PARTIES:	IN THE MATTER OF THE JUSTICES ACT AND IN THE MATTER OF AN APPEAL AGAINST SENTENCE IMPOSED BY THE COURT OF SUMMARY JURISDICTION AT DARWIN BETWEEN: **HORRIE AMAGULA** Appellant AND: **ROGER JOHN JEFFREY** Respondent
TITLE OF COURT:	In the Supreme Court of the Northern Territory of Australia
JURISDICTION:	Supreme Court of the Northern Territory of Australia
FILE NO:	JA 18 of 1996
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Legislation

Parole of Prisoners Act

Cases

Lowe v The Queen (1984) 154 CLR 606
Lovelock v The Queen (1978) 33 FLR 132 at 136-7
The Queen v Kite (1971) 2 SASR 94 at 96
Bann v Frew (1982) 69 FLR 354
The Queen v MacGowan (1986) 42 SASR 580
Kelly v The Queen (1991) 33 FCR 536 at 542
R v Lainas (1989) 50 SASR 461 at 463
Carlson v Hayward (unreported) Kearney J, 26 April 1996

Texts

Nil

REPRESENTATION:

Counsel:

Appellant:	Mr Robinson
Respondent:	Ms O'Rourke

Solicitor:

Appellant:	NAALAS
Respondent:	DPP

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OF AUSTRALIA
AT DARWIN

No. JA 18 OF 1996

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IN THE MATTER OF AN APPEAL AGAINST SENTENCE IMPOSED BY THE COURT OF SUMMARY JURISDICTION AT DARWIN

BETWEEN:

HORRIE AMAGULA
Appellant

AND:

ROGER JOHN JEFFREY
Respondent

CORAM: **MILDREN J**

REASONS FOR JUDGMENT

(Delivered 16 July 1996)

This is an appeal against a sentence imposed by Mr Gillies SM on 29 February 1996 whereby he sentenced the appellant to a term of imprisonment for nine months. In consequence of that sentence, the appellant, who was on parole at the time for other offences, suffered the consequence that his parole was thereby revoked: see *Parole of Prisoners Act*, s12. Mr Gillies SM, as required by s4(5) of the *Parole of Prisoners Act*, fixed a new non-parole period of eight months.

The appellant had pleaded guilty before his Worship for unlawful use of a motor vehicle with the circumstance of aggravation that the property unlawfully used was of the value of greater than $20,000, namely $22,000, contrary to s218 of

the *Criminal Code*. The maximum penalty fixed by the *Criminal Code* for that offence was seven years imprisonment.

The facts, as apparently accepted by his Worship, were that at approximately 8:30 p.m. on the evening of Thursday, 25 January 1996, the appellant was with a group of friends at Angurugu when they were approached by one Camson Lalara who suggested that they go and steal a car. The appellant and the other offenders, who had all been sniffing petrol, walked to the mine site where the appellant and others waited in the bushes whilst one of the co-offenders, Amison Warrawilya, went to the car. The keys were found inside the car by him and he used the keys to drive it. He then gave the keys to the appellant who drove the vehicle to Umbakumba and back to the airport at Angurugu where he left the car and decided to go home. No damage was caused to the vehicle. The appellant did, however, give the keys to another co-offender.

On 30 January the appellant was apprehended and conveyed to the Alyangula Police Station where he participated in an audio-taped record of interview in which he made full admissions. When asked why he had stolen the car, he stated: "Just for a drive." He was then charged.

At the time of the offence the appellant had been on parole since July of the previous year in relation to offences of entering a building with intent to commit a crime, stealing and unlawful use of a motor vehicle, the value of which exceeded $20,000. Those offences were dealt with by the Alyangula Court of Summary Jurisdiction on 21 December 1994. The appellant on that occasion was sentenced to 18 months imprisonment in relation to the unlawful use offence, 2 months imprisonment in relation to the stealing offence and 2 months imprisonment in relation to the unlawful entry. A non-parole period of 6 months was imposed.

The facts, as put before the Court, in relation to the offender was that he is aged 20, having been born and raised at Angurugu. His father died when he was young. He was educated to grade 7 and left school so that he could participate in traditional ceremonies. He was currently in receipt of unemployment benefits. He was in a de facto relationship but there were no children. He had been living most recently at Angurugu with his aunt and uncle. He had apparently only recently been permitted to come to Groote Eylandt. He had been living on Bickerton Island with his uncle and had been going well, but his uncle had come to Groote Eylandt for ceremonial purposes and the appellant was basically required to remain with him and consequently he followed him to Groote Eylandt where this offence was committed.

The appellant had a long standing petrol sniffing problem. It was submitted by his counsel that he was not the primary offender in the taking of the vehicle.

The learned Magistrate had placed before him the appellant's record of prior convictions which included 17 prior convictions for unlawful use of a motor vehicle and 3 prior convictions for attempting to unlawfully use a motor vehicle. He also had a number of prior convictions for stealing.

The learned Magistrate was alive to the need to have regard to the principles of parity of sentencing and adjourned the matter on two occasions so that he could obtain further information from the parties as to the sentencing dispositions that had been imposed by another Magistrate, Mr McCormack SM, in relation to the co-offenders. One of the co-offenders was a juvenile and was placed on two months probation. Another offender was released upon entering into a three month good behaviour bond. Community service orders were imposed on three other offenders amounting to 24 hours, 40 hours and 120 hours respectively. The person said to be the principal offender, Camson Lalara, had not been dealt with by the Court at that

stage. I was told during the hearing of the appeal by the counsel for the respondent, Ms O'Rourke, that the charge against Lalara was subsequently withdrawn.

His Worship had placed before him information concerning the prior convictions of the other offenders. Rodson Amalgula, who was still a juvenile and released on probation, had only one prior conviction for unlawful use of a motor vehicle. Lester Amalgula, who received 40 hours community service, had no prior convictions at all. Dave Murrungun, who received 120 hours community service, had two prior convictions for unlawful use of a motor vehicle, two for unlawful entry and one for stealing. Amison Warrawilya, who was released on a three month good behaviour bond, had eight prior convictions for unlawful use of a motor vehicle and one prior conviction for attempted unlawful use of a motor vehicle. He had previously been imprisoned on 31 July 1995 in relation to unlawful use charges. He also had a number of other previous convictions for dishonesty. The appellant's counsel had submitted that the offender whose prior record most resembled that of the appellant was Darren Bara Bara, who was slightly older than the appellant. His most recent prior offence had been dealt with on 20 December 1995 when he received 80 hours of community service. He had 19 prior convictions for unlawful use of a motor vehicle, plus one for attempting to use a motor vehicle.

This led his Worship to make further enquiries about what view Mr McCormack SM had taken in relation to the role which Mr Bara Bara had played in the commission of the offence. Mr McCormack's sentencing remarks had not been transcribed and as the appellant was in custody, his Worship was naturally anxious to have the matter dealt with promptly, so he adopted the expedient on having Mr McCormack's sentencing remarks in the matter of Mr Bara Bara, which had been tape recorded, played in Court in the presence of counsel. His Worship having heard Mr McCormack's sentencing remarks said:

> "It seems that Mr McCormack SM's reasons were very short and in relation to the use motor vehicle he made a distinction between drivers and initiators and those taking a ride and he attributed to Darren Bara Bara the role of a person taking a ride."

On sentencing the appellant, Mr Gillies SM differentiated the case of Darren Bara Bara from that of the appellant on the following bases:

1. The appellant committed this offence whilst on parole.

2. Mr McCormack SM dealt with Bara Bara on the basis that he had "just taken a ride", whilst in his view, on the facts presented to him, all of the co-offenders were "all instigators".

3. The appellant had actually driven the vehicle.

His Worship then imposed the sentence he did because of the need for both general and special deterrence and to protect the community.

The sole ground of appeal is that the learned Magistrate imposed a sentence that was unjustifiably disparate with the sentences imposed on the co-offenders. It was submitted that in accordance with the principles discussed by the High Court in *Lowe v The Queen* (1984) 154 CLR 606, a sentence of imprisonment of nine months for this offence was so disparate from a good behaviour bond or from community service orders as to warrant the intervention of this Court. It was not suggested that the sentence was manifestly excessive or that his Worship otherwise erred in any other way. It was suggested that notwithstanding the differences which his Worship adverted to before imposing a prison sentence on the appellant, whilst this may have justified his Worship in imposing a suspended sentence of imprisonment, it did not warrant an actual term.

Counsel for the respondent, Ms O'Rourke, submitted that these factors did warrant the course taken by Mr Gillies SM, and further, that the sentences imposed on the co-offenders were manifestly inadequate and that in those circumstances there could be no justifiable sense of grievance or any appearance that justice had not been done.

Further she pointed to the fact that the appellant had, whilst on parole, been dealt with by the Court for the same offence only one month previously when leniency had been extended to him by the imposition of a 120 hour community service order. I note on that occasion that the conviction for unlawful use apparently did not involve any circumstance of aggravation. However, on that occasion the consequence of the imposition of a community service order meant that the prisoner's parole had not been revoked.

Undoubtedly, there is considerable disparity between the actual sentence imposed upon the appellant and those of his co-offenders. However, as Gibbs CJ said in *Lowe v The Queen* at 609:

> "It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she paid in the commission of the offence, have to be taken into account."

It is apparent that his Worship gave consideration to these matters. In my opinion, it has not been shown that he was wrong in reaching the conclusion that it was appropriate for him to differentiate between the appellant and the other offenders on the basis of the appellant's previous criminal history, the fact that he committed the offence whilst on parole, the fact that he had only recently been dealt with leniently for a similar offence whilst on parole, the differences in age between the appellant and some of the other

co-offenders, the fact that the appellant actually drove the vehicle whilst a number of the others did not, and the different view of the role Mr Bara Bara played which he took.

Furthermore, I think Ms O'Rourke is correct in relation to her submission that the sentence imposed by Mr McCormack SM for the co-offender Bara Bara was manifestly inadequate, having regard to Bara Bara's age, his previous criminal history, and the fact that he had been convicted of a similar offence only a few weeks previously. In *Lowe v The Queen*, Mason J (as he then was) said at pp 613-614:

> "What I have already said provides an answer to the second question: what is the correct principle to be applied in cases of discrepancy? It is that a court of appeal is entitled to intervene when there is a manifest discrepancy such as to engender a justifiable sense of grievance, by reducing the sentence, which is not excessive or inappropriate considered apart from the discrepancy, to the point where it might be regarded as inadequate."

On the other hand, Brennan J (as he then was) at p 618, repeated what he had said in *Lovelock v The Queen* (1978) 33 FLR 132 at 136-7:

> "The Court does not interfere with a sentence imposed on one offender merely because "a disparity has been created by another sentence which was far too lenient, and even though, as a consequence, the appellant may be left with a sense of injustice or grievance" (per Walters J in *O'Malley v French*; and see *R v Steinberg*)."

None of the other members of the Court in *Lowe* commented upon the approach which should be adopted when the sentencing court, or for that matter an appeal court, was dealing with a situation where the sentence being compared with was manifestly inadequate.

I note that Mason J used the expression "might be regarded as inadequate" rather than "manifestly inadequate".

In *The Queen v Kite* (1971) 2 SASR 94 at 96, the Supreme Court of South Australia, in a joint judgment of Bray CJ and Hogarth and Sangster JJ said:

> "It has often been said, and we repeat it, that the mere fact that one convicted person has received too light a sentence is no reason why another convicted person should receive similar treatment. If there is excessive disparity, it does not follow that the one with the heavier sentence was treated too severely; it may be that the one with the lighter sentence was treated too leniently. Often in these cases the disparity should ideally be remedied by increasing the sentence of the one, rather than by reducing the sentence of the other. But we can only deal with the appeal before us. ... If the applicant was treated justly has no right to complain if someone else was treated more leniently than he deserved."

In *Bann v Frew* (1982) 69 FLR 354, Nader J said at p 363:

> "Some useful guidance can be seen to emerge from the cases. A sentence that is otherwise beyond legitimate challenge will be interfered with on the ground of disparity with another particular sentence only if:
>
> (1) The disparity is so gross as in itself to manifest an injustice.
>
> (2) Generally speaking, the other sentence is not so inadequate as to be seen to be manifestly wrong. (The appealed sentence would not manifest injustice contrasted with such a sentence.)
>
> (3) The involvement and circumstances of the two co-offenders is such as to indicate equal or similar degrees of criminality. (If the degree of involvement or the relevant subjective factors differ to any extent disparity may not manifest any injustice unless the less criminally involved receive the heavier sentence.)
>
> (4) The prosecution has not by its conduct prevented the person with a lesser sentence from receiving a proper sentence: for example, by accepting a plea to a less aggravated offence thereby precluding consideration of some aggravating factors."

Since the decision of the High Court in *Lowe v The Queen*, the matter had been considered in at least four other jurisdictions. In South Australia, in *The Queen v MacGowan*

(1986) 42 SASR 580, King CJ, with whom Mohr and von Doussa JJ agreed, said at pp 582-3:

> "The principles which should govern the Court's approach to a situation such as this have been laid down by the High Court in *Lowe v The Queen*. It is now convenient to state certain principles, derived from *Lowe*'s case and from decisions of this Court, which should govern the approach of sentencing judges and Courts of Criminal Appeal to the sentencing of co-offenders.
>
> 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.
>
> 2. Sentences imposed by different judges on co-offenders should also be proportionate to the respective degrees of culpability and the individual circumstances of the co-offenders. In such circumstances, a sentencing judge should ascertain the punishment which has been imposed upon any co-offender previously sentenced. He should endeavour to assess a sentence which fairly reflects any relevant distinctions. If, however, the earlier sentence is, in the opinion of the judge imposing the subsequent sentence, outside the range of sentences properly applicable to the case, he may legitimately impose what he regards as the appropriate sentence, leaving any correction of disparity to the Court of Criminal Appeal. The sentencing judge should give reasons explaining any disparity between the sentence which he imposes and earlier sentences imposed on co-offenders.
>
> 3. Marked disparity of sentences imposed upon co-offenders by different judges is a ground upon which the Court of Criminal Appeal may intervene on an appeal by the Attorney-General or an offender. If both sentences are within the maximum authorised by law and are within the range of sentences properly open on the facts of the case, the Court of Criminal Appeal is not bound to intervene. In such

> circumstances disparity, although a ground for interference, will not necessarily lead the Court of Criminal Appeal to interfere. It is a matter for the discretion of the Court. There may be considerations against interference. The protection of the public may require the higher sentence to stand. The lower sentence may be so inadequate that to establish parity may be felt to compound the error in a way which would be unacceptable to the public conscience. The sense of grievance experienced by the offender may have to be tolerated in the public interest. But in the absence of strong countervailing considerations, the Court of Criminal Appeal will interfere to eliminate marked disparities which cannot be justified in the circumstances of the case."

That passage was approved by the Federal Court of Australia in *Kelly v The Queen* (1991) 33 FCR 536 at 542 per O'Loughlin J with whom Jenkinson and Higgins JJ agreed.

In *R v Lainas* (1989) 50 SASR 461 at 463, White J, with whom Bollan and Prior JJ agreed said:

> "It has been held repeatedly since *R v Kite* (1971) 2 SASR 94 that where one sentencing Judge fixes a manifestly inadequate sentence (or non-parole period) for one offender and where another sentencing Judge is subsequently called upon to sentence a co-offender, the second Judge is not bound to perpetuate any error committed by the first Judge but rather is entitled to use his discretion to fix the appropriate sentence. He would, of course, take into account the first sentence but, upon it becoming clear that a manifestly inadequate sentence was imposed initially, the second Judge must exercise his own independent discretion to impose a just sentence. The second offender cannot, in those circumstances, entertain a reasonable grievance about any apparent disparity in his treatment as a co-offender. The second co-offender has no vested interest in the perpetuation of the original mistake in sentencing principle."

In the case of *Dale Cox* (1991) 55 A Crim R 397, a decision of the Court of Criminal Appeal of Queensland, Thomas J, with whom Byrne J agreed, said at 401:

> "It by no means follows that an appeal court will interfere, especially when the consequence of reducing the higher sentence will be two inappropriately low sentences

> instead of one. As the authorities show, it may sometimes be necessary for an appeal court to take that undesirable course in order to avoid a greater evil, but it is very much the province of the appeal courts to perceive a sufficiently good reason to take such a course."

In the case of *Warwick Gibson* (1991) 56 A Crim R 1 at 8, a decision of the Court of Criminal Appeal of New South Wales, Carruthers J with whom Loveday J and Clarke JA agreed, said:

> "Nor, in my respectful view, is there anything in the judgments in *Lowe* which requires that where the first co-offender is dealt with leniently there is thereafter to be a domino effect for the benefit of his co-offenders."

Carruthers J then adopted the paragraph numbered 2 of the remarks of King CJ in *The Queen v MacGowan*, which I have set out above.

Finally, I should mention the case of *Carlson v Hayward* (unreported) Kearney J, 26 April 1996, where his Honour referred to *Bann v Frew* and the observations of Brennan J in *Lovelock v The Queen* with apparent approval.

As these decisions show, where the Court considers that the sentence or sentences of the co-offender or co-offenders was manifestly inadequate, even if there has been no appeal by the Crown from those sentences, although the appeal court retains a discretion to interfere to eliminate marked disparities, it will not usually take that course.

In this case, I consider that the sentence imposed upon Bara Bara, in particular, and the sentence imposed upon the co-offender, Amison Warrawilya, who had eight prior convictions for this offence and had previously served a term of imprisonment in relation thereto, were manifestly inadequate, even if they were merely passengers. On this basis, I see no reason to interfere with what is otherwise a proper sentence imposed by Mr Gillies SM. To adopt King CJ's words in *The Queen v MacGowan*, in this case the protection of the public

requires the appellant's sentence to stand, and to try to establish parity would be to compound the error in a way unacceptable to the public conscience.

It was suggested that the disparity may have arisen because of differing views between the Magistrates on the special sentencing regime that Mr McCormack SM, who is the regular visiting Magistrate to Groote Eylandt, has imposed in that area. The Court was referred to the sentencing of *Jason Mamarika and Others* (Nos 37-41 of 1995) by Angel J on 27 October 1995. I have read the transcript of the submissions before Angel J in those matters and his Honour's sentencing remarks. His Honour did not give any approval or adoption of the special regime but on my reading of his sentencing remarks found special reasons to take the course he did in those particular cases. In any event, as this case as well as other cases known to this Court show, the "special regime" does not preclude the imposition of sentences of actual imprisonment in a proper case.

Accordingly, the appeal must be dismissed.