alcohol fuelled violence involving the use of weapons and the seriousness of the respondent's offending, in my view it was an error to give the "greatest" weight to rehabilitation and "some", meaning lesser, weight to punishment, denunciation and general deterrence.

Ground 3 – Manifest Inadequacy

[19] As to the length of the sentence, it must be borne in mind that there is no tariff for serious crimes of violence of the type committed by the respondent. Such crimes are committed in an infinite variety of circumstances and by a wide range of offenders. Notwithstanding the absence of a tariff, however, "there is a range of appropriate sentences that can be said to comprise the sentencing 'standard'" for the particular crime

under consideration.[1] The role of a sentencing standard was explained in the joint judgment of Martin (BR) CJ and Riley J in *Daniels v The Queen*[2] and it is unnecessary to repeat that discussion.

[20] Regard must be had to the objective seriousness of the respondent's criminal conduct and to any mitigating circumstances accompanying the commission of the crime or arising from matters personal to the respondent. Regardless of the particularly strong circumstances of mitigation, the respondent's criminal conduct was not at the lowest end of the scale of seriousness for crimes of this type. While the offending was toward the lower end of that scale, by reason of the features to which I have referred, it was not at the lowest end. In my opinion the error by the sentencing Judge as to the place of rehabilitation in the sentencing process led his Honour into error by imposing a head sentence at the very lowest end of the range of sentences for offences of this type. In my view such a sentence was not appropriate.

[21] As to the decision of the sentencing Judge to suspend the sentence after service of only one month, in my view this is one of those rare and exceptional cases where that course was justified. Sentences for crimes of violence of the type committed by the respondent have increased in recent years. Further, in recent years the criminal court has emphasised that young offenders, even young offenders of prior good character, must expect to go to gaol if they commit serious crimes involving alcohol fuelled violence

[1] *The Queen v J O* [2009] NTCCA 4 at [87].

[2] (2007) 20 NTLR 147 at [29].

causing serious injury. However, neither the criminal courts nor the legislature have gone so far as to exclude the possibility of suspension of all but a very short period of actual custody, recognising that there are exceptional cases in which the interests of justice and the community are best served by suspension after only a short period of actual custody. This is one of those cases. As I have said, prior to committing the offence under consideration, the respondent had overcome the difficulties attending life as a young Aboriginal person in Tennant Creek and was, in ordinary language, "an excellent young person". He struck a single blow on the spur of the moment without a specific intention to use the glass as a weapon. His conduct was entirely out of character and he has set himself on the road to full rehabilitation. The respondent is a young man with a good future who has the capacity to make a positive contribution to the community. As King CJ said in *The Queen v Osenkowski*:[3]

> "There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform."

[22] Further, the respondent having served a period in custody, he is now undergoing a three month residential program of rehabilitation. He has excellent prospects of employment when that program has been completed. If the respondent is required to serve an additional period in custody, his

[3] (1982) 30 SASR 212 at 212 – 213.

progress in rehabilitation would be interrupted and the respondent is likely to become not only bewildered, but embittered. In addition, as a young person of previous good character, the respondent would be exposed further to the corrupting influence of prison.

[23] For these reasons, in my opinion, not only was this an exceptional case in which the course taken by the sentencing Judge was justified, but it would be counterproductive to the best interests of the community to require the respondent to serve any additional period in custody. To do so would not advance the elements of punishment, denunciation and general deterrence. It is sufficient to send the message that it is only in the rare and exceptional case that a serious crime of violence involving the use of a weapon, and causing serious injury, will not result in the offender being required to serve a significant period in custody.

[24] Similarly, although error occurred and the head sentence is too low, in my view the appeal in respect of that sentence should be dismissed. This is a Crown appeal and special considerations apply such that even if a sentence is manifestly inadequate it is not always appropriate to allow the appeal and re-sentence. In view of the powerful mitigating circumstances, this is not one of those cases in which it is necessary to interfere. It is sufficient to send the message that the head sentence was too low and future offenders, even young offenders of previous good character, cannot expect to receive the same degree of leniency

[25] For these reasons, in my view the appeal by the Director should be dismissed.

Mildren J:

[26] On 24 August 2009, the respondent was convicted on one count of causing serious harm contrary to s 181 of the *Criminal Code*. The learned sentencing Judge imposed a sentence of imprisonment for 18 months with orders that the sentence be suspended after serving one month on conditions. The conditions included a period of supervision for six months after release as well as a requirement to undergo a three-month residential alcohol abuse program. An operational period of 18 months was prescribed.

[27] The grounds of the appeal are:

1. That the learned sentencing Judge failed to give adequate weight to the principles of general deterrence and denunciation in light of his findings that this is a prevalent offence.

2. That the learned sentencing Judge erred in giving the greatest weight to rehabilitation.

3. That in all the circumstances of the case the sentence imposed by the learned sentencing Judge was manifestly inadequate.

[28] The facts as found by the learned sentencing Judge were that the respondent attended a New Years evening at the Tennant Creek Memorial Club on Wednesday 31 December 2008, drank a quantity of beer and became drunk.

The victim, a Committee member of the club, was also at the venue at the time consuming alcohol with friends. The victim approached the respondent and instructed him to leave the premises. He escorted the respondent from the drinking area adjacent to the bar through the reception area out of the front entrance doors and into the entrance alcove adjacent to the public footpath. The respondent followed about a metre or two behind. He had complied promptly with the victim's instructions and walked out of the club by the most direct route.

[29] As he was walking out the respondent drank the rest of the beer in his glass which he had been holding when he was directed to quit the premises. He still had hold of the empty glass in his right hand as he walked out the club. As both the victim and the respondent emerged from the club through the entrance door and into the alcove leading onto the public footpath, there was a verbal exchange between them, the nature of which is unknown. The respondent stopped and turned whilst the victim continued forward towards him. The victim approached the respondent to less than half a metre. The respondent then swung his right fist in the direction of the victim's face and connected instead with the left posterior lateral side of the victim's neck. The respondent still had an empty beer glass in his hand when he did so. The force of the blow caused the glass to shatter and as a result, the victim suffered a seven-centimetre laceration to that part of his neck. The respondent then left. He was pursued by friends of the victim who saw the

assault. They caught and detained the respondent approximately 100 metres from the club.

[30] Police and St Johns Ambulance attended a short time later. The victim was treated and conveyed to the Tennant Creek Hospital. The respondent was taken into police custody. He received four sutures to his right hand and was then conveyed to the Tennant Creek watch house where he was interviewed in accordance with s 140 of the *Police Administration Act*. He was then lodged in the cells.

[31] At approximately 5:00 pm on Thursday 1 January 2009, the respondent spoke with a legal practitioner and subsequently declined to take part in a formal record of interview. He was later charged, remanded in custody and then bailed on 2 January 2009.

[32] According to a medical report tendered by the Crown, the victim was transferred from the Tennant Creek Hospital to the Alice Springs Hospital on 1 January 2009. The report from the Tennant Creek Hospital said that there was an initial blood loss of approximately 400 millilitres at the site and there was slight oozing from the wound when he arrived at the Tennant Creek Hospital. There was a large clot sitting in the wound which had not dislodged and a dressing was applied. He was resuscitated with fluid and then transferred from Tennant Creek to the Alice Springs Hospital. At the Alice Springs Hospital, it was noted that there was a partial cut to the

sternum mastoid muscles and there was still bleeding from the muscle belly which was controlled by suture ligation and the muscle belly was repaired.

[33] In the opinion of Dr Jacob, head of the Surgery Department of the Alice Springs Hospital, the injury was of a serious nature mainly because there was a cut to the muscle belly which was still bleeding and if it was left alone it could form a large expanding haematoma which could actually compromise the airway. Dr Jacob noted that the victim made a good recovery and was discharged from hospital on 2 January 2009.

[34] According to the Victim Impact Statement, the victim stated that he had lost a very large quantity of blood and was resuscitated on two occasions by paramedics whilst in Tennant Creek. Directly following the attack, he was drifting in and out of consciousness. He was required to remain at the Tennant Creek Hospital for approximately 10 hours as the medical staff were having difficulties in stabilising him enough so that he could be medivaced by the Royal Flying Doctor Service to the Alice Springs Hospital.

[35] The victim found the flight to Alice Springs very distressful because he was tied down to prevent all movement so that the wound would not rupture in flight.

[36] The victim stated that he was the owner and operator of a freight company in Tennant Creek. Because of the injury, he was unable to return to work

for two weeks due to the possibility of the wound rupturing and it was necessary for him to employ additional personnel to cover his workload.

[37] He further said that since the attack he was less trusting of others, that he was very cautious of other people and his surroundings, that when he goes out socialising, he always has his back to the bar or the wall and if anyone comes up from behind him, he becomes very anxious and concerned for his safety. He is also nervous when in public places where there are large numbers of people.

[38] The learned sentencing Judge said that the offending was serious, that such offences are prevalent, that the victim sustained a serious injury, that glasses are particularly dangerous weapons and that the seriousness of the offending was qualified by the fact that the respondent acted on the spur of the moment and struck the victim only once.

[39] The learned sentencing Judge accepted that the respondent was remorseful for his conduct. He found that he had pleaded guilty at the earliest opportunity and that he had written a letter of apology to the victim. His Honour accepted that the offending was out of character and that the respondent was remorseful for his actions. He also found that the respondent had good prospects of rehabilitation.

[40] So far as the respondent's personal circumstances are concerned, the learned sentencing Judge found that the respondent is an Aboriginal man who was born in Darwin on 17 June 1986. He was therefore 22 years of age at the

time of the offence. The respondent grew up on Bagot Reserve in Darwin and in Tennant Creek. Although his parents have separated and now live apart, he came from a functional and supportive family. The respondent had completed year 10 at Nightcliff High School in Darwin. After finishing high school, he completed a number of vocational courses which involved him studying mechanics at Charles Darwin University and welding, animal husbandry, stock work and first aid at the Katherine Rural College. He had a good work history and had recently been employed in the Ready for School Initiative Program conducted by the Julalikari Aboriginal Corporation in Tennant Creek.

[41] The respondent has no prior convictions. A number of references were tendered on his behalf. The learned sentencing Judge found that prior to committing the offence the respondent had a positively good reputation.

[42] Prior to the offending the respondent had a problem with the misuse of alcohol. At his own motion, he attended a religious institution in Sydney to try to overcome this problem where he was a resident for approximately three months in 2006.

Grounds of Appeal

Ground 1 – Failure to give adequate weight to the principles of general deterrence and denunciation in light of the finding that the offence was prevalent.

[43] Counsel for the respondent does not take issue that this was "serious, prevalent offending". It is not clear to me in what sense the offending was

said to be prevalent. During the course of submissions, his Honour referred to prevalence in this fashion:

> But the reality is, these offences are quite prevalent, now Australia wide this sort of glassing business that goes on. People who escort people who are drunk from such premises shouldn't be subject to such risks.

[44] The so-called glassing offences vary considerably. It is one thing to deliberately knock the end of a glass bottle and use the bottle as a weapon for the deliberate purpose of inflicting injury. It is another thing where the person has a glass in his hand at the time he swings a blow in the spur of the moment and in the process injures not only the victim, but himself as well.

[45] In the former case, the offender is obviously intending to inflict serious harm on the victim. In the latter case, no such intention may be evident and indeed, in this case, the respondent was not charged with intentionally causing grievous harm.

[46] I agree with the observations of the Chief Justice at paras [8] and [9] of his Honour's reasons that it is misguided and unfortunate to use the term "glassing" in cases of this kind.

[47] Further, there was no finding that the attack was unprovoked; nor was there a finding that the attack was provoked. The question of whether or not there was any provocation was left neutral because neither party could remember what the conversation was about nor why it was that the victim approached the respondent in the manner set out in the Crown facts. This distinguishes

the case from those where there is a positive finding that the attack was unprovoked.

[48] On the other hand, the injuries sustained to the victim were quite serious. It was fortunate indeed that the victim was able to receive prompt treatment and apparently has not been left with any significant scarring or other physical consequences of a permanent or even semi-permanent nature.

[49] Counsel for the appellant referred to the remarks of the learned sentencing Judge where his Honour said that:

> In all the circumstances of this case, I have given the greatest weight to rehabilitation. I have also given some weight to punishment and to denunciation and to general deterrence. I have given less weight to specific deterrence.

[50] It was put that in the present case the learned sentencing Judge failed to appropriately balance the competing interests of punishment, rehabilitation, deterrence, denunciation and protection and in particular failed to give significant weight to general deterrence and denunciation as they related to an objectively serious and prevalent offence.

[51] As I understand some of the submissions that were put by counsel for the appellant, in cases of this kind, general deterrence was a matter of "overriding importance" and that it was necessary in seeking to determine the sentence appropriate to the crime to have regard to the gravity of the offence viewed objectively before taking into consideration other factors.

[52] In my view, since the decision of the High Court in *Markarian v The Queen*[4] it is impermissible to adopt a two tiered approach where the objective circumstances determine the first tier and the second tier or sentence ultimately imposed was derived by making additions to or subtractions from the first tier to reflect matters personal to the accused. That is not the say that it would be wrong for a sentencer to make, in a provisional way, an assessment of the sentence called for by the objective facts. However, as was pointed out in the majority judgment in *Markarian v The Queen:*[5]

> It might or might not be appropriate for a trial judge to state such a provisional view. A judge would rarely be in error in not doing so. It is, after all, a provisional position only.

[53] Further, their Honours said:[6]

> Express legislative provisions apart, neither principle, nor any of the grounds of appellate review, dictates the particular path that a sentencer, passing sentence in a case where the penalty is not fixed by statute, must follow in reasoning to the conclusion that the sentence to be imposed should be fixed as it is. The judgment is a discretionary judgment and, as the bases for appellate review reveal, what is required is that the sentencer must take into account all relevant considerations (and only relevant considerations) in forming the conclusion reached. As has now been pointed out more than once, there is no single correct sentence. And judges at first instance are to be allowed as much flexibility in sentencing as is consonant with consistency of approach and as accords with the statutory regime that applies.

[54] In my opinion, it has not been demonstrated that the learned sentencing Judge erred in giving, as he appears to have done, significant weight to

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[4] (2005) 228 CLR 357.

[5] (2005) 228 CLR 357 at 372-373.

[6] *Markarian v The Queen* (2005) 228 CLR 357 at 371 [27].

rehabilitation and less weight to general deterrence, punishment and denunciation. It cannot be said that he gave no weight to the other factors which are necessarily required to be considered in arriving at a just sentence. Plainly, he took them all into account. As has often been said, a sentence of imprisonment whether suspended or not is still a sentence of imprisonment and, in any event, in this particular case, the sentence was not wholly suspended. Whilst, as a general rule, general deterrence, punishment and denunciation should be given primary consideration in cases of his kind, there are always rare and exceptional cases where greater weight can justifiably be given to rehabilitation.

[55] There were clearly a number of important mitigatory factors in this case. These included the respondent's age, his early plea of guilty, his remorse and contrition, the fact that he apologised to the victim, his good work record, his lack of prior convictions and positive good character and the fact that he was a person who was interested in providing assistance and help to others. Moreover, it was very much to his credit that notwithstanding his Aboriginal background and early difficulties with alcohol, he had taken steps of his own volition to curb his alcohol consumption. These were all powerful mitigatory factors to which the learned sentencing Judge was entitled to give significant weight.

[56] It must also be remembered that in order to establish the existence of error the Crown must show that the sentence imposed was not just arguably

inadequate, but so very obviously inadequate that the sentence imposed is unreasonable or plainly unjust.[7]

[57] It is perhaps also timely to remember the observations of King CJ in *R v Osenkowski*:[8]

> It is important that prosecution appeals should not be allowed to circumscribed unduly the sentencing discretion of judges. There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for leniency which has traditionally been extended even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform. The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crimes to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.

[58] So far as the head sentence is concerned, we were referred to a number of comparative sentences imposed by Judges of this Court for sentences imposed for this offence. I do not consider that the comparatives show that the head sentence imposed in this case was so far out of range as to demonstrate error.

[59] On the other hand, it is the case that the actual period of time that the respondent has been sentenced to serve before being released on conditional liberty is less than the cases to which we have been referred. However, in

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[7] *R v Raggett* (1990) 101 FLR 323; (1990) 50 A Crim R 41 at 47.

[8] (1982) 30 SASR 212 at 212-213.

each of those case, the offending was, for one reason or another, more serious than in the instant case.

[60] As was said in *Yardley v Betts:*[9]

> The protection of the community is also contributed to by the successful rehabilitation of offenders. This aspect of sentencing should never be lost sight of and it assumes particular importance in the case of first offenders and others who have not developed settled criminal habits. If a sentence has the effect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an offender to avoid offending in future, the protection of the community is to that extent enhanced.

[61] The learned sentencing Judge, because of the seriousness of the offence, was without doubt required to order a term of imprisonment some of which needed to be served. This in fact he did. I am unable to conclude that the sentence which he actually imposed is manifestly inadequate in the sense discussed in the authorities.

[62] I would dismiss the appeal.

Kelly J:

[63] This is an appeal by the Crown. There are three grounds of appeal:

1. that the learned sentencing Judge failed to give adequate weight to the principles of general deterrence and denunciation in light of his finding that this is a prevalent offence;

[9] (1979) 22 SASR 108 at 112 per King CJ.

2. that the learned sentencing Judge erred in giving the greatest weight to rehabilitation;

3. that in all the circumstances of the case the sentence imposed by the learned sentencing judge was manifestly inadequate.

[64] On 21 August 2009 the Respondent Jermaine Holmes pleaded guilty to unlawfully causing serious harm contrary to s 181 of the *Criminal Code*. The maximum penalty for that offence is imprisonment for 14 years.

[65] The facts are set out in the reasons of Mildren J.

[66] On 24 August 2009 the Respondent was sentenced to 18 months imprisonment with the sentence suspended after 1 month with an operative period of 18 months. There were conditions imposed on the suspended sentence requiring the Respondent to be under the supervision of the Director of Correctional Services for a period of six months and to attend a residential rehabilitation programme upon release.

[67] The Respondent has served one month in prison and is currently undergoing the residential rehabilitation programme in compliance with the terms of his suspended sentence. The programme lasts from two to three months.

Ground 1 and 2: Failure to give adequate weight to the principles of general deterrence and denunciation and giving the greatest weight to rehabilitation

[68] Grounds 1 and 2 are closely interrelated. Essentially the Appellant contends that, given the objective seriousness of the offence and the finding that the offence is prevalent, the learned sentencing Judge should have given more weight to general deterrence and denunciation and less weight to rehabilitation.

[69] It is not suggested by the Appellant that the sentencing Judge ignored the principles of general deterrence and denunciation. In his sentencing remarks, he said:

> "In all of the circumstances of this case, I have given the greatest weight to rehabilitation. I've also given some weight to punishment and to denunciation and to general deterrence. I have given less weight to specific deterrence. The community strongly disapproves of the offender's conduct and committee members of clubs are entitled to be safe when escorting drunken people off club premises. Courts must do what they can to protect them."

[70] Counsel for the Appellant, Mr Nathan, rightly conceded that for the Appellant to succeed on either of these grounds, he would need to show that, given the objective seriousness of the offending and the prevalence of this kind of offence, it was an error of principle to place the greatest weight upon rehabilitation.

[71] In *R v Goodwin*[10] this Court emphasised that:

> "Where crimes of considerable gravity are committed, the protective function of the criminal court would cease to operate unless denunciation, general deterrence and retribution are significant sentencing considerations even in the case of juveniles."

[72] In *Waye v The Queen*[11] the Court went further and said:

> "In cases of armed robbery, armed home invasion, rape of a stranger involving violence with offensive weapons and other crimes of similar gravity, subjective mitigating factors must take a back seat to the need to deter, punish and make it entirely clear that the community does not approve of such conduct. Those who engage in offences such as the present[12] must be left in no doubt that regardless of their youth and prospects for future rehabilitation, they will forfeit their liberty for a very considerable period."

[73] It is in each case a matter for the sentencing Judge to find the appropriate balance having regard to the objective seriousness of the offence as well as the subjective factors peculiar to the offender. As the High Court pointed out in *Veen v The Queen (No 2)*:[13]

> "However, sentencing is not a purely logical exercise, and the troublesome nature of the sentencing discretion arises in large measure from the unavoidable difficulty in giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: protection of society, deterrence of the offender and others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they can point in different directions."

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[10] [2003] NTCCA 9.

[11] [2000] NTCCA 5.

[12] *Waye* was a case of home invasion and rape involving the use of offensive weapons.

[13] (1988) 164 CLR 465 at 476.

[74] The Appellant in its submissions, quoted from *R v Ciccone*:[14]

> "It is to be hoped that the deterrent effect of a term of imprisonment will itself be a step towards the reformation and rehabilitation of the prisoner. Imprisonment is not necessarily to be regarded as the antithesis of rehabilitation."

[75] That is clearly correct. However, the other side of the coin is that prevention and community protection are not necessarily to be regarded as the antithesis of rehabilitation. It has often been observed that successful rehabilitation itself serves the purpose of community protection.

> "If a sentence has the affect of turning an offender towards a criminal way of life, the protection of the community is to that extent impaired. If the sentence induces or assists an offender to avoid offending in future, the protection of the community is to that extent enhanced."[15]

[76] I do not consider that the learned sentencing Judge made an error of principle in placing the greatest weight upon rehabilitation in the circumstances of the present case. Although the crime to which the Respondent pleaded guilty is a serious one, I do not think that, in all the circumstances, it is in the category of cases, such as those mentioned by the Court in *Waye*, in which rehabilitation must necessarily take a back seat to retribution and deterrence.

[77] The learned sentencing Judge found that, while the offending was serious, its seriousness was qualified by the fact that the Respondent acted on the

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[14] (1974) 7 SASR 110 at 113.

[15] *Yardley v Betts* (1979) 22 SASR 108; (1979) 1 A Crim R 329 at 333.

spur of the moment and only struck the victim once. As Martin CJ has pointed out, the Respondent did not specifically intend to strike the victim with the glass, and the circumstances are far removed from those cases in which the offender deliberately smashes a glass or bottle with the intention of using it as a weapon to attack the victim. Moreover, before the verbal exchange which immediately preceded the offending, the Respondent was quietly and compliantly leaving the premises having been requested by the victim (a club committee member) to do so.

[78] The Respondent is a young Aboriginal man aged 23, who was raised in Darwin, where he and his family lived on the Bagot Community. He attended Ludmilla Primary School and Nightcliff High School. He completed year 10 and is literate and numerate and computer literate. He undertook vocational training at Charles Darwin University and Katherine Rural College.

[79] The Respondent plays a musical instrument and played in the Bagot church band. While he was living in Darwin, he was a member of an indigenous band which was regularly engaged by school authorities to perform lunch time concerts with a view to providing role models for secondary students – in particular indigenous students.

[80] The Respondent went to live in Tennant Creek with his father in 2005, and was living there at the time of the offending. He and his brother were

initiated as men in the Alyawarre tradition under the supervision of his father and uncles.

[81] While in Tennant Creek the Respondent was employed by the Julalikari Council as part of a three man team funded by the Commonwealth government to encourage young indigenous children to attend school.

[82] The Respondent has never been in trouble with the law before the present offending. He pleaded guilty to the present charge at the earliest opportunity and wrote a letter of apology to the victim.

[83] The Respondent is not an alcoholic, but at age 20 he recognised that when he did drink, he drank to excess – ie until he was oblivious - a phenomenon known as "binge drinking". With the encouragement of his family and church, he attended a three month course to help him curb his drinking, after which he did not fall back into the same pattern. He was drunk when the offending occurred, but it should be noted that the offence occurred on New Years Eve at the Memorial Club in Tennant Creek where the Respondent had gone to celebrate with his cousins. Shortly after committing the offence, he voluntarily sought further assistance to control his drinking.

[84] The learned sentencing Judge found that the offending was out of character, that the Respondent was remorseful for his actions and had good prospects of rehabilitation. In these circumstances, and considering the terrible difficulties faced by young Aboriginal men in our society, and the tragic prevalence of alcoholism and substance abuse, unemployment and crime

among the young Aboriginal men among whom the Respondent lives, it cannot be said that it was inappropriate for the learned sentencing Judge to place great weight on rehabilitation when faced with a young man who, apart from this one offence, appeared to be making a success of his life as a useful and productive member of the community.

Ground 3: – Sentence manifestly inadequate

[85] On a Crown appeal against the adequacy of a sentence, it is not enough that the Appeal Court is of the view that the sentence is too light. In the absence of a specific error by the sentencing judge, the sentence must be so manifestly inadequate as to demonstrate that error of principle must have occurred. To put it another way, the sentence must be so low as to "shock the public conscience".[16]

> "It is also trite law that an appellate court will not increase a sentence merely because its members believe they would have imposed a more severe sentence. The judicial discretion upon sentence is a wide one and rightly so. What must be established, before an appeal based on inadequacy of sentence is allowed, is not that it is lower than average, or merciful, but plainly wrong on established principles. In determining such an appeal an appellate Court must, in the ordinary case, keep an eye on the statute, the circumstances of the offence, the prevalence of the offence, and the background and character of the offender. In assessing the last-mentioned consideration, the trial judge has a tremendous advantage, especially if he is considering conditional release as a prelude to rehabilitation."[17]

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[16] *R v Osenkowski* (1982) 30 SASR 212 per King CJ at 213; *R v Riley* (2006) 161 A Crim R 414 at 419 [18] - [20], 421 - 422 [34]; *R v Lange* [2007] NTCCA 3 at [31].

[17] *Ireland v The Queen* (1987) 49 NTR 10 per Muirhead AJ, applied in *R v Raggett* (1990) 101 FLR 323; (1990) 50 A Crim R 41 by Kearney J at 47.

[86] The Appellant submits that, as the learned sentencing Judge noted, the offending in this case was serious. The Appellant points to the agreed facts tendered at sentence.

(a) The Respondent was intoxicated.

(b) The victim, a committee member of the Tennant Creek Memorial Club, escorted the respondent from the drinking area adjacent to the bar, through the reception area, out of the front entrance doors and into the entrance alcove adjacent to the public footpath.

(c) The Respondent swung his right fist at the victim's face.

(d) The Respondent and victim were less than half a metre apart.

(e) The Respondent knew that he held an empty beer glass in his hand.

(f) The empty beer glass connected with the left postural lateral side of the victim's neck.

(g) The force of the blow caused the glass to shatter.

(h) The victim suffered a 7 centimetre laceration to his neck and loss 400 milligrams of blood at the site.

(i) The victim suffered significant physical and emotional effects as a result of the Respondent's conduct.

[87] To this must be added that, by his plea of guilty, the Respondent must be taken to have foreseen the possibility of serious harm.

[88] The Appellant submits that, given the serious aggravating features, the sentence imposed by the learned sentencing Judge was "so disproportionate to the seriousness of the crime as to shock the public conscience."

[89] The Appellant relied upon a number of sentencing decisions as comparatives, none of which were truly comparable. Each of the cases relied on was objectively more serious than the present one, and none of the offenders had personal characteristics akin to those of the Respondent.[18] Most of the cases cited involved the deliberate creation of a weapon by smashing a glass or bottle (or picking up a broken bottle) followed by an intentional attack often involving multiple stabs/blows. When one looks at the range of sentences imposed[19] in the cases cited by the Appellant, considered against both the objective seriousness of the offences and the subjective factors, it seems to me that the head sentence of 18 months imprisonment was within that range. It was not manifestly inadequate.

[90] The question remains whether the fact that the learned sentencing Judge suspended the sentence after one month rendered the sentence manifestly inadequate. While it is true that a period of only one month to serve is low

[18] The one that was most similar on the facts (*R v Jones* (2008) 186 A Crim R 191) was from a different jurisdiction, and for a different offence which carried a lesser maximum penalty, but the head sentence was the same as in the instant case.

[19] The head sentences ranged from 18 months to 3 years.

for a case of causing serious harm with the use of a weapon, in my view it is not so low as to shock the public conscience given:

(a) the factors which the learned sentencing Judge found qualified the seriousness of the offending;

(b) the fact that the learned sentencing Judge imposed a substantial term of imprisonment as a head sentence;

(c) the subjective factors which led the learned sentencing Judge to place great weight upon rehabilitation; and

(d) the fact that the Respondent was also ordered to undertake a residential rehabilitation upon his release which, as counsel for the Respondent pointed out, placed a further restraint upon his liberty in addition to the one month imprisonment.

[91] I agree with Martin CJ and Mildren J that the observations of King CJ in *R v Osenkowski*[20] (quoted at [21] and [57] above) are apposite in the circumstances.

[92] I would dismiss the appeal.

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[20] (1982) 30 SASR 212 at 212-213. See also *DPP (Vic) v King* (2008) 187 A Crim R 219 per Relich JA (with whom Warren CJ and Forrest AJA agreed) at 230.